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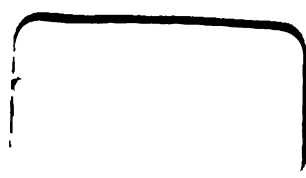
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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. III.

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[NOTE.—The following are the certificates of approval furnished by the gentlemen to whom the articles in this volume were submitted.]

[BAILMENT.]

OFFICE 60 CONGRESS STREET,
BOSTON, MASSACHUSETTS.

As to the subject of "Bailment," submitted to me as final editor, I desire to say that I am confirmed in my previous good opinion of your general editor's work. I think he has shown excellent judgment as to digested cases, omitted cases, etc., and that the points have been well digested. I approve the judgment used in all the cases not printed in full.

JAMES SCHOULER.*

[BANKS; BANKS, NATIONAL; BILLS AND NOTES.]

LYNCHBURG, VA., March 22, 1884.

I have examined the cases under the heads of "Banks;" "National Banks;" and "Bills and Notes," submitted to me as digested by the general editor of "Federal Decisions," and as not deemed of sufficient importance to be printed in full, according to the plan of the work, and I am of opinion that they have been well digested, and that good judgment has been exercised in excluding them, the points being covered by other cases printed in full.

Very Respectfully,

JNO. W. DANIEL.†

* Author of Treatises on Domestic Relations, Personal Property, Bailments and Executors and Administrators.

† Author of Daniel on Negotiable Instruments, and Daniel on Attachments.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register ...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
Black	Black.	Mason	Mason.
Blatchford	Blatch.	Montana Territory	Mont. T'y.
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Blatchford & Howland	Bl. & How.	National Bankruptcy Regis-	
Bond	Bond.	ter	N. B. R.
Brewster	Brewster.	Olcott	Olc.
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Brown	Brown.	eral	Opp. Att'y Genl.
Call	Call (Va.).	Oregon	Oreg.
Central Law Journal	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine	Paine.
Clifford	Cliff.	Peters	Pet.
Colorado Territory	Colo. T'y.	Peters' Admiralty	Pet. Adm.
Connecticut Reports	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story.
Dakota Territory	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court	Wall. C. C.
Federal Reporter	Fed. R.	Wallace, Jr.	Wall. Jr.
Fisher's Patent Cases	Fish. Pat. Cas.	Ware	Ware.
Flippin	Flip.	Washington	Wash.
Garrison	Gall.	Washington Territory	Wash. T'y.
Gilpin	Gilp.	Wheaton	Wheat.
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Hoffman	Hoff.	Woods	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter ..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

BAGGAGE.

See CARRIERS.

BAILEE AND BAILOR.

See BAILMENT.

See, also, AGENCY; BANKS; CARRIERS; INNKEEPERS; WAREHOUSEMEN.

As to the doctrine of Collateral Security, see BAILMENT; DEBTOR AND CREDITOR.

BAIL IN ADMIRALTY.

As to the putting in of bail, the enforcement of bail bonds and stipulations, and the delivery of property on bail, see PRACTICE.

BAIL IN CIVIL CASES.

See DEBTOR AND CREDITOR; PRACTICE.

BAIL IN CRIMINAL CASES.

See CRIMINAL LAW.

BAILMENT.

[See AGENCY; BANKS; CARRIERS; INNKEEPERS; WAREHOUSES.]

I. DUTIES AND LIABILITIES OF BAILEE, §§ 1-82.

1. *Bailee for Hire*, §§ 5-26.

2. *Gratuitous Bailee*, §§ 27-82.

II. OF THE LAW OF PLEDGE, §§ 83-84.

III. COLLATERAL SECURITY, §§ 65-74.

IV. MISCELLANEOUS, §§ 75-92.

I. DUTIES AND LIABILITIES OF BAILEE.

SUMMARY — *Holding property subject to the event of a suit.* § 1.— *Loss of goods by fire; negligence in storing gunpowder.* § 2.— *Bailee of steamboat takes subject to visible defects.* § 3.— *Gratuitous bailee liable only for gross negligence.* § 4.

§ 1. Certain property in the hands of defendants, as bailees, was seized for violation of the revenue laws. Under an arrangement with the revenue officers, the defendants agreed to sell the property and hold the proceeds subject to proceedings in court to condemn the property. The goods were sold, and a suit was duly instituted, the owners of the goods defending. The suit was dismissed, and the defendants, after holding the money nearly four years, delivered it to the owners of the goods. *Held*, that the defendants were not liable; that after the dismissal of the suit they were only required to hold the money for a reasonable time. *Pettigrew v. United States*, §§ 5, 6.

§ 2. A carrier storing goods in his warehouse until called for is a bailee for hire, and is held to reasonable diligence. If he stores gunpowder in the same building with other goods, and the presence of the powder prevents the firemen from successfully operating to subdue a fire which breaks out in the building, and the goods are destroyed, the storage of the gunpowder is held to be an act of negligence. Although the fire in such case may be regarded as the proximate cause of the loss, yet it may be also held that the presence of the gunpowder, by keeping the workmen from the fire, contributed to the loss in such a way as to make it a proximate cause. It is not necessary to prove, or ask the jury to find, that gunpowder is a dangerous compound. (a) *White v. Colorado Central Railroad*, §§ 7-12.

§ 3. Where a bailee for hire of a steamboat accepts the same without objection, he takes it subject to all visible defects. He is bound to the exercise of ordinary care and diligence, but if an injury to the boat results from unknown and hidden defects, he is not liable. In this case the steamboat was injured by an explosion while in the possession of the bailee, and the action was brought for damages on the ground of negligence. The court left it to the jury to determine whether the explosion was one which human skill could have prevented, but charging at the same time that if the explosion was the result of an unknown and hidden defect the defendant was not liable. *Stewart v. Western Union Railroad Company*, §§ 13-15.

§ 4. A gratuitous bailee is liable only for gross negligence. He must use such care as is used by persons of common prudence, having reference to the circumstances, and the character of the property. Money must be guarded with greater care than common property. The language of the books as to what constitutes gross negligence is sometimes loose and inaccurate. When it is said that gross negligence is equivalent to fraud, it is not meant that it cannot exist without fraud. There may be gross negligence in cases where there is no pretense that the party has been guilty of fraud, though such negligence is often presumptive of fraud. In determining what is gross negligence, the nature of the thing bailed must be considered. Care and diligence are to be proportioned to the value of the goods, the tempta-

(a) The question of proximate cause of loss is discussed at length in *Milwaukee, etc., Railway Co. v. Kellogg*, 4 Otto, 469. It was charged that fire was communicated from defendant's steamboat to an elevator owned by defendant, and from the elevator to plaintiff's mill and lumber. The court ruled as follows: The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? It is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. But the natural and probable consequences of a wrongful act or omission are not chargeable to the misfeasance or nonfeasance, where there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.

On the point that the question of proximate cause is one of law, the court questions the authority of the cases of *Ryan v. The New York Central R. Co.*, 35 N. Y., 210, and *Kerr v. Pennsylvania R. Co.*, 62 Penn. St., 353, and holds that they are not in harmony with *Webb v. The Rome, etc., R. Co.*, 49 N. Y., 430; *Pennsylvania R. Co. v. Hope*, 80 Penn. St., 373; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis., 224; *Perley v. The Eastern R. Co.*, 93 Mass., 414; *Higgins v. Dewey*, 107 Mass., 494, and *Tent v. The Toledo, etc., R. Co.*, 49 Ill., 349.

In the application of the doctrine of proximate and remote causes, each case must be decided largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable criteria furnished by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. *Insurance Co. v. Tweed*, 7 Wall., 44.

tion and facility of stealing them, and the danger of losing them. The true test is, whether the gratuitous bailee has bestowed such care as persons of common prudence in the same situation usually bestow upon the particular kind of property; a want of such care is gross negligence. (a) *Tracy v. Wood*, §§ 27-30.

[NOTES.— See §§ 16-26, 31, 32.]

1. *Bailee for Hire.*

PETTIGREW v. UNITED STATES.

(7 Otto, 385-389. 1878.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.— The judgment in this case is for \$1,354.35, and a question is raised as to the jurisdiction of this court, because it does not exceed \$2,000. If it is an action to enforce a revenue law of the United States, we have jurisdiction without regard to amount. Rev. Stat., sec. 699. If it is not such an action, we have not. The counts in the original complaint are very clearly counts on a contract of bailment and, for money had and received. But a demurrer to the declaration was sustained, and the case was tried on an amended declaration.

§ 5. *The supreme court has jurisdiction of cases under the revenue laws without regard to the amount.*

The amended declaration sets forth the seizure, while in possession of the defendants, of ninety caddies of tobacco as forfeited to the United States, on account of false and fraudulent stamps and inspection marks found there by Rolf S. Sanders, a collector of internal revenue; that said Sanders and defendants having entered into an unlawful and unauthorized agreement that defendants should sell the tobacco and hold the proceeds of the sale subject to the decision of the proper court, in proceedings to be instituted therein for the condemnation of the tobacco, said agreement was void; by reason whereof the defendants became liable to the United States for the value of the tobacco,

(a) The theory that there are three degrees of negligence, described by the terms slight, ordinary and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define." (*Storer v. Gowen*, 18 Me., 177.) "What is common or ordinary diligence is more a matter of fact than of law." (*Story on Bailments*, § 11.) Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. (*Wilson v. Brett*, 11 Mees. & W., 113; *Wylde v. Pickford*, 8 Id., 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B., 646, 651.) It is settled that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." (*Story on Bailments*, § 15.) It is also settled that, if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill or an omission to exercise it. Per *Curtis, J.*, in *Steamboat New World v. King*, 16 How., 469.

Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. (*Wharton on Negligence*, § 1, and notes, cited.) *Railroad Company v. Jones*, 5 Otto, 433.

Negligence has been defined to be the omission to do something which a reasonable man, guided by the considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do. (*Blyth v. Birmingham Water Works*, 11 Exch., 734.) It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. *Nitro-glycerine Case*, 15 Wall., 524.

Ordinary diligence is a relative term, to be judged of by the nature of the subject to which it is directed. *Holladay v. Kennard*, 12 Wall., 254.

which they have refused to pay. This is repeated in the second count, and the third is for money had and received. The substance of this is, that the tobacco being forfeited for a violation of the revenue law, and a seizure made, and the goods left with the defendants, the contemporaneous agreement is void, and the defendants are proceeded against *in personam* for the value of the goods so left with them, which cannot now be found. It would be a very narrow and technical definition of the phrase "enforcement of any revenue law" which did not recognize this action as one brought for that purpose. If there had been no revenue law which made this tobacco liable to seizure, the complaint would be bad on demurrer. The foundation of the action is the right which the revenue law vests in the United States to this property, and it is the enforcement of this right that is sought in this action. This was clearly the view which the court took of the matter, and in that view of it instructed the jury as follows: "That if they believed the tobacco caddies had upon them counterfeit stamps or brands, that such fact forfeited it to the government. And if the proper officer seized it as forfeited, and the defendants sold the same by direction of the officer seizing it, and received the money, and had not paid it, or any part thereof, to the government, they remained liable for the amount so received by them, and they should find a verdict for the plaintiffs." The judge evidently understood that he was enforcing the revenue law against a person unlawfully dealing with property which had been found in his possession forfeited to the government by reason of a violation of that law. We think this court has jurisdiction, under the section of the Revised Statutes cited.

§ 6. *A bailee, after a suit to condemn property in his hands has been dismissed, may, after a reasonable time, deliver the property to the original owner.*

The third plea of the defendants sets out the facts that, up to the time the goods were seized, they held them on sale for commission for Glazier, Luko & Co., of St. Louis, and knew nothing of the causes of the alleged seizure; that at the request of Sanders, the officer who made the seizure, they consented to sell the goods, and hold the proceeds subject to proceedings in court to condemn them; that defendants were directed by Sanders to sell the tobacco, because it would become worthless if detained until the end of the suit; that they did sell the tobacco, and while the proceeds were in their hands a suit was commenced against them for the money, which was defended by Glazier, Luko & Co., and dismissed by the district attorney after plea filed; that after retaining the money for nearly four years, and no other suit being brought for the money, or other proceedings against the tobacco, or any demand of them, they paid over the money to the parties from whom they had received the tobacco. To this plea a demurrer was filed and overruled, and issue was taken on it. The bill of exceptions shows that testimony was offered tending to sustain every allegation of the plea; but by giving the instruction copied above, the court, in effect, held that, if the jury believed the plea to be sustained by the evidence, it was no defense. In this we think the court erred. The defendants were bailees of Glazier, Luko & Co. when the officer made the seizure. They were not charged with any offense against the revenue laws, and they were in no danger of loss, since they did not own the tobacco. It was a matter of indifference to them, in a pecuniary sense, what the officer did with the tobacco. It was his own convenience, therefore, and the interest of the government, that induced them to take charge of it, and sell it to prevent loss; and they did so, holding the proceeds subject to judicial proceedings, to be instituted to determine the right

of the government to those proceeds. We see nothing in this to condemn. The agreement made was the best that could have been made, both for the government and the owner of the goods, and was one in which the defendants were to remain bailees under the changed condition of affairs. Undoubtedly, the officer could have required them, as a condition of leaving the property where he found it, to pay the money it sold for to him, or into the treasury, or into the registry of the court. But he did not. And we see no reason to hold that it was not competent for the defendants to retain the property on the terms which he proposed. If he had required them to sell it as property of the United States, and pay them the proceeds, they might have relieved themselves of all trouble by refusing. The officer may not have performed his duty. It was probably his duty when he made seizure of the property to deliver it to some other officer of the government, and have it libeled at once, and a warrant of seizure issued. But this neglect of his duty did not make void the promise of the defendants to take suitable care of the property, and hold it ready for such order as the court which might take jurisdiction of the proceeding should make.

If the contract of defendants was obligatory on them, as we think it was, the evidence shows that they did all that it required of them. They sold the property, and held the money until a suit was instituted against them for it. The right to the money could as well have been decided in that suit as in this; but after the owners of the tobacco had taken the defense of the suit on themselves, and filed a plea, the suit was dismissed by the attorney for the United States. The defendants still held the money for nearly four years, awaiting any further legal proceedings, or any order from Sanders or from the government. In the absence of anything of the kind, they felt it to be their duty to pay the money to the parties from whom they had received the tobacco. And we think they were right. They took the goods as bailees, to hold subject to a proceeding for condemnation. Such a suit, in effect, was commenced and dismissed. They were only bound to hold after this for a reasonable time; and when that was passed, their duty under the agreement was ended, and their obligation to Glazier, Luko & Co. revived. This is the honest and fair view of the subject, and we think it conflicts with no rule of law. The instructions of the judge were in conflict with this view, and the judgment must, therefore, be reversed and a new trial granted; and it is so ordered.

WHITE v. COLORADO CENTRAL RAILROAD CO.

(Circuit Court for Colorado: 5 Dillon, 428-437; 3 McCrary, 559-569. 1879.)

MOTION by plaintiff for a new trial.

Opinion by HALLETT, J.

STATEMENT OF FACTS.—On the 1st of January last, plaintiff's intestate shipped a lot of dry goods and clothing from Georgetown to Denver over defendant's line. The goods were received at Denver and placed in defendant's warehouse on the morning of the 3d of the same month. Two days later they were destroyed by fire which originated in the building without fault of defendant. This action, in which plaintiff seeks to recover the value of the goods so destroyed, is founded upon an alleged liability of defendant to plaintiff as a common carrier and as a warehouseman. As to the first count in the declaration, in which plaintiff sought to charge defendant as a common carrier, the jury have found against the plaintiff, and thus all questions arising on

that count have been eliminated from the case. On the second count, in which defendant is charged with negligence as a warehouseman, the jury found for plaintiff in the sum of \$4,704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that defendant's warehouse was a long wooden structure — one hundred feet or more in length — and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainder of the building was used for storing goods. At about the center of the building, on each side, and communicating with the part which was used for storage, were large doors, through which the goods were passed when received into or taken out of the building. The plaintiff's goods, when received, were put in that end of the building which did not contain the office, and, of course, at some distance from the doors last mentioned. By the same train which brought plaintiff's goods, a quantity of gunpowder, amounting to about one hundred and sixty kegs, was also received; and this powder was put by defendant in the same room with plaintiff's goods, but upon the other side of the doors before mentioned, and towards the offices, which were in that end of the building. So that, with reference to the doors which opened through the warehouse, it may be correct to say that the offices and the powder were in one end of the building, while the plaintiff's goods were in the other end of the same building. But the powder was, in fact, pretty near the door on that side where it lay, and between the offices and the plaintiff's goods. The fire which destroyed the building and the goods, when first discovered, was in the roof immediately above the offices, and, of course, at some distance from the plaintiff's goods. Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors before mentioned as the fire. This was the situation when members of the fire department arrived in considerable force on the ground with their apparatus, for the purpose of extinguishing the fire. The weather was cold, and some delay occurred before water was obtained, but three or four streams were soon brought to bear, so that, under ordinary circumstances, the flames might have been suppressed before half the building was destroyed. One witness testifies that there was an opportunity to cut off the fire at the large doors before mentioned, by carrying the water in at that place and playing on the fire from the inside.

But nothing of this kind was attempted, and, indeed, the firemen would not go within seventy or eighty feet of the building on the outside, because they feared injury from the powder. Some testimony was given at the trial to show that this fear was unfounded, but if the experts who testified on that point had been present at the fire to explain the properties of gunpowder to the terrified firemen, it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is that metallic cans, in which the powder was put, are so expanded and cracked by the heat of a burning building that the powder escapes, and in that condition, if ignited, it produces only a flash in the pan, which is not at all dangerous to those who are outside of the building. If, however, one who is inside the building swallows the fire, as one of the witnesses said, it is deadly; so that even on this theory it was not safe to go into the building at the large doors before mentioned, for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so

as to render them harmless. Altogether, it may be said that this evidence does not prove, nor tend to prove, that the powder was not dangerous to life in the situation where it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of twenty-five or thirty feet than at a distance of eighty feet, does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned, with hose, and there operating against the fire. All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason. One witness testifies that he suggested it to the firemen, and was answered that it was dangerous to go there on account of the powder. Looking to the form of the building, the fact that it was built of wood, and the situation of plaintiff's goods with reference to the fire, it also seems probable that the goods would have been saved if the powder had not been stored in the building. Upon the evidence showing or tending to show that the loss of the goods was due to the presence of the powder in the warehouse, the court charged the jury as follows: "As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so, if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witness said about it; you determine as well as you can whether this loss certainly proceeded from that cause—from the presence of the powder. If it is doubtful in your mind, upon the evidence here, whether the loss was occasioned by that,—that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which the matter stands."

§ 7. *Storage of gunpowder in a city is a public nuisance.*

That this principle is applicable to ordinary warehousemen, would appear to be beyond question. To store or deposit gunpowder in large quantities in any place in a city where it will endanger life and property, is a public nuisance. *Cheatham v. Shearon*, 1 Swan, 213; *Myers v. Malcolm*, 6 Hill, 292. The case in 6 Hill shows that the party storing the powder will be liable for any damage that may result from it. And the same view is expressed in some of the text-books. 1 Addison on Torts, 308; Wood on Nuisances, sec. 142. Warehouses are usually, if not always, located in cities, where the danger from fire is great, and, of course, keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under con-

sideration. With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods, in a populous city — whether that is the usual and ordinary course of business — to decide the question of negligence.

§ 8. *A railroad company storing goods in its warehouse until called for is a bailee for hire.*

But it is said that a railway company which keeps warehouses for the convenience of the public, and as a necessary appendage to the business of a carrier, is not to be put upon the footing of ordinary warehousemen; that the company is not a warehouseman by choice, but through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the company may lawfully carry all things, so may it lawfully store whatever it carries, and he who entrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed that they ought not to prevail against the general rule which exacts from a bailee for hire reasonable diligence in the care of property entrusted to him. That a railway company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee for hire, and not as a naked depository, is now fully settled. *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 273; *Wharton on Negligence*, sec. 478. As such, no reason is seen for relieving it from the duties and responsibilities which attach to that character of bailment. It must be borne in mind that the company was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse. *Boston and Albany Railroad Co. v. Shanly*, 107 Mass. 575; *Wharton on Negligence*, sec. 856.

§ 9. *Storing powder in large quantities in same warehouse with goods is culpable negligence.*

If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So, also, it may be said the matter of storing the powder was disconnected from and entirely independent of the carrying. Although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might have been required to take away the powder in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act, carrying danger to the property of others, and therefore wrongful in itself. That it was not an exercise of the reasonable care in preserving the plaintiff's property which the law enjoined, seems to be too plain for argument.

§ 10. *Doctrine as to proximate cause of loss.*

Another objection to the charge is that the powder, if at all instrumental in the destruction of plaintiff's goods, was not the proximate cause of that result. To support this objection insurance cases are cited in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause. Hence, it is claimed that, in all such cases, the fire, and not the powder, is the proximate cause of loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to the

plaintiff's house. The fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective break on the car. If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss. *Oil Creek and Allegheny Railway Co. v. Keighron*, 74 Pa. St. 316. So, also, where dry grass was negligently allowed to remain in heaps near defendant's railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable. *Smith v. London and Southwestern Railway Co.* Law Rep. 6 C. P. 14; S. C. Law Rep. 5 C. P. 98. The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or (if that had been possible) had caused the wind to blow, it would have been liable for the loss in the same manner. On the same principle, it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act. *Metallic Compression Casting Co. v. Fitchburg Railroad Co.* 109 Mass. 278. There, as in the case at bar, it was contended that the proximate cause of loss was the fire, rather than the act of the defendant. But the court was of a different opinion; saying that when a man cuts off the hose "through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it," his act is to be regarded as the direct and efficient cause of the injury. In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." *Shearman and Redfield on Negligence*, sec. 10. Without further discussion of what appears to be plain, we have no doubt the powder was near enough to the loss to make the defendant liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result; and this objection must be overruled.

§ 11. *Where the facts are established, negligence may be an inference of law.*

The defendant further relies on the form of the instruction, claiming that the question of negligence was improperly withdrawn from the jury. It is not denied, and it cannot be successfully claimed, that where the facts are established, negligence may be an inference of the law to be decided by the courts. *Shearman and Redfield on Negligence*, sec. 11; *Tarwater v. Hannibal and St. Joseph Railroad Co.* 42 Mo. 193; *Pittsburg and Connellsville Railroad Co. v. McClurg*, 56 Pa. St. 294. In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise (17 Wall. 663); but here the facts lead in but one direction. It was admitted at the trial that defendant's warehouse was in the city of Denver, and whether powder was stored there — although it was not denied — was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy. In the argument of this motion at the bar, counsel were understood as saying that the testimony of witnesses at the trial had raised a doubt

as to the effect of powder exploding in a burning building, and if the question to be decided should be as to the effect of such explosion on the building itself and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by the explosions. But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of powder in the building from effective work in extinguishing the fire. And so far was the evidence from showing or tending to show that the firemen were not so deterred, that it tended rather to establish the inference of danger to life from the presence of that article, at least as to all those who should attempt to enter the building. So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point, as to whether the firemen were in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence.

§ 12. *It is not necessary to prove that gunpowder is a dangerous compound.*

Aside from this, I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal notoriety, familiar to all men, and needs neither finding nor proof to establish it. What would be thought of the demand for such proof in a prosecution for assault with attempt to kill and murder? Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance capable of expelling the ball from the gun with great force, and so on? Generally, as to the negligence imputed to defendant, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury. If under any circumstances the storing of powder with other goods in a warehouse in a city would be a reasonable exercise of judgment and discretion, the rule would be otherwise; because, if the circumstances may give color to the act, and make that fair and unquestionable which otherwise must appear to be culpable, the jury would have to determine whether by the circumstances the act was relieved of the character ascribed to it. But such, it is believed, cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say that the act of putting powder in the warehouse was not negligence, and therefore there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence. Whether the presence of the powder in the warehouse was the direct and efficient cause of the loss, was not, as it could not be, conclusively shown; but the evidence on that point is regarded as sufficient to sustain the verdict. That was peculiarly a question for the jury. *Milwaukee Railway Co. v. Kellogg*, 4 Otto, 474. We do not feel at liberty to disturb the verdict on that ground; and we have not been able to discover any error in any part of the record. The motion is denied.

STEWART v. WESTERN UNION RAILROAD CO.

(Circuit Court for Indiana: 4 Bissell, 362-364. 1869.)

Charge by DAVIS, J

STATEMENT OF FACTS.—In the spring of 1867 the defendant leased of the plaintiff a steamboat called the *Lansing*, with a view of transporting freight and passengers from Davenport, Iowa, to Port Byron, Illinois. By the terms

of the contract the railroad were to return the steamboat to the plaintiff at the end of a certain time in good condition, paying reasonable compensation for the use of the same. While the steamboat was making a passage from Davenport to Port Byron and had landed at Hampden, on the Iowa side, an explosion took place, and this action was brought to recover compensation for the damages sustained in consequence of the explosion, and the inability thereby of the railroad company to return the boat, on the ground that the explosion was the result of the negligence and want of due care and skill of the employees of the company.

§ 13. *The bailee for hire of a steamboat, by an acceptance thereof, without objection, waives all known and visible defects.*

The contract provided that the boat was in good condition, and that two persons named in the contract might or should determine whether the boat was or was not in good condition. It turned out, in point of fact, that these persons from some cause never did determine whether the boat was in the condition named in the contract, but the boat was delivered to and received by the defendant without objection. If there was any defect which was known to or could be seen by the servants of the defendant, and without making objections in consequence of the defect, then the defendant is estopped from setting it up as a defense to this action. The time to make that objection was when the boat was delivered, and that might have been urged as a reason for non-acceptance.

§ 14. *A bailee for hire is bound to use reasonable care. If an injury results from a hidden defect, he is not liable.*

It was the duty of the defendant to return the boat according to the terms of the contract, unless prevented from so doing by a misfortune that skill, care and diligence could not prevent. In the use of the boat the defendant was bound to exercise all reasonable skill, and I leave it as a question for the jury to determine whether the explosion was one which human skill could have prevented. If it was the result of some hidden, unknown defect, the defendant is discharged. The contract provides that for extraordinary repairs the plaintiff, the lessor, should be chargeable.

§ 15. *Interest may be allowed as a part of the damages.*

The question arises as to the right to recover interest. Although as a matter of law you are not obliged to give interest, yet if you find for the plaintiff, and fix upon the value of the boat at the particular time as the compensation due the plaintiff, you may, by way of additional damages, give interest. It is optional with you.

§ 16. *Of the contract of bailment.*—In every bailment or letting for hire a price or compensation for the hire is essential. The amount may not be stipulated; it may be a reasonable compensation or a *quantum valebat*, but the contract must contemplate payment for the use of the thing let or bailed. Thus where a contract stipulated that certain property was let to A. "for hire," no price for the hire being mentioned; and security was taken for the return of the property within a stipulated time, on demand, A. having the right within that time to purchase, it was held that the contract was not a bailment. *Heryford v. Davis*, 12 Otto, 244.

§ 17. A bank made application to another bank to loan some money for it, taking collateral security therefor, and requesting it to make a proper charge for its service. The latter bank made the loan as requested, but determined, inasmuch as the former bank was a large depositor, not to make any charge, but this determination was not communicated to the former bank. The collaterals received were deposited in the burglar-proof safe of the latter bank, from which they were stolen by burglars. Held, that the bank, in making the loan, was not a gratuitous bailee; that as the first bank coupled the request to transact the business with a promise to pay a reasonable charge therefor, and the latter bank accepted the agency without

communicating the fact that it declined compensation, it was proper to assume that the position of an agent for hire was accepted. *Second National Bank v. Ocean National Bank*,* 11 Blatch., 862.

§ 18. Where A. and B. entered into a contract under which B. was to manufacture a certain article for A., the raw material for such manufacture to be furnished by A., the profits to be divided, etc., *held*, that raw material delivered to B. became his property, subject to execution against him, and that the transaction did not constitute a bailment. *Powder Co. v. Burkhardt*, 7 Otto, 116. See §§ 75, 77.

§ 19. Where a bank, in consideration of a party's keeping a deposit in the bank, receives a box for safe keeping, there is a sufficient consideration to make the contract an obligatory contract of bailment. A special depositor in a bank is not bound by a by-law of which he had no notice. He is entitled to such security, neither less nor greater, than the course of business between him and the depository shows to have been mutually intended and expected between them. *White v. Bank*,* 4 Brewster, 234. See § 89.

§ 20. Bailor's title.—The title of the bailor is not divested by a sale of the property by the bailee. *Stump v. Roberts*,* 1 Cooke (Tenn.), 350. So where goods are entrusted to a broker to sell, he has no power to pledge them; and if he pledges them to raise money, the owner may recover them from the pledgee. Although the possession of personal chattels is said to be *prima facie* evidence of property, and consequently of an apparent power of disposition, yet it is no less true, that when property does not in fact exist, possession confers no right either on the holder himself or a vendee under him who pays a valuable consideration on the faith of such possession. The only exception to this rule at common law is that of sale in *market overt*. *Bragg v. Meyer*, McAL. 408. See § 86.

§ 21. A bailee cannot avail himself of the title of a third person for the purpose of keeping the property for himself, nor in any case where he has not yielded the paramount title; but if he has performed his legal duty by delivering the property to its true owner, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees. It is not true that, by accepting the bailment, the bailee has estopped himself from questioning the right of the bailor; the contract raises a strong presumption that the bailor is entitled, but the contract is to do with the property what the bailor has directed—to restore it, or to account for it—and he does account for it when he has yielded it to the claim of one who has right paramount to that of the bailor. *The Idaho*, 3 Otto, 578.

§ 22. Liability of bailee.—A bailee for hire is bound to ordinary care and diligence. *Reeves v. The Constitution*, Gilp. 585. If he uses due care, he is not liable if the goods are stolen. *White v. Bank*, 4 Brewster, 234. The reward paid for the thing hired is presumed to include not merely a compensation for its use, but also for the ordinary wear, and the risk attending the employment, unless it be produced by an abuse of it, or by such negligence as brings responsibility upon the hirer. *Reeves v. The Constitution*, Gilp. 585. See § 85.

§ 23. A bailee is responsible for delivering goods to a wrong person; but if care has been used in the selection of officers and clerks, he is not responsible for a wrong delivery not made in the course of the business of the officer or clerk. *White v. Bank*,* 4 Brewster, 234.

§ 24. Where an agent was authorized to collect money, and transmit it by mail, or some responsible person, receiving a compensation for his trouble; and he collected it and delivered it for transmission to a trustworthy youth of eighteen years of age, from whom the money was stolen, *held*, that the agent was not liable. *Pelham v. Pace*, Hemp. 223.

§ 25. A receiver of public money is not a mere ordinary bailee, and it is no defense to an action on his bond that the money was taken from him by irresistible force. His liability is measured by his bond, and that binds him to pay the money; a cause, therefore, which renders it impossible for him to pay is of no importance, for he has assumed the risk. *Boyden v. United States*, 18 Wall. 21. See § 90.

§ 26. Every bailee may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruction or injury unless he, by his negligence, contribute to the same. *Bank of Ky. v. Adams Express Co.* 1 Flip. 256. See §§ 75-92.

2. *Gratuitous Bailee.*

TRACY v. WOOD.

(Circuit Court for Rhode Island: 8 Mason, 132-136. 1822.)

STATEMENT OF FACTS.—The facts in this case are these: The defendant, who was a money broker and who was about to take a trip from New York to Boston, was entrusted with two bags of gold to be carried as bailee without reward.

On the evening preceding the voyage he brought his valise containing both bags on board of the steamer, and put it in a berth, where he left it while he attended the theater that evening. He made inquiries on board, if the valise would be safe, and was informed if it contained articles of value he had better put it in charge of the captain's clerk, who would put it under lock and key. In the morning, while the steamer was still lying at the dock in New York, one of the bags was found to be missing, and the other was left by the defendant on a table, in his valise in the cabin, for a few minutes while he went on deck to send information of the supposed robbery to the plaintiffs. The loss was generally known, and there was a number of passengers on board. On his return to the cabin the other bag was also missing, and after a thorough search the missing property was not found.

§ 27. *Gratuitous bailees are liable only for gross negligence. (a)*

Opinion by STORY, J. I agree to the law as laid down at the bar, that, in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case if the plaintiffs had known him to be a very careless or a very attentive man. Jones' Bail. 46.

§ 28. *Gross negligence defined.*

The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said that gross negligence is equivalent to fraud, it is not meant that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretense that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. In determining what is gross negligence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law. "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be *gross* negligence in a depositary to leave such deposit in an open ante-chamber; and *ordinary* neglect, at least, to let them remain on the table, where they might possibly tempt his servants." Jones' Bail. 33, 46, 62. So in *Smith v. Horne*, 2 Moore's R. 18, it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So

(a) Same point, *Worthington v. Preston*, 4 Wash. 463.

in *Booth v. Wilson*, 1 Barn. & Ald. 59, it was held gross negligence in a gratuitous bailee to put a horse into a dangerous pasture. In *Batson v. Donovan*, 4 Barn. & Ald. 21, the general doctrine was admitted in the fullest terms.

§ 29. *A bailee without hire is guilty of gross negligence if he omits to use ordinary prudence.*

It appears to me that the true way of considering cases of this nature is to consider whether the party has omitted that care which bailees without hire, or mandataries of ordinary prudence, usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care which men of common sense, however inattentive, usually take, or ought to be presumed to take, of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

§ 30. *Money delivered to a bailee without reward is to be kept with more care than common property.*

The present is a case of a mandatory of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiffs'. Still if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.

§ 31. *Gratuitous bailee.*—Where a gratuitous bailee loans money, takes a mortgage, and delivers the same to his principal, who has abundant opportunity to record it, and a loss occurs by reason of non-recording, the bailee is not liable. *Turton v. Duffie*, 6 Wall. 420.

§ 32. Certain record books were stolen from a county, and the county officers placed a sum of money in the hands of A., to be paid to the person causing a return of the property, stipulating that a failure to return some small paper or papers should not invalidate the agreement. *Held*, that A. was a gratuitous bailee, and was justified in paying over the money on a return of the books, although some of the books were damaged. *Eldridge v. Hill*, 7 Otto, 92. See § 85.

II. OF THE LAW OF PLEDGE.

SUMMARY—*Delivery of pledge*, §§ 33-35.—*Surrender to military officer*, § 36.—*Sale to bona fide purchaser*, § 37.

§ 33. Possession by the pledgee is of the very essence of a pledge. The pledge may be redelivered to the pledgor for a temporary purpose without defeating the rights of the pledgee; but if the pledgee never had possession, as in a case merely of an agreement for a pledge, or the pledge be delivered back to the pledgor absolutely, with power to substitute other property or securities, the pledgee has no further rights as against third persons. *Casey v. Cavaroc*, §§ 88-47. See § 62.

§ 34. There must be a delivery before the pledgee's lien will attach, but the delivery may be either actual or constructive; the possession may be held by an agent, and the agent may be the pledgor, the only question being whether the transaction is *bona fide*.—A bill of sale intended for security operates as a pledge, and need not be recorded. *Ex parte Fitz*, §§ 48-50.

§ 35. A decree of a probate court, holding a bailment void because the thing pledged had never been delivered, will not bar a suit by the pledgee against the executor of the pledgor to compel a delivery of the pledge. *Myers v. D'Meza*, §§ 51, 52.

§ 36. Where a bank is put in liquidation by a military officer, and securities held in pledge are taken and sold at less than their value, the bank yields to superior force, and is not liable. *McLemore v. Louisiana State Bank*, § 53.

§ 37. Where the pledgee sells the pledge to a *bona fide* purchaser, without notice of the claim of the pledgor, the pledgor cannot recover the pledge without tendering the amount due. And it seems that it would not be material that the note, to secure which the pledge was given, remained in the hands of the pledgee, especially if it had matured when suit was brought. *Talty v. Freedman's S. & T. Co.* §§ 54, 55. See § 53.

[NOTES.—See §§ 56-64.]

CASEY v. CAVAROC.

(6 Otto, 467-491. 1877.)

APPEAL from U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—The National New Orleans Banking Association failed October 4, 1873, and about that time Cavaroc, its president, took \$325,000 of its notes and bills and deposited them with his firm, C. Cavaroc & Son, who claimed to hold them as agents for the Société de Crédit Mobilier of Paris, as security or pledge to secure the society for certain acceptances in July previous by the society for the bank. The question was whether these securities constituted a valid pledge, or whether the arrangement was a fraudulent preference of creditors. The bill in this case was filed by the receiver to subject these assets to the general debts of the bank, and upon the hearing was dismissed. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE BRADLEY.

The substance of the agreement in this case, so far as necessary to be considered, was that the Credit Mobilier should accept the drafts of the banking association to the amount of a million of francs at ninety days, the bank agreeing to furnish funds to pay the drafts at maturity, with the privilege of a renewal; and it was stipulated that this obligation of the bank should be guaranteed by Cavaroc & Co., and by a deposit with them, for the use of the Credit Mobilier, of first-class securities, of which deposit the latter was to be advised. This arrangement was immediately telegraphed to New Orleans, and the drafts were drawn on the 12th of July; but the weight of the evidence is, that none of the collateral securities were delivered until the 19th of August,—which might raise a question whether the accommodation acceptances of the Credit Mobilier could be considered as a contemporary consideration therefor; or, if not, whether the bank was at that time, in the apprehension of Cavaroc (the common agent), in a condition of solvency and good credit,—as to which an affirmative answer could not well be given, since the proof is quite clear that the bank was then struggling with serious financial difficulties, from which it never recovered. Waiving this question, however, for the present, we will proceed to examine whether, supposing that no objection arises from the time when this transaction took place, it amounted to such a transfer or pledge of the securities in question as to entitle the Credit Mobilier to a preference upon them over the other creditors of the bank at the time of its failure. Was there such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana? Clearly they were never out of the possession of the officers of the bank, and were never out of the bank for a single moment, but were always subject to its disposal in any manner whatever, whether by collection, renewal, substitution, or exchange; and collections, when made, were made for the benefit of the bank, and not that of the Credit Mobilier. The case has some features in common with, though differing in others from, that of *Clarke v. Iselin*, 21 Wall. 360, in which this

court held that collateral securities transferred by the borrower to the lender at the time of the loan were not divested out of the latter by the mere fact of his depositing them with the borrower for collection. The court say: "Obviously this deposit in no degree affected the title of the defendants to the notes. It merely facilitated collections." The court then cited *White v. Platt*, a New York case in 5 Denio, 269, in which it was said: "Where promissory notes are pledged by a debtor to secure a debt, the pledgee acquires a special property in them. That property is not lost by their being redelivered to the pledgor to enable him to collect them, the principal debt being still unpaid. Money which he may collect upon them is the specific property of the creditor. It is deemed collected by the debtor in a fiduciary capacity."

§ 38. *Possession is of the very essence of a pledge; without it third persons are not affected. (a)*

The case of *Clarke v. Iselin*, being a New York case, and governed by New York law, or the common law as understood in New York, the authority cited was necessarily of great weight, if not controlling. When, as in that case, the title has been transferred to the creditor, and the collections are made for his benefit, the pledgor merely acting as his servant or agent in making them, the character of the security is not affected at the common law by the debtor having actual possession of the collaterals, there being no fraud in the transaction. In such case, they are held by the creditor by way of mortgage as well as pledge; and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (*Pothier, Nantissement*, 8); and if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual: it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security,—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession. This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their indorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt* and in *Clarke v. Iselin*. Hence the actual possession of the securities by the creditor was a matter of less importance in those cases.

§ 39. *The pledge may be redelivered, temporarily, to the pledgor. (See § 62.)*

Whether constructive possession in the creditor can be affirmed, where an article to which his only title is that of pledge is actually redelivered to the debtor, with general authority to dispose of it and substitute another article of

(a) The cases of *Casey v. National Bank*,* (6 Otto, 492), and *Casey v. Schuchardt*,* (Id., 494), were the same as the case under consideration. The pledgor bank retained possession of the securities, with power of collection and substitution, and it was held that the bailment was of no effect as against third persons.

equal value in its place, is the question which we have to meet in this case. Such a redelivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the carriage-maker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor. So, when the debtor is employed in the creditor's service, his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession to the debtor. This is in accordance both with the common and the civil law. *Reeves v. Capper*, 5 Bing. N. C. 136, was a case of this kind. A sea-captain pledged his chronometer for a debt. He was afterwards employed by the pledgee as master of one of his ships, and the chronometer was placed in his charge, to be used on the voyage. It was held that the possession of the pledgee was not lost. He recovered the chronometer against a person to whom the master pledged it a second time.

§ 40. *Authorities reviewed.*

In *Hays v. Riddle*, 1 Sandf. (N. Y.) 248, the plaintiff delivered to the defendant, at his request, a convertible bond of the New York and Erie Railroad Company (which had been pledged by the latter to the former), in order to get it exchanged for stock of the same company, which stock was to be returned and substituted for the bond in pledge. The defendant never returned either the bond or the stock. The plaintiff brought an action of trover against him for the bond, and recovered its value, being less than the debt for which it was pledged. It being objected that by delivering back the bond to the pledgor the plaintiff had lost his special property in it as pledgee, the court said: "At common law, as a general rule, the positive delivery back of the possession of the thing, with the consent of the pledgee, terminates his title. 2 Pick. 607; 15 Mass. 389. If the thing, however, is delivered back to the owner for a temporary purpose only, and it is agreed to be redelivered by him, the pledgee may recover it against the owner, if he refuse to restore it to the pledgee, after the purpose is fulfilled. 2 Taunt. 266; Story on Bailm. sec. 299. So, if it be delivered back to the owner in a new character; as, for example, as a special bailee or agent. In such case, the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons. 14 Pick. 497." In *Macomber v. Parker*, 14 Pick. (Mass.) 497, referred to in the last case, the proprietors of a brickyard contracted it out on shares to a brickmaker, agreeing to advance the money requisite to carry on the manufacture of bricks, and, after being repaid their advances, to divide the profits with the latter. It was agreed that the bricks, as fast as made, should be pledged to the owners of the yard as security for their advances; but the brickmaker was to keep them in his charge, and sell them at retail, and as often as he got the amount of a hundred dollars from the sales he was to deposit it in bank to the credit of the owners. The bricks were afterwards attached as to the share of the maker for his debts. But the court held that the owners of the yard had not, by leaving the bricks in the hands of the maker, lost their lien as pledgees of the entire property. They remark: "To say that this limited authority to sell the bricks by retail, in small sums, on account of the plaintiffs, was a waiver of their possession of the residue that remained in the kilns in their yard, would be clearly against the intent and meaning of the parties, unreasonable and unwarranted by the evidence." Again: "The special authority given by the plaintiffs to Evans [the brickmaker] was to clothe him with the character of agent to a limited extent only, and no remission to him in his

character of pledgor of the plaintiffs' right to retain the bricks according to the agreement." To the objection that retention of possession by the pledgor would have the effect to deceive those dealing with him, the court said: "If the vendor or the pledgor should have the actual possession of the property after it were pledged or sold, it would only be *prima facie*, but not conclusive, evidence of fraud. The matter might be explained and proved to be for the vendee or pledgee. It is a most familiar principle, that one man may have the actual possession or custody, while another has the legal title and the constructive possession."

In this case, it will be observed, the pledgees were joint owners of the brick, and were owners of the premises on which the bricks were kept; and the decision was undoubtedly correct. But, in the general remarks made by the court, there is manifest, as in many other cases, a tendency to confound the distinction between cases in which the title is in the creditor, and those in which his whole interest depends on possession. All the cases cited, however, show that a bailment to the pledgor for a mere temporary purpose for the use of the pledgee, or for the repair and conservation of the pledge, will not destroy the latter's possession; at the same time, they imply that a redelivery to the pledgor, except for the special and temporary purposes indicated, divests the possession of the pledgee, and destroys the pledge.

§ 41. *The doctrine of pledge under the civil law.*

The civil law, which is more particularly our guide in the present case, is to the same general effect; though it is more careful in denouncing the danger of losing the right of pledge by parting with any thing like permanent or continued possession to the pledgor; and it preserves very clearly the distinction between pledge and hypothecation, or mortgage. The old civil law of the digest, it is true, was more indulgent, and permitted the pledge to be delivered to the pledgor without prejudice to the security, in a manner that would not be allowed at the present day. Thus, in book XIII of the digest, title VII, law 35, Modestinus says: "A pledge transfers only the possession to the creditor, the property remaining in the debtor; yet the debtor may have the use of it, either as a gratuity, or for hire." And Paulus, in the same title, law 37, says: "If I lend a pledge to the owner thereof, I retain possession by means of the loan; for before the debtor borrowed it, the possession was not in him; and when he borrowed it, it was my intention still to retain the possession, and it was not his to acquire it." Pothier's *Pandects*, vol. VII, p. 360. As to this law of the digest, Mr. Bell, in his *Commentaries on the Scotch Law*, remarks as follows: "Voet very justly observes, in criticising this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to movables; and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession preserves property. It is true," Bell continues, "that, in the course of many contracts, there is a necessity for separating property and possession; and that the mere circumstance of goods being in the hands of another on a temporary contract will not deprive the real proprietor of his right, in favor of the creditors of the temporary possessor. And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession, in the course of necessary operations on it; the manufacturer, or other holder, being custodier for the pledgee, without injury to the real security."

But the doctrine delivered by Voet is sound, where the possession is given up without necessity to the owner of the goods." 2 Bell, Com. (7th ed.) p. 22. The modern French law, governed by a similar policy, has been put into a very explicit form in the civil code, which has been followed in the civil code of Louisiana. A quotation of some of the principal articles, bearing on this subject, will show the care taken to require distinct possession in the pledgee.

§ 42. *The law of Louisiana relating to the privilege of pledge. (a)*

Art. 3158 (Rev. Civ. Code La.), relating to movables, is as follows: "This privilege" [namely, that of pledge] "shall take place against third persons, only in case the pawn is proved by an act made either in a public form, or under private signature: *Provided*, that in this last case it should be duly registered in the office of a notary public at a time not suspicious: *Provided also*, that whatever may be the form of the act, it mentions the amount of the debt as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure." This article is copied from art. 2074 of the Code Napoleon. As to negotiable securities, the Louisiana code, by art. 3161, provided that a regular transfer by indorsement should be sufficient. But by a subsequent act, passed in 1852, and re-enacted March 15, 1855, it was provided "that where a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith." A question was made on the argument whether this statute was in force in 1873, when the transaction in question took place. Without giving our reasons at present, it is sufficient to say that we are satisfied that the act was in force at that time. The next article, 3162, which is not affected by the statute, and which is copied from art. 2076 of the Code Napoleon, is important, and is in these words: "In no case does this privilege subsist in the pledge except when the thing pledged, if it be a corporeal movable, or the evidence of the debt, if it be a note or other obligation under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties."

As might be supposed, this article has formed the subject of much discussion by the commentators. Troplong says: "The pledgee has this privilege only on the condition of being possessed of the thing. This condition was expressly imposed upon him by art. 181 of the Custom of Paris. This is reproduced by art. 2102, No. 2, of the code civil, and we shall specially discuss it in the commentary on art. 2076. Possession is indispensable to him. It withdraws the thing from the hands of the debtor and from the actions of creditors, and sets it aside in a privileged situation. '*Possidentis melior est conditio.*' Possession is the most sure foundation, and the most striking index of his privilege. Without it, the creditor would have no ground for escaping the law of contribution. Casaregis says, 'Preference is accorded to a pledgee on the thing pledged, because he has it in his own hands.' This possession ought to be certain and not equivocal. If it is ambiguous, if the things pledged have been so placed as to deceive the other creditors, and to lead them to believe that the debtor always continued the possessor, the pledge would be endangered." Troplong shows, however, that this possession may be a civil possession, as where the

(a) By the law of Louisiana, in 1873, the actual delivery to the pledgee of negotiable and other securities and their retention by him, constituted a valid bailment. *Casey v. Schneider*,* 6 Otto, 496.

delivery is made by the transfer of a bill of lading of goods on board a ship, etc. Troplong, *Nantissement*, arts. 97-99. The same author, in commenting on art. 2076, after treating of the absolute necessity of possession by the pledgee, in order to constitute the relation of pledge, and after discussing the different forms of possession, actual and constructive, adapted to the nature and situation of the thing pledged, proceeds (*Nantissement*, No. 309) to treat of the manner in which it may be in the hands of the pledgor without destroying the possession and right of the pledgee. He says: "Though the merchandise be deposited in the creditor's storehouse, it may still need the care of the debtor. Then it is not forbidden to stipulate that he shall continue to attend to it in the interest of the creditor. The important thing is, that this clause does not cover a fraud. Aside from this, the possession of the creditor is not incompatible with a certain co-operation of the debtor,—being for the conservation of the thing,—he still being the owner. The creditor does not any the less continue exclusive possessor of the thing. The debtor is none the less dispossessed of it." He then gives some cases by way of illustration. For example: In 1839, Morin & Co., of Beaune, pledged to Weiland & Co., of Baden, sixty thousand bottles of sparkling Burgundy, for a debt. The wine was delivered to an agent of Weiland & Co., and deposited in a vault hired by him for the purpose. It was agreed that Morin & Co. should give the wine all necessary care, in presence of the agent, who was to keep the keys of the vault. But, to facilitate matters, it sometimes happened that the agent gave the keys to Morin & Co.; and once, in 1840, the latter removed some of the bottles of wine to their own premises. Morin & Co. having failed, their assignees (syndics) insisted that the pledge was null and void, because the debtors were not dispossessed of the wine. But Weiland & Co. having renounced their privilege on the wines which had been removed, were sustained by the highest court in their claim to the remainder. It was held that the special character of the wine, and the difficulty of finding persons qualified to take proper care of it, were sufficient reasons for employing Morin & Co. to attend to it; and the agent's allowing them to take the keys occasionally for this purpose was a mere matter of convenience, to facilitate the operations of the workmen. Troplong, *Nant.*, No. 311; Dalloz, *Repertoire*, vol. XXXII, p. 455, art. *Nantissement*. See, also, Duranton, vol. XVIII, Nos. 525, 528, 531.

A different result was had in another case, where certain Champagne wines were the object of the pledge, and the debtor had reserved the care of them; and, though the vaults in which they were stored were leased to the creditors, they communicated by open doors with the other vaults of the debtors, where their workmen were employed on the wines, and there was nothing to indicate which were pledged, and which were not, and nothing to prevent a substitution thereof; so that the debtors appeared in possession, and kept up their credit thereby, which they could not otherwise have done. Troplong, No. 312; Ricou et al. v. Syndics of Joly & Co. Dalloz, *Repertoire*, *Nantissement*, No. 93, note. In another case, it was decided that the debtor might be permitted to make sales of the goods pledged, provided that they remained in the pledgee's possession, and could not be delivered to the purchaser without his consent. Dalloz, No. 129. Troplong deduces, from these and other cases, the general conclusion that, whenever the assistance of the debtor is necessary to the better accomplishment of the object of the pledge, it ought to be permitted, provided always that it does not disturb the possession of the creditor in any respect. *Nant.* No. 313. Dalloz says: "It is evident that if the pledge of movables could,

without a delivery, have effect in regard to third persons, it would be the source of great frauds and deceptions. When the debtor is obliged to surrender possession he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby." He takes special notice of the decision that a pledge is not valid if the dispossession of the debtor is not sufficiently complete to prevent substitution; or if there is a mere contract for a pledge, and not an actual pledge. Dalloz, Rep. Nant. 119. And he lays down the principle, that though a contract for a pledge may be enforced against the pledgor and his heirs (Nant. No. 121), yet that, by the very words of the code, he cannot set up the privilege of the pledge, which alone constitutes his right as against third persons, without actual possession, or its equivalent. Nant. 119, 209.

§ 43. *Delivery to the pledgor with power of collection and substitution defeats the privilege of pledge as to third persons.* (See § 62.)

From these authorities it seems to be evident that, in the French law at least, the text of which, in this regard, is the same as that of Louisiana, a delivery by the owner of securities by way of pledge, followed by a return thereof to him, for the purpose of enabling him to collect them and apply the money to his own use, on substituting others in their stead, and with general liberty of substitution, and to appear as the owner and possessor thereof in his dealings with others (the title of the securities not being transferred to the creditor), is not such a delivery of possession as is necessary to establish the privilege due to a pledge as to third persons. It would be contrary to the very letter of the law to allow such a transaction to have that effect. It would not be mere evidence of fraud, which might be rebutted by counter evidence; but it would be contrary to the rule of law adopted to prevent fraud. In other words, as to third persons, it would not be a pledge at all within the meaning and requirements of the law.

We think that the decisions in Louisiana lead to the same conclusion. In the case of *Geddes v. Bennett*, 6 La. Ann. 516, the object of the pledge was certain barrels of whisky in the warehouse of a third person. The creditor allowed the debtor to remove them to his own premises, upon giving the following receipt: "Received from J. & R. Geddes four hundred and fifty-six barrels of whisky on storage." Having the goods thus in his own possession, the debtor parted with them to a third person. The supreme court, in an action brought by the pledgees to recover the whisky, said: "The plaintiffs have shown no compliance with the articles of the code, concerning the form of the contract of pledge, which it would be necessary to observe in order to enable them to recover against the defendants, who are third persons; and our impression is, that, under the circumstances of the case, the delivery of the object pledged to Bennett, even under the receipt he gave, would of itself defeat the pledge;" referring to article 3162 of the code, which we have been considering. And in the late case of *D'Meza's Succession*, 26 id. 35, Myers & Levy had made certain accommodation indorsements for the deceased, upon the faith and promise of receiving from him a policy of insurance upon his life, for which he had made application. Having procured the policy, he told them to call at his office and get it from his book-keeper, informing them that he had told the book-keeper it was for them. But he died before it was actually delivered. The court held that the policy was never placed beyond the control of D'Meza, and that Myers & Levy never had the requisite possession thereof. "The book-keeper," say the court, "never held the policy as agent or trustee for Myers & Levy. Although

informed of his employer's intention in regard to one of the policies" (he had obtained two of the same amount), "he was never instructed to deliver it to Myers & Levy, or any one else. There was, therefore, no delivery of the policy to Myers & Levy, although the deceased intended to do so. Consequently, they never held it as a pledge or collateral security for their accommodation indorsements." These cases appear to us to govern the present. The securities claimed to have been pledged to the Credit Mobilier remained in the possession and control of the bank until the time of its failure. Up to that period they were not in such a condition as the law requires for a pledge. The placing them in such a condition afterwards, by Cavaroc's removing them from the bank at the time of its failure, was, in fact, an attempt to create a pledge then, by assuming the possession requisite thereto; and a pledge taking its origin at that time was a preference forbidden by the banking act.

§ 44: *An agreement for a pledge raises no privilege.*

It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage; for the title of the securities was never transferred to them. The evidence of the cashier is, that they were all stamped payable to the order of the bank, when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank had failed. Two cases, decided by the supreme court of Louisiana, have been cited and relied on (as well as some other cases in England and the United States), to show that an assignee only takes the property assigned exactly in the plight in which the debtor held it, and subject to all the equities to which it was subject in his hands. The first case is that of *Campbell v. Slidell*, 5 La. Ann. 274, in which a syndic claimed certain real estate which the debtor had conveyed to a *bona fide* purchaser, but the deed had not been duly registered. The court held that this made no difference. The debtor had parted with the title, and, therefore, he could not assign to the syndic what he did not himself own, although the deed might be void, for want of registry, as against a subsequent purchaser in good faith, or a subsequent judgment creditor who should acquire a mortgage by recording his judgment. It is evident that this case is unlike the one now under consideration. Here the debtor never transferred the title; and the only question is, whether there was such an attempt to pledge as to raise a privilege,— which, as we have seen, there was not. The second case is that of *Partee, Syndic, v. Corning*, 9 La. Ann. 539. In this case, the debtor had actually pledged and delivered bills receivable to the defendants for simultaneous advances, but had not indorsed the bills, as required by art. 3156. The court said: "It is clear that the pledgors could not have set up this objection; and we are of opinion that the syndic cannot, upon a mere naked informality of this sort, disturb the pledge. Let it be observed that there is no pretense that the pledges were taken in bad faith, or that an injury was done to creditors in taking them." Here, the indispensable requisite of possession existed. The other formalities (which were required at that time) were enjoined by the article referred to, it is true; but there was no declaration that the pledge should be void, or that the privilege should not exist without them. We do not think that these cases conflict with the conclusion which we have reached in this case. We have examined the other authorities referred to, among which are *Mitford v. Mitford*, 9 Ves. Jr. 86; *Mitchell v. Winslow* 2 Story, 630; and also the cases of *Gibson v. Warden*, 14 Wall.

244, and *Cook v. Tullis*, 18 id. 332; but these were all cases in which the creditor claiming adverse to the assignee had a clear legal or equitable title to the property claimed. None of them stood as the present case does, upon the claim of a privilege expressly denied by the law. We do not deem it necessary, therefore, to go into a review of those cases. They cannot affect this.

§ 45. *How far an assignee for the benefit of creditors is liable to equities against the debtor.*

Whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class. By the law of Louisiana, a pledge, in order to be effective against third persons, must be accompanied by a privilege. It may be valid as a contract between the parties without this quality, as held both in the French law (as already shown) and in Louisiana, in the case of *Matthews v. Rutherford*, 7 La. Ann. 225. But art. 3162 expressly declares that the privilege arising from a pledge does not subsist except when the thing pledged has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties. Without the privilege, or right of preference, the *Credit Mobilier* has no claim to hold the securities in question as against the other creditors. How, then, can it set up such a claim against the receiver? The receiver does not represent the bank alone; he represents all the parties. He represents the law, which takes charge of the property for the benefit of all creditors, according to their respective and mutual rights. Suppose no receiver had been appointed, and, when the bank failed, it had called the creditors together, and laid all its assets on a table, could the *Credit Mobilier*, in presence of the other creditors, have laid its hands on the securities in question, and claimed them by right of any privilege or preference? It certainly could not have done so if it had no privilege as against them. And yet this is precisely the relation in which the parties stood. The existence of a receiver, as trustee for all, did not change it. That one essential thing which the law requires for the subsistence of the privilege, namely, possession, was wanting. Other formalities might have been dispensed with. But, possession is essential, — made so by the express terms of the law. Nearly all the cases in France, where this question has arisen, have been contests between creditors claiming by way of pledge, and the syndics of the failing debtor, who stand in the place occupied by the receiver here. If there is any distinction between them, it is in favor of a firmer right on the part of the receiver to protect the interests of the general creditors. He is not made receiver by a voluntary assignment of the bank, but is appointed by the magistrate *in invitum* the bank, for the very purpose of securing equal justice to all its creditors, and under a law which sternly forbids preferences. Surely such an officer, whatever may be the rule in the case of voluntary assignments, may assert those rights of the general creditors, which the law itself creates, without being subject to all the disabilities under which the bank would labor in combating its private engagements with favored creditors. If the law says, "there shall be no privilege, as to third persons, by a pledge without possession," there will be no need of a judgment and execution in order to oppose such a pledge if only a creditor, or one who represents creditors, has a proper standing in court. Insolvency of the debtor, if a bank, and the appointment of a receiver thereof, will force the pledgee into concurrence with the general

creditors; and the receiver's power will be fully adequate to the protection of their interests as established by law. The case of *Bank of Alexandria v. Herbert*, 8 Cranch, 36, presents a state of things almost precisely analogous to this. There, the trustee of an insolvent debtor recovered the proceeds of property which the latter had mortgaged to the bank. The recovery was had on the ground that the mortgage had not been recorded in proper time under the law of Virginia, which declared that all deeds and mortgages, though good between the parties, should be void as to creditors and subsequent purchasers without notice, unless recorded within eight months from date. "To set up this deed against the creditors," said Mr. Chief Justice Marshall, "would be to defeat the very object for which the law was made."

§ 46. *Powers of a receiver or syndic as against privileges or preferences of special creditors.*

Indeed, it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a receiver under the national banking act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power cannot well be doubted; and since a national bank cannot be put into bankruptcy, but can only be wound up under the peculiar provisions of the banking act, the receiver appointed by virtue thereof must have the same power, or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors. Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact, to invalidate the transaction. But, in the present case that question does not arise; or, if it might be raised, it is immaterial. The *Credit Mobilier* claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. This consideration meets the objection which is urged against the rule, that it would result in giving to the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities are also increased to the same amount by the demand of the party who makes the advances,—the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter de-

rive any benefit from this result, it must be remembered that, in the view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded.

§ 47. *When equity will not consider that as done which was intended to be done.*

These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in the view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued. This suggestion may also be answered by the fact that it cannot be truly said to have been the intent of the parties to transfer the title. The agreement was only that "securities of the first class shall be deposited with the firm of Messrs. Cavaroc & Son." A transfer of the title would have been inconsistent with that unrestricted control over the securities which the bank desired to, and did, retain, and which must be considered as having been assented to by the Credit Mobilier, through the common agent, Cavaroc.

On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the parties, and of actual possession and control in the pledgor, we feel compelled to hold that the Credit Mobilier had no privilege as to third persons, and that the receiver was entitled to the securities in question. The decree will, accordingly, be reversed, and the cause remanded to the circuit court with directions to enter a decree in favor of the complainant below in conformity to this opinion; and it is so ordered.

JUSTICES SWAYNE, FIELD and HARLAN dissented.

EX PARTE FITZ — RE RAWSON.

(District Court for Massachusetts: 2 Lowell, 519-521. 1876.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The petitioner lent money to Rawson & Hittinger, and took from them at the same time the notes of Jacob Hittinger, not a member of the firm, and bills of sale of certain locomotive engines, then in their machine shop in Cambridgeport, as additional security. Rawson & Hittinger have become bankrupt, and Jacob Hittinger has paid the debt; and the petitioner, acting as trustee for him, asks that the engines or their proceeds be now applied to pay the debt. Jacob Hittinger has become a party to the petition, and submits his rights to the determination of the court.

§ 48. *Bill of sale intended for security operates as a pledge and not a mortgage, and need not be recorded.*

It was argued in behalf of the petitioner that the bills of sale were mortgages, and that the failure to record them would not, under the circumstances of the case, be fatal to the title of the mortgagee. I take it, however, to be clear, that, by the law of Massachusetts, as of the other states, the bill of sale, intended for security, operated as a pledge and not as a mort-

gage, and neither required nor admitted of registration. *Walker v. Staples*, 5 Allen, 34; *Kimball v. Hildreth*, 8 id. 167; and, incidentally, *Newton v. Fay*, 10 id. 505; *Drake v. White*, 117 Mass. 10.

§ 49. *Possession of pledge necessary as against assignee in bankruptcy.*

As a general rule, the pledgee must take and keep possession of the chattels, or his title will not be valid against the assignee in bankruptcy. My decision, that a mortgagee had a better title than the assignee in some cases, though he neither took possession nor recorded his mortgage, does not apply to pledges, but turned on the words of a statute, construed with the aid of the rule of the common law of Massachusetts, that the possession of a mortgagor is consistent with the title of the mortgagee. Still, on the question of what is a sufficient taking and keeping, the cases arising under mortgages are in point.

§ 50. *There must be a delivery before lien of pledgee will attach, but the delivery may be actual or constructive. (See § 62.)*

I understand the law to be that there must be a delivery before the pledgee's lien will attach, but the delivery may be either actual or constructive. *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; 4 H. L. 317; *Young v. Lambert*, L. R. 3 P. C. 142. Then, as to keeping possession, it may be kept by an agent, and that agent may be the pledgor. If the circumstances make out a good reason for giving the custody and apparent control to the pledgor, there may not even be evidence of fraud; but at most, his possession will only be evidence either that the pledge has been abandoned, or that the transaction is covinous. See *Sumner v. Hamlet*, 12 Pick. 76; *Macomber v. Parker*, 14 id. 497; *Hays v. Riddle*, 1 Sandf. 248; *Way v. Davidson*, 12 Gray, 465; *Cooper v. Ray*, 47 Id. 53; *Martin v. Reid*, 11 C. B. N. S. 730; *Thayer v. Dwight*, 104 Mass. 254; *Thorn-dike v. Bath*, 114 id. 116; *Weld v. Cutler*, 2 Gray, 195. On the question of fact, whether possession was taken and kept, there is, unfortunately, a direct contradiction between the only two witnesses to the acts done. The petitioner testifies that, soon after the bills of sale were given, he went to the shop of the pledgors, and in presence of one of them, Michael Hittinger, took possession of every one of the engines, put his hand upon each, and told Michael Hittinger to hold them as his agent, and that if any of them were sold he would give an order for the delivery. Michael Hittinger says that the petitioner came over to the shop, and one engine was pointed out to him, but he did nothing about taking possession, and gave no orders. Supposing, as I do, that the witnesses are equally veracious, I feel bound to give greater credit to the evidence of the petitioner; because he cannot be mistaken, and Mr. Hittinger may have forgotten the circumstances. The petitioner went to the factory, according to his story, with a definite purpose, and must recollect what it was, and what he did in pursuance of it. Both stand before the court unimpeached, and with no serious bias, because the debt has been paid to Mr. Fitz, and he is proceeding for the benefit of a surety; and Mr. Hittinger, on his part, has assigned all his title by his petition and the proceedings in bankruptcy. I can only regret that the parties did not see fit to submit the decision of this question to a jury. Taking it, as I feel bound to do, that Mr. Fitz's recollection is the more accurate, it seems to me, as matter of law, that his possession was sufficient. I do not consider that a pledgee is bound to remove locomotive engines, and put them into his house or into a warehouse. He might well leave them with the pledgor, to be finished, or even to be sold. There is somewhat more danger of fraud if the pledgor himself is intrusted with the possession, than if a third person was employed; but there is no

difference in principle between the appointment of Hittinger and of one of his clerks. It comes back to a question of fraud or good faith. Of course, it is well understood that an assignee in bankruptcy is not a purchaser without notice.

It is argued that there was no sufficient designation of the particular engine pledged. I do not understand the evidence to be undisputed on this point. Mr. Fitz said that the engines mentioned in his bill of sale could be easily picked out from the others; and Mr. Hittinger again differed from him on this point. But this matter is set at rest by the evidence, which I have accepted as accurate, that each engine was in fact designated and pointed out when Mr. Fitz went over to the shop and took possession, which was long before the bankruptcy.

Petition granted.

MYERS v. D'MEZA.

(Circuit Court for Louisiana: 2 Woods, 160-163. 1875.)

STATEMENT OF FACTS.—A loan was made upon the security of a policy of life insurance. Deceased indorsed the policy, but did not deliver it in his life time; his executor collected the money and held it, claiming that it formed part of testator's general assets. The creditor filed a bill for a specific performance, to which there was a plea that the probate court had decided against the complainant's claim, and that the decision had been affirmed in the supreme court of the state.

Opinion by Woods, C. J. The proof to support the plea is a certified transcript from the record of the probate court of the parish of Orleans, of the opposition of the complainants, Myers & Levy, to the provisional tableau of the defendant as executor of A. D. D'Meza, and the decree of the supreme court rendered on appeal.

The provisional tableau to which their opposition was made shows that Myers & Levy were placed in the same as ordinary or general creditors. The opposition to this tableau represented that opponents had a special lien on said policy of \$5,000, to secure the payment of their debt, and prayed that they be declared to have a privilege upon said life policy, or the funds received thereon, and that the executor be ordered to pay the opponents said sum of three thousand five hundred and twenty-four dollars.

§ 51. *Pledgee may enforce delivery of pledge, after a judgment holding the bailment void for want of delivery.*

It seems to me quite clear that a judgment that the complainants in this case had no lien or privilege on this fund does not bar them from setting up an absolute title to the policy, or to a part of its proceeds. It is plain, from the opinion of the supreme court, that the claim of the complainants to a specific performance of the contract of D'Meza, to transfer to them the policy, has never been adjudicated upon. The supreme court, in affirming the judgment of the probate court, dismissing the opposition to the tableau, say: "Whether opponent's remedy were an action to enforce the verbal contract, with regard to the policy, or a suit for breach thereof, it is unnecessary to decide in disposing of this case. But it is proper to remark, that a contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral, not transferred or delivered in pursuance of said contract or promise." Succession of D'Meza, 26 La. An. 35. It

appears from this as well as from the opposition to the tableau, that the opponents were setting up a claim to the fund as to a thing pledged. The case went against them, because it appeared that the thing which was claimed as a pledge had never been delivered. On this ground alone the court decided against them. Can there be any doubt that a decision of that controversy does not bar the complainants from praying a specific performance of the contract to deliver the pledge? It is clear that this would be an entirely different issue, and would not be decided by a judgment finding that the pledge had never been delivered.

§ 52. *The doctrine of res adjudicata.*

To ascertain what is demanded in a particular suit, in order to determine whether it is a bar to another suit brought, resort must be had to the prayer of the petition. *Slocomb v. Lizardi*, 21 La. An. 355. The prayer of the opposition to the tableau and the prayer of the bill in this case differ in the relief sought, and the title to the relief sought is different in the two cases. But the defendant says that when a party has brought suit upon a particular title, and has been defeated, he cannot afterwards bring another suit for the same thing upon another title, unless he acquired such title since the former demand. In support of this proposition, he cites the cases of *Williams v. Close*, 12 La. An. 878, and *Schaffer v. Scuddy*, 14 id. 576. But these authorities do not settle the question raised by the plea in bar. It may well be held, that if a plaintiff has two titles to a thing, one derived from A. and the other from B., and he brings suit for the recovery of the thing to which his titles relate, and offers in evidence only the title derived from A., and loses his case, he cannot afterwards bring another action, and set up the title derived from B. The reason is that he might have used both titles in his first suit. But in this case, the complainants having claimed in the probate court to have a pledge of the policy, could not at the same time set up an absolute title. Evidence to sustain title would not have been pertinent to the issue and would have been excluded. In fact, the probate court would not have had jurisdiction of a suit for the specific performance of the contract. Code of Pr. art. 126. I am of opinion that the controversy presented by the bill in this case has never been passed upon, and it would be depriving the complainants of their day in court upon it, to hold them concluded by the proceedings in the probate court. The finding of this court must, therefore, be against the plea of defendant.

McLEMORE v. LOUISIANA STATE BANK.

(1 Otto, 27-29. 1875.)

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—It is unnecessary to consider whether in all respects the charge of the circuit court to the jury was correct, because the record shows the case of the plaintiff to be so fatally defective that the judgment below would not be reversed for instructions, however erroneous. *Brobst v. Brock*, 10 Wall. 519; *Decatur Bank v. St. Louis Bank*, 21 id. 301. The case is this: The plaintiff was the owner of certain promissory notes and acceptances, in possession of the commercial firm in New Orleans of which he was a member, which were pledged by the firm, in 1861 and 1862, to the bank, as security for the payment of their promissory notes discounted by the bank.

These notes were not met at maturity, and, with the collaterals pledged for their payment, remained in possession of the bank until June 11, 1863, when it was put in liquidation by order of Major-General Banks, and its effects transferred to military commissioners appointed to close it up. Its officers, while submitting to this order because they had no power to resist it, deemed it unjust and oppressive, and entered a protest against it on their minutes. During the administration of these commissioners, the pledged paper was sold for less than its face. In January, 1866, the military liquidation ceased by order of Major-General Canby, and the effects of the bank which were unadministered were restored to it. The plaintiff, on the ground that the securities were parted with illegally, seeks to make the bank responsible for the proceedings of the commissioners; but this he cannot do. Certainly no act was done, or omitted to be done, by it, inconsistent with its duty; for it was only bound to take that care of the pledge which a careful man bestows on his own property.

§ 53. *Bank not liable where it is put in process of liquidation by a military officer, and securities are taken and sold for less than their value.*

It is true, it was the duty of the bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged. 2 Kent, 579; Story on Bailments, sec. 339; Commercial Bank v. Martin, 1 Annual, 344. That the proceedings of General Banks and the liquidators appointed by him constituted "superior force," which no prudent administrator of the affairs of a corporation could either resist or prevent, is too plain for controversy. It was in the midst of war that the order was made, and with an army at hand to enforce it. There was nothing left but submission under protest. Any other course of action, under the circumstances, instead of benefitting, would have injured, every one who had dealings with the bank. It has turned out that the plaintiff has suffered injury, but not through the fault of the officers of the bank; for they retained the notes and bills long after the paper for which they were given as security had matured, and until they were dispossessed of them by military force. Under such circumstances, they have discharged every duty which they owed to the plaintiff; and, if loss has been occasioned in consequence of the order in question, the bank is not responsible for it.

The judgment is affirmed.

TALTY v. FREEDMAN'S SAVINGS AND TRUST COMPANY

(3 Otto, 321-326. 1876.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This was an action of replevin, prosecuted by the plaintiff in error. The judgment was against him. The bill of exceptions discloses all the evidence given by both parties. The facts lie within a narrow compass, and, except as to one point, which in our view is of no consequence in this case, there is no disagreement between them.

Talty had a claim against the city of Washington for work and materials, amounting to \$6,096.75. He submitted it to the proper authority, and received the usual voucher. On the 4th of January, 1872, the claim was approved by

the commissioners of audit, and a certificate to that effect was given to him. On the 6th of that month he employed Kendig, a broker, to negotiate a loan for him. With that view he placed in Kendig's hands his own note for \$3,000, having sixty days to run, with interest at the rate of ten per cent. per annum, payable to his own order, and indorsed by him in blank. He also placed in the hands of Kendig, to be used as collateral, his claim against the city, indorsed in blank also. The same day Kendig negotiated the loan and paid Talty the amount of the note, less the discount. Kendig sold the claim against the city to the defendant for ninety-six cents on the dollar. The money was paid to him. The purchase was made in good faith, and without notice of any right or claim on the part of Talty. With the proceeds of this sale Kendig took up the note. A few days before its maturity Talty called on Kendig and offered to pay the note, and demanded back the collateral. Kendig declined to accede to the proposition. He insisted that the understanding between him and Talty was that he was to receive no commission for negotiating the loan, but that he was to have instead the right to sell or take the claim against the city, if he chose to do so, at ninety cents on the dollar. He offered to pay Talty for the claim, making the computation at that rate, and deducting the amount of the note. This Talty refused, and insisted that Kendig had no authority with respect to the claim but to sell, in the event of default in the payment of the note at maturity. Each party testified accordingly. Subsequently, and after the maturity of the note, Talty demanded from the defendant in error the vouchers relating to the claim. The defendant refused to give them up, and this suit was thereupon instituted. The marshal took them under the writ of replevin, and delivered them to the plaintiff. No tender was made by Talty to the defendant in error, nor to Kendig, and nothing was said by him upon the subject of paying his note to either, except the offer to Kendig, as before stated. After receiving back the collateral, Talty was paid the full amount of it by the commissioners of the sinking fund of the city. The only dispute between the parties as to the facts was that in relation to the authority of Kendig touching the claim. Upon this state of the evidence the court instructed the jury to find for the defendant, and to assess the damages at the value of the claim. This was done, and judgment was entered upon the verdict. The instruction was excepted to.

§ 54. *Where the pledge is sold to a bona fide purchaser, it cannot be replevied without tendering the amount due. (See § 58.)*

Before entering upon the examination of the merits of the controversy, it may be well to consider for a moment the situation of the several parties. Talty has received and holds the proceeds of his note and the full amount of the collateral. Kendig holds the note and the amount of the collateral, less four per cent. The defendant in error, the *bona fide* purchaser of the claim, is out of pocket the amount paid for it to Kendig, and has the burden of this litigation and the security afforded by the replevin bond of Talty. The question to be determined is, whether a tender to the defendant in error by Talty of the amount due on his note before bringing this suit was indispensable to entitle him to recover.

§ 55. *Authorities reviewed on the authority of the pledgee to pledge or sell.*

Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a

pawnee for the purposes of the pledge. Judge Story says (Bailm. secs. 324-327), "The pawnee may by the common law deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee." "Whatever doubt may be indulged in, in the case of a mere factor, it has been decided, in the case of a strict pledge, that, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

Numerous authorities are cited in support of these propositions. The subject as to the point last mentioned was learnedly examined in *Jarvis' Adm'r v. Rodgers*, 15 Mass. 389. That was the case of a re-pledge by the first pledgee. The rule of the text as to the rights of the sub-pledgee was distinctly affirmed. The case of *Lewis v. Mott*, 36 N. Y. 395, was in some of its leading points strikingly like the case before us. There, Brown had placed certain collaterals in the hands of Howe to secure the payment of two promissory notes of Brown held by Howe; Howe sold the notes and collaterals to Varnum; Brown offered to pay Varnum the amount of the notes, and demanded the collaterals; Varnum refused to give them up, and Brown sued for them. The court said, "It must be conceded that Varnum, by the purchase of those securities from Howe, acquired the lien and interest of Howe, whatever that may have been; and the plaintiff's assignee, to have entitled himself to a redelivery of these securities, must have tendered the amount of the lien. There was simply an offer to pay Varnum the amount due upon these notes. It was unattended with any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the return of the notes. . . . The offer to pay is not the equivalent for an actual tender. *Bateman v. Pool*, 15 Wend. 637; *Strong v. Black*, 46 Barb. 222; *Edmonson v. McLeod*, 16 N. Y. 543." See also *Baldwin v. Ely*, 9 How. 580; *Merchants' Bank v. The State Bank*, 10 Wall. 604. The English law is the same. In *Donald v. Suckling*, Law Rep. 1 Q. B. 585, the case was this: A. deposited debentures with B. as security for the payment of a bill indorsed by A. and discounted by B. It was agreed, that, if the bill was not paid when due, B. might sell or otherwise dispose of the debentures. Before the maturity of the bill, B. deposited the debentures with C., to be held as security for a loan by him to B. larger than the amount of the bill. The bill was dishonored; and, while it was unpaid, A. sued C. in detinue for the debentures. It was held that A. could not maintain the suit without having paid or tendered to C. the amount of the bill. The case was elaborately considered by the court. See also *Moore v. Conham*, Owen, 123; *Ratcliffe v. Davis*, Yelv. 178; *Johnson v. Cumming*, Scott's C. B. N. S. 331. A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes *ipso facto* the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled. *Donald v. Suckling*, *supra*; *Jarvis' Adm'r v. Rodgers*, *supra*; S. C. 13 Mass. 105.

But it is suggested that the note was in the hands of Kendig, and that Talty could not, therefore, safely pay the amount due upon it to the holder of the collateral. The like fact existed in *Donald v. Suckling*. It is not adverted to

in the arguments of counsel, nor in the opinions of the judges in that case. It could not, therefore, have been regarded by either as of any significance. The answer here to the objection is obvious. The note, a few days before its maturity, was in the hands of Kendig. There being no proof to the contrary, it is to be presumed to have remained there. This suit was commenced after it matured. Talty might then have paid the amount due upon it to the defendant in error, and could thereupon have defended successfully in a suit on the note, whether brought by Kendig or any indorsee taking it after due. He might also, after making the tender, have filed his bill in equity, making Kendig and the savings bank defendants, and thus have settled the rights of all the parties in that litigation. Having sued at law without making the tender, it is clear he was not entitled to recover.

The instruction given by the court to the jury was, therefore, correct. The proceeding and judgment were according to the local law regulating the action of replevin in the District of Columbia. In the discussion here our attention was called only to the question of tender; nothing was said as to the rule of damages laid down by the court below.

There is another question arising upon the record, and that is, whether the defendant in error, being a *bona fide* purchaser, did not, under the circumstances, acquire the absolute ownership of the claim. Story on Agency, sec 127; *Addis v. Baker*, 1 Anst. 222; *McNiel v. The Tenth National Bank*, 46 N. Y. 325; *Fatman v. Lobach*, 1 Duer, 524; *Weirick v. The Mahoning County Bank*, 16 O. St., 297; *Fullerton v. Sturgess*, 4 Ohio St. 529. But as the point has not been argued, we express no opinion upon the subject.

Judgment affirmed.

§ 56. *Judicial sale—Tender.*—Where a vessel was pledged to secure a sum of money, and was attached and sold by a creditor of the bailor, and bought by the bailee, who found it necessary to make certain repairs, *held*, in an action of trover, that it was necessary for the bailor to tender the cost of repairs, and all necessary sums advanced by the defendant, as well as the original debt and interest. *Barker v. Parkenhorn*, 2 Wash. 144.

§ 57. *Past consideration.*—Pledges and mortgages are exceptions to the general rule that a mere past consideration will not support a contract, and a pledge made upon a past consideration, if there still remains a subsisting liability, is made on a sufficient consideration. *In re Wiley*, 4 Biss. 173. See § 72.

§ 58. *Sale of pledge.*—Where a bank holds property, such as coin or certificates, in pledge, it has a special property which may be sold or assigned, and the assignee will become invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period. *Merchants' Bank v. State Bank*, 10 Wall. 643. Where bonds were pledged by a bank, with power of sale on giving notice, and the bank failed, closed its place of business, and the pledgee sold the bonds, at their market value, without notice, it was held that the performance of the condition precedent to the sale had become impossible, and that the pledgee was not liable for a conversion. *City Bank v. Babcock*, 1 Holmes, 190. See §§ 37, 54.

§ 59. *Extent of the security.*—Where a certificate of debt bound the obligor "for the payment of the sum therein mentioned, with interest," a pledge of stock for the "redemption of the certificate of debt," became security for the interest as well as the principal, and a foreclosure was authorized on default in the payment of any instalment of interest. *Swasey v. North Carolina R. Co.** 1 Hughes, 17. See § 81.

§ 60. *Title of pledgee.*—The pledgee of a negotiable instrument is entitled to the benefit of his security on the bankruptcy of the pledgor. *Jerome v. McCarter*, 7 Otto, 734. A pledgee cannot retain a pledge to secure other debts or to use for other objects than those for which it was given. This principle applies in cases in which the United States are parties as in cases between individuals. *Boughton v. United States*,* 12 Ct. of Cl. 337.

§ 61. The pledgee is not bound to return the pledge until his debt has been paid; and this rule holds good where the bailor is adjudged a bankrupt. *Yeatman v. Savings Institution*, 5 Otto, 763. There is no lien at common law upon pledged personal property beyond the special object for which it was pledged, except (1st) where it is implied from the usage of

trade; (2d) where there is an express contract; (3d) from the manner of dealing between the parties; (4th) where the party acts as a factor. But where a corporation has by its charter a lien on the shares of its stockholders for dues from such stockholders, and a stockholder deposits shares with it to secure a debt, the company has a lien on such shares for other debts due from such stockholder. *In re Peebles*, 2 Hughes, 397. See §§ 81-83.

§ 62. *Delivery of pledge.*—To render a pledge valid, it is a general rule that the thing pledged must be delivered. This rule, however, is subject to exception. It is not necessary that the possession of the pledgee should be actual. Stocks, and, it would seem, equitable interests, though incapable of actual delivery, may be pledged. And perhaps it may be safely asserted that, in general, when from the circumstances of the case an actual delivery is impossible, the pledge may be good without a delivery. So where a note was in the hands of a third party at the time it was pledged, there was a sufficient delivery, the possession of such third party being the possession of the pledgee. *In re Wiley*, 4 Biss. 172. And where notes deposited as a pledge are returned to the pledgor, for convenience of collection, to be collected for account of the pledgee, or to be replaced by others, such transaction does not affect the title of the pledgee. *Clarke v. Iselin*, 21 Wall. 368; *Casey v. Société de Crédit Mobilier*, 2 Woods, 77. See §§ 33-35, 39, 43, 50.

§ 63. *Pledge of stock.*—To constitute a pledge of stock as against third parties, in the absence of a statutory provision, there must be a transfer on the books of the company, or a power of attorney authorizing a transfer, or some assignment or contract in writing by which the holder may assert title and compel a transfer when desired. Merely handing over the certificate is not sufficient. Where it was agreed to pledge certain stock, and there was no transfer or written assignment, the stock remaining under the control of the pledgor, there was no valid pledge as against third parties. *Nisbit v. Macon Bank & Trust Co.* 12 Fed. R. 690. Stock in a corporation may be pledged in Louisiana, and the pledgee takes it subject to all the liens and privileges the law puts upon it. *New Orleans Banking Association v. Wiltz*, 10 Fed. R. 332.

§ 64. *Difference between a pledge and a mortgage.*—In all cases where personal property is given as a security for a debt or engagement, accompanied by a change of possession, either actual or constructive, the transaction better comports with the character of a pledge than a mortgage; and where the transaction imports nothing more than giving a security, without a sale or change of title of the property, the law favors the conclusion that it was intended as a pledge and not a mortgage. So where plaintiff made advances on certain wheat owned by defendant, and stored in certain warehouses, taking the warehouse receipts as security for the advances, the receipts stipulating that the wheat was at the risk of the owner in case of flood: *Held*, that the transaction amounted to a pledge, but that the owner was liable for loss caused by a flood. *Bank of British Columbia v. Marshall*, 11 Fed. R. 19.

III. COLLATERAL SECURITY.

[See *BILLS AND NOTES; DEBTOR AND CREDITOR.*]

- SUMMARY—*Sale of collaterals*, § 65.—*Notice of dishonor of note*, § 66.—*Suit on original debt*, § 67.

§ 65. Where collaterals are deposited with a bank, with full power to sell, and after default and due notice the bank sells to its directors, for more than the market value of the collaterals, the bailor, especially after a long delay, is entitled to no remedy against the bank. *Hayward v. National Bank*, §§ 68, 69.

§ 66. The holder of a note as collateral is not bound by the strict rules in regard to demand and notice. If through his negligence, however, the amount of the note is lost, he is liable to the owner. *Westphal v. Ludlow*, § 70.

§ 67. The assignment of non-negotiable instruments as collateral security does not suspend the creditor's right to sue on the original debt, without a special contract to that effect. It would be otherwise in case of negotiable instruments which had been parted with by the bailee. *Kemmil v. Wilson*, § 71.

[NOTES.—See §§ 72-74.]

HAYWARD v. NATIONAL BANK.

(6 Otto, 611-619. 1877.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—Hayward borrowed money from a bank, depositing stocks as collateral security, with full discretion as to the manner of sale, and

without any demand or notice whatever. Failing to pay, and continuing in default after repeated remonstrance, the bank finally sold the stocks, which three of the directors agreed to take at a full price. Hayward was notified of this arrangement. This took place in 1868, and in 1872 Hayward filed this bill to compel the bank to transfer the stock to him, and for an account, etc. The bill was dismissed.

Opinion by MR. JUSTICE HARLAN. This bill seems to have been prepared upon the supposition that the bank held and owned the nine hundred shares of stock in the Calumet and Hecla Mining Company at the commencement of this action. It is evident, however, that the bank's connection with the stock ceased September 8, 1868, when it was sold to three of the bank directors. After that date, the purchasers claimed and controlled the stock as their individual property, paid all assessments laid, and received all dividends declared. The evidence shows that the sale to them was absolute and unconditional; and the title which then unquestionably passed to them has ever since been uniformly recognized by the bank and the company. If the appellant is entitled, upon any ground whatever, to a transfer of the stock, such relief can only be given in a suit against the holders of it. A large portion of the very elaborate argument made in behalf of the appellant was in support of the proposition that the bank, having received the stock in pledge to secure his indebtedness to it, could not, consistently with settled principles, buy from itself, and consequently could not sell to its directors. If these principles were at all applicable to this case, it would only follow that the bank, by violating its duty, had become liable to him for the value of the stock. But such liability is not charged, nor is such relief asked. The specific relief sought is a decree requiring the bank to transfer the stock to him,—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this suit to a decree for the value of the stock, even if the facts justified any such relief. 1 Dan. Ch. Pr. (3d Am. ed.) 382; *Chalmers et ux. v. Chambers*, 6 Har. & J. (Md.) 29; *Hobson v. McArthur*, 16 Pet. 182; *English v. Foxall*, 2 id. 595; *Thomason v. Smithson*, 7 Port. (Ala.) 144; *Driver v. Fortner*, 5 id. 9; *Strange v. Watson*, 11 Ala. 324.

§ 68. *Of the right of a bank to sell collaterals to its directors.*

But, waiving the consideration last mentioned, we discover nothing in the evidence which would entitle Hayward to a decree against the bank in any form of proceeding. The bank had the unquestionable right to sell the stock in satisfaction of his indebtedness. It is equally clear, that, with his assent, the stock could have been taken by the bank in discharge of such indebtedness, or sold to any of its directors. Where such assent is clearly shown, and the sale to them was unattended by circumstances of fraud, unfairness, or imposition, we perceive no sound reason why it should not be upheld, especially after an unreasonable and unexplained lapse of time, without objection or complaint by him. Prior to the sale, he was often requested by the bank to take up his notes, and meet the assessments upon the stock. He failed to do either, and the bank was compelled to provide for the assessments. The indulgence extended to him by the bank was characterized by the utmost liberality. It was all that he could have expected or demanded. When, therefore, he was informed (as we do not doubt he was) of the settled purpose of the bank to sell the stock, and of the proposition of the three directors to purchase it, it was his duty, if

he disapproved of the latter arrangement, to give expression, in some form, to that disapproval. So far from expressing disapproval, the weight of the evidence is that he gave his consent. It is quite certain that the directors made the purchase in the belief that he had been advised of their proposition, and had assented to its acceptance by the bank. The most favorable construction for him which can be put upon the evidence is, that he was silent when notified of the proposition, and made no objection to its acceptance. His silence, however, under the circumstances, taken in connection with his subsequent conduct, should be held as conclusive as if he had originally assented, in express terms, to the sale. If it be suggested that, after having been informed of the proposition of the directors, sufficient time was not allowed him for deliberation before the sale was made, and if he could have repudiated it for that reason, and reclaimed the stock, there is still no satisfactory explanation of his course after he learned that a sale had actually occurred. He was promptly advised of it, and of the amount realized therefrom. He received, at the same time, an itemized account, showing the amount claimed by the bank upon the original loans, as well as for interest and for advances to meet assessments. That account, it is true, contained no statement, in terms, of the sale, nor did it give the names of the purchasers. But he admits, in his cross-examination, that he was informed by the person who delivered the account that the stock had been sold, and that he understood the credit of \$39,257.16 to denote the sum realized from such sale. There was no other mode, as he well knew, by which he could become entitled to so large a credit. He disputed no item in the account, expressed no disapproval of what had been done, and made no complaint to the bank of its action. Although he was well acquainted with the bank officers, and met them frequently after the sale, often upon terms of familiar intercourse, he made no inquiry on the subject. He gave no intimation either of dissatisfaction or of any purpose to repudiate the sale and look to the bank for the value of the stock. He says that he felt "too castaway to speak to anybody; . . . couldn't help himself, nor pay the loan; cared very little about anything." If, as soon as he was notified of the sale, he had the right to repudiate it, and compel the bank to recover the stock, such a course would have profited him nothing, since the three directors paid more for the stock than it was then worth; and the bank, under its express authority to sell, could have put it at once upon the market. It was this consideration which perhaps induced him to remain silent and inactive for more than three years and a half. During all that period he neither paid, nor offered to pay, any interest to the bank, although his present suit rests upon the basis that the bank had an unsettled account with him, embracing a valid subsisting debt, upon which, he now concedes, it is entitled to interest; and he permitted the bank and the purchasing directors to act in the belief that he was content with their action, and that the money realized from the sale had been properly applied to the payment of his indebtedness. Although all the time conversant with the market value of such stock, he made no demand upon the company for dividends declared, nor did he protest against the payment of them to others. Finally, the extraordinary advance in the market price of the stock caused him to break the silence which he had so long and so persistently maintained, and, in March, 1872, he formally notified the bank of his desire and purpose to redeem the stock, although he knew, or could have ascertained upon inquiry, either at the bank or at the office of the company in Boston, that the bank had not held or controlled the stock in any form, directly or indirectly, after the sale in September, 1868.

The facts present insuperable obstacles to any decree in favor of the appellant. If the sale made by the bank was originally impeachable by him, the right to question its validity was lost by his acquiescence. He was in a condition, immediately after the sale, to enforce such rights as the law gave him, as he was fully apprised of their nature, and of all the material facts of the case. He now claims that the sale was in derogation of his rights and injurious to his interests; and yet his conduct was uniformly inconsistent with any purpose to repudiate the sale or assert ownership of the stock. His course was continuously such as to induce a reasonable belief of his fixed determination to abide by the action of the bank. He remained silent when he should have spoken. He will not be heard now, when he should be silent. He must be held to have waived and abandoned the right, if any he had, to impeach the transaction of September 8, 1868. But the appellant is equally concluded by the lapse of time, during which that transaction has been allowed to stand, without any effort upon his part to impeach it. It must now be regarded as unimpeachable.

§ 69. *Courts of equity always discountenance laches and neglect.*

Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground "of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right." 2 Story, Eq. Jur. sec. 1520. In *Smith v. Clay*, Amb. 645, Lord Camden said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced." These doctrines have received the approval of this court in numerous cases. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Badger v. Badger*, 2 Wall. 87; *Marsh v. Whitmore*, 21 id. 178; *Harwood v. Railroad Company*, 17 id. 79. In the last-named case, this court said, that, without reference to any statute of limitation, equity has adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. "A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the mean time varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." Kerr, *Mistake and Fraud* (Bump's ed.), pp. 302, 306; *Twin Lick Oil Co. v. Marbury*, *supra*.

If Hayward was defrauded of his stock,—if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally upon any ground to repudiate the sale and reclaim the stock,—it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and in the value of the stock had intervened. No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He must

be deemed to have made a final election not to disturb the sale of 1868; and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity.

For the reasons given, and without discussing other questions of minor importance, the decree should be affirmed; and it is so ordered.

WESTPHAL v. LUDLOW.

(Circuit Court for Minnesota: 2 McCrary, 505-508. 1881.)

STATEMENT OF FACTS.—The defense to this suit was the alleged negligence of the plaintiff in failing to collect a note which defendant had placed in his hands as collateral security.

§ 70. *Holder of note as collateral not bound by strict rules of notice of dishonor.* (See § 73.)

Opinion by NELSON, D. J. The plaintiffs are not held to the strict rules in regard to the presentment at maturity of the note taken as collateral security, and notice of non-payment to his debtor. The note was not received, although indorsed by the defendant, upon the condition that they would use such diligence. It does not represent the original debt, and to hold the defendant it is not necessary that the plaintiffs should regularly proceed to have the note presented and protested. It was not a satisfaction and extinguishment of the original debt, and a failure to give notice of non-payment will not necessarily defeat a recovery. If, however, by the neglect and laches of the plaintiffs the defendant was injured and the amount of the note lost, he may plead such negligence as a defense, for in such case the plaintiffs would be bound, as trustees or agents, to see that the defendant did not suffer loss on their account. Was the note lost through the plaintiffs' negligence? Defendant urges that the insolvency of the maker occurred after its maturity, and if he had been informed of its non-payment he could have secured himself. The evidence, as interpreted by me, does not prove that the insolvency of the maker occurred after the note matured.

The maker, in his testimony, says his financial condition at the maturity of the note was the same as December 5th, when several judgments were confessed by him in favor of other creditors, and there is no evidence to the contrary. He certainly had not sufficient property to pay his debts, and thus, I think, was insolvent at the maturity of the note. Judge Washington, in *Gallagher's Ex'rs v. Roberts*, 2 Wash. 191, says Buller lays down the true rule in his *Nisi Prius* (ed. 1806), p. 182: "If a note is indorsed for a precedent debt, and a receipt was given as for so much money when the note shall be paid, and the creditor neglects to apply to the maker in time, and by his laches the note is lost, the precedent debt is extinguished;" but if it is kept without demand and insolvency takes place, the creditor who receives it must lose. See also 2 How. (U. S.) 457. This doctrine determines this case. The note taken as collateral security matured November 17, 1878. The defendant knew it was unpaid November 29th, when he quieted the plaintiffs by writing them that Cole would pay it soon. There is no direct evidence of a demand made for payment at maturity, and if it is conceded that he was not applied to in time, there is not in addition laches which damaged the defendant. Cole was insolvent, in fact, when the note matured, and the ordinary mode of legal proceedings would not save the debt. There is no evidence to show that a

writ of attachment could have been obtained, and even the defendant, who lived near Cole, says that he was not aware of his insolvency at that time, and doubted it as late as December, when the levies were made.

Judgment will be entered for the plaintiffs for the amount claimed.

KEMMIL v. WILSON.

(Circuit Court for Pennsylvania: 4 Washington, 308, 309. 1822.)

STATEMENT OF FACTS.—Suit on a promissory note. It was contended by defendant that plaintiff could not sue on the note until he had used all necessary means to compel payment of two certain recognizances which had been assigned to him as collateral security.

§ 71. *Collateral security does not bar or postpone a suit on the original contract.* (See § 74.)

Charge by WASHINGTON, J. These recognizances were assigned to the plaintiff expressly as collateral security, and consequently they cannot be considered as payment, or satisfaction of the original debt, or as operating even to suspend the plaintiff's remedy to enforce the payment of it. This consequence may be produced, we admit, by a special contract to that effect; but none such exists in this case. The plaintiff is not bound by the terms of the assignment to collect the amounts of the recognizances, much less to pursue legal means to enforce payment of them. They are to be collected as he may think proper; and when collected an appropriation of the money is made. If the plaintiff's right to sue for his original debt is suspended at all, it would be difficult to say at what time, or upon what contingency, the suspension could be removed. The contract points out none, nor has the defendant's counsel undertaken to suggest any. If the evidence of debt assigned to the creditor be negotiable, and has been parted with by him, he cannot recover upon the original debt, because the debtor might, in such a case, be twice charged. But that is very different from the present case. These recognizances are not assignable, so as to enable the assignee to sue upon them in his own name. By payment of the original debt due to the plaintiff, the defendant becomes in equity, as he is in law, the owner of these recognizances, and entitled to collect their amount, or to enforce payment of them. If the plaintiff has received any part of their amount, the defendant, upon proving the same (and it is for him to prove it), would be entitled in this suit to a credit *pro tanto*. But no evidence of this sort has been offered. The plaintiff is therefore entitled to a verdict for his whole demand.

Verdict accordingly.

§ 72. *Past consideration.*—It seems now to be agreed, that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt for which it is held as collateral. *Goodman v. Simonds*, 20 How. 371; *Railroad Co. v. National Bank*, 12 Otto, 21; *Swift v. Tyson*, 16 Pet. 1; *McCarty v. Roots*, 21 How. 432; *Lanning v. Lockett*, 10 Fed. R. 453. See § 57.

§ 73. *Demand and notice.*—Where a note is received, the proceeds to be applied in discharge of a debt, the holder must use due diligence as to demand and notice, or he will make the note his own; but he will only be liable to the party injured for the damages actually sustained. *Allen v. King*, 4 McL. 128; *Foote v. Brown*, 2 McL. 369. Where a note is deposited as collateral security, and for collection, it falls within the law of agency, and the agent is only bound to use due diligence to collect the same; it does not fall within the strict rules of

commercial law applicable to commercial paper, in respect to demand and notice. *Lawrence v. McCalmot*, 2 How. 426. See §§ 70, 80.

§ 74. Remedy on original debt.—It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor. *Lewis v. United States*, 2 Otto, 623. See § 71.

IV. MISCELLANEOUS.

[Under this head will be found a variety of cases properly belonging to the subject of Bailment, but not capable of a more accurate classification.]

§ 75. Bailment.—Where property is delivered to a party for his own use and consumption, and it is understood that the identical property is not to be returned, either in its original or altered shape, but that property of the same kind will be returned, or the property paid for, as in the case of storage of grain in a warehouse, the transaction is a sale and not a bailment. *Rahilly v. Wilson*, 3 Dill. 420. See § 18.

§ 76. Where T. agreed to run W.'s boat for a certain period, and by the terms of the agreement the earnings of the boat were to be applied to the payment of expenses, insurance, and a certain sum to W., the remainder to be divided, it was held that until the first three items were paid T. was only a bailee or agent, after which T. and W. became partners. *Ward v. Thompson*, Newb. 95.

§ 77. Manufacturer.—A. delivered wool and yarn to B. to be manufactured into cloth under a specific agreement, the wool, yarn and cloth to be continuously the property of A. After commencing the work the goods all passed into the hands of C., B.'s assignee in bankruptcy, in the shape of dyed wool, mixed with shoddy, and woolen yarns in the various stages of manufacture into cloth. The assignee finished the manufacture, prior to which A. made a demand for the goods, offering to pay charges. *Held*, in an action of trover by A., that an offer to pay charges was sufficient, without a tender of a specific amount, and that A. was entitled to recover the proceeds of the goods, less expenses and charges. *Aborn v. Mason*, 14 Blatch. 405. See § 18.

§ 78. Contract to pack pork.—Where a party undertakes to pack pork for another, and his skill and experience in that business are relied upon, he is bound to due diligence. If a part of the pork proves unsound, the measure of damages is the difference between the price at which it sold and the price of sound pork. *Forman v. Miller*, 5 McL. 218.

§ 79. Consignee.—Where a party accepts a consignment of goods, with the accompanying bill of lading, and a draft drawn against the goods, with instructions to deliver the goods when the draft is paid, the transaction is a bailment, and the title of the owner is not transferred. *Dows v. Nat. Exch. Bank*, 1 Otto, 618. Where a party accepts goods under instructions not to deliver them to the purchaser without payment or security, if he delivers them contrary to the instructions he is liable. No man can compel another to render him acts of friendship or services of any kind, whether gratuitously or with a view to a remuneration; but if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. *Walker v. Smith*, 1 Wash. 152.

§ 80. Bills and notes.—A party accepting a loan of a note must use due diligence to collect it; and if the debt is lost through his negligence, he is liable to the owner. *Higbie v. Hopkins*, 1 Wash. 230. Where a bailee of a note voluntarily delivered the same to an attorney at law for collection, it was held that he parted with all interest in the note, and could not maintain a suit against the attorney for negligence in failing to collect the note, etc. *Sevier v. Holliday*, Hemp. 160. Where a party holds a bill as collateral, and refuses to return it or to make any effort to collect it, he is liable for the loss that may happen from such negligence. *Childs v. Corp.* 1 Paine, 285. See § 73.

§ 81. Bankruptcy—Creditor's lien.—Where the pledgor of stock becomes bankrupt, the pledgee may sell, and pay the surplus into court, without obtaining leave of court. *In re Grinnell*,* 9 N. B. R. 137. Where a note is assigned as security, and the creditor obtains judgment upon it, his right to resort to the security is not defeated by judgment against the debtor, and a *scire facias* against the bail and discharge on a *ca. sa.* *Hartshorn v. McIver*, 1 Cr. C. C. 421. See §§ 60, 61.

§ 82. Where a creditor is in a privileged relation, which thus gives him a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien. This general lien

is a right of retention, which attaches at once, and becomes ultimately available for his benefit, if there is a surplus of the value of the particular security, and such surplus is needed in order to cover any deficiencies. *Sparhawk v. Drexel*, * 12 N. B. R. 459.

§ 83. On the bankruptcy of a firm, a creditor who holds property of one member as security for a firm debt, may, and must, at the request of the separate creditors, prove his whole debt, without deduction, against the joint assets; but the deficiency, after disposing of the security, must be proved against the separate assets of the pledgor. *In re May*, * 17 N. B. R. 192. See §§ 60, 61.

§ 84. Charter-party.—Where the whole capacity of a ship is let by charter-party, the owner is not a common carrier, but a bailee to transport for hire, and as such he is bound to the use of ordinary skill and care. *Lamb v. Parkman*, 1 Spr. 353.

§ 85. Where a vessel was hired by government officers on behalf of the government, but the contract was void because not reduced to writing as required by law, it was held that the owner was entitled to recover a *quantum meruit* for the services of the vessel, but the implied contract being simply one of bailment for hire, he could not recover for the loss of his vessel without proving negligence; that a bailee for hire is only responsible for ordinary diligence, and liable for ordinary negligence in the care of the property bailed. *Clark v. United States*, 5 Otto, 539. See §§ 27, 31.

§ 86. Pledge by bailee.—Where a party with whom goods are deposited for safe keeping pledges them, with intent to convert the proceeds to his own use, the pledgee obtains no title as against the owner. *Gootlieb v. Hartman*, * 3 Col. Ty. 58. In Louisiana a factor cannot pledge the property of his principal for his own debts. *Insurance Co. v. Kiger*, 13 Otto, 355. And this seems to be the general doctrine. *Evans v. Potter*, 2 Gall. 13; *Van Amringe v. Peabody*, 1 Mason, 440; *Warner v. Martin*, 11 How. 209. See § 20. See, also, AGENCY, where the cases will be found in full.

§ 87. Hire of slaves.—Slaves were hired by a master and part owner of a vessel as mariners, at the usual wages, and escaped in a foreign port. The plaintiff contended that the master had violated his instructions in going to the port at which the slaves escaped, but it was held that the port was one of the contingent *termini* of the voyage, and therefore within the hazards to which the plaintiff knew his property might be exposed. *Beverly v. Brooke*, 2 Wheat. 100.

§ 88. A slave was hired for a year, and within ten days after the hiring was arrested for theft and imprisoned for the remainder of the year. *Held*, that the loss fell upon the hirer. *Scott v. Bartleman*, 2 Cr. C. C. 313.

§ 89. Banks.—If a bank is accustomed to receive a certain class of deposits, and this is known to and acquiesced in by its officers, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of its charter. This doctrine applies to national banks, and they will not be permitted to plead *ultra vires*. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *National Bank v. Graham*, 10 Otto, 702. Where a bank collects money as the agent of another bank, and places it with its own funds, giving credit to the principal for the amount, the money becomes the property of the collecting bank, and it must bear the loss resulting from a depreciation in the value of the money. *Marine Bank v. Fulton Bank*, 2 Wall. 252. National banks may take a pledge of bonds and other personal chattels as security for money loaned. *Pittsburg, etc. Car Works v. State Nat. Bank*, * 2 Cent. L. J. 692; 8 Ch. Leg. News, 41. See § 19.

§ 90. Officers.—It has been repeatedly held that a receiver of public money is not an ordinary bailee for hire; that his liability is determined by the condition of his bond. It is accordingly held that he is liable where the money is stolen from him. *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashiell*, 4 Wall. 182. Also where he was attacked in his office, and the money taken from him by force. *Boyden v. United States*, 13 Wall. 17. Also where he neglected to pay the money over at the proper time, and it was taken from him by agents of the confederate government. *Bevans v. United States*, 13 Wall. 56; *Halliburton v. United States*, 13 Wall. 63. But in *United States v. Thomas*, 15 Wall. 337, it was held that a receiver of public money was not liable where the money was taken from him by agents of the rebel government, without any fault or negligence on his part. The previous cases are reviewed in this case, and the conclusion reached that the officer is not liable at all events, but that he may be released from liability on his bond by overruling necessity. In *United States v. Freeman*, 1 Woodb. & M. 45, money was advanced to Freeman, an officer of the marine corps, to be used in the Florida war, and deposited by him in bank, and lost through the insolvency of the bank. He had no orders where to make his deposits, but it was contended in defense that he deposited in a bank selected by the government for its collecting and disbursing officers. *Held*, on the authority of *United States v. Prescott*, *supra*, that he was liable. See § 25.

§ 91. Prize.—Where a capture has actually taken place, with the assent of the commodore, express or implied, the prizemaster may be considered as bailee to the use of the whole squadron who are to share in the prize money. *The Eleanor*, 2 Wheat., 357.

§ 92. Antichresis.—In Louisiana, where a conveyance of land is made, and the grantee executes an agreement that in default of payment of a certain sum by a day named the land shall be sold, and the proceeds applied to the payment of the sum named, and any balance to be paid to the grantor, and providing for a reconveyance on payment within the time, this constitutes a pledge of immovables, or what is called in Louisiana an *antichresis*. *Livingston v. Story*, 11 Pet., 351.

Consult the titles AGENCY; BANKS; CARRIERS; CONSIGNOR AND CONSIGNEE; INNKEEPERS; WAREHOUSEMEN.

As to the duties of Factors and Brokers, see AGENCY.

As to the hire of Vessels by the Government, see GOVERNMENT; MARITIME LAW.

As to authority of the Master to hypothecate Vessel or Cargo, see MARITIME LAW, sub-title *Hypothecation*.

As to the liability of Officers, see BONDS, sub-title *Official*; OFFICERS.

BANK CHECKS.

See BANKS; BILLS AND NOTES.

BANK NOTES.

See MONEY.

BANKRUPTCY.

See INSOLVENT AND BANKRUPT LAWS.

BANKS.*

[See BANKS, NATIONAL.]

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| I. POWERS OF THE BANK, §§ 1-60. | VII. BANKER'S LIEN, §§ 191-193. |
| II. DIRECTORS, §§ 61-68. | VIII. COLLECTIONS, §§ 194-245. |
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| V. BANKER AND DEPOSITOR, §§ 149-181. | XI. SUITS, §§ 264-310. |
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I. POWERS OF THE BANK.

SUMMARY — *How charter is construed*, § 1.—*Powers of United States Bank*, § 2.—*Corporate seal*, § 3.—*Right to establish sub-office*, § 4.—*When draft is void*, § 5.

§ 1. In construing the charter of a bank, the ordinary meaning of the language used must be presumed to be intended, unless it would manifestly defeat the object intended to be accomplished. *Minor v. Mechanics' Bank of Alexandria*, §§ 6-19.

§ 2. The Bank of the United States had power to discount commercial paper. *Fleckner v. Bank of the United States*, §§ 20-27.

§ 3. Acts of a corporation are binding, although no corporate seal be used to authenticate the same. *Ibid.*

§ 4. Where the act of incorporation of a bank confers upon it power to deal in exchange without restriction, the purchase by it of bills of exchange at another city is lawful. And for the purpose of making such purchases it may establish an agency in a part of the state other than that of its location. *Bank v. Beach*, §§ 28-30.

§ 5. A draft issued by a bank in direct violation of its charter is absolutely void. Such a draft, even if accepted by the creditor, is no payment. *Davis v. Bank of River Raisin*, § 31. See § 34.

[NOTES.— See §§ 32-60.]

MINOR v. THE MECHANICS' BANK OF ALEXANDRIA.

(1 Peters, 46-88. 1828.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.— This is a writ of error to the circuit court of the District of Columbia, sitting at Alexandria. The plaintiffs in error were original defendants in the cause, and the suit is now before this court upon the judgment of the court below, upon certain pleas of the defendants, to which there was a demurrer; and also upon the instructions given and refused by the court upon the trial of certain issues of fact, joined by the parties. The action is debt upon an official bond, given by Philip H. Minor, cashier of the bank, and by four other persons as his sureties, with condition that Minor "shall well and truly execute the duties of cashier" of the bank, and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after *oyer* of the bond and condition (which thereby became part of the declaration), severed themselves from the principal, and pleaded nine several pleas. To the first two of these pleas demurrers were put in; and the court below, upon consideration, gave judgment upon the demurrers in favor of the bank; and the correctness of this decision constitutes the first subject of inquiry. Exceptions have been taken, both to the matter and the form of these pleas, and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon general demurrer. Both of them are, in effect, though not in form, special pleas of *nul tiel* corporation. The first plea in substance avers that, by the charter granted by the act of congress of the 16th of May, 1812, c. 87 (2 Stats. at Large, 735), the capital stock of the bank was, by the charter, fixed and limited to consist of \$500,000, *bona fide*; that the whole capital stock was not *bona fide* filled up and subscribed for; but, on the contrary, by a collusion between the commissioners under whose direction the subscriptions were taken and the subscribers, a large portion of the capital stock, to wit, eighteen thousand shares, amounting to \$180,000, were filled up by false and colorable subscriptions; the ostensible subscribers, after payment of the first instalments, were fraudulently permitted to withdraw the same, and future payments by them were dispensed with, while they were still rated and held out as stockholders, for the purpose of colorably filling up the subscription of the whole capital stock and electing a board of directors, and that in this manner and by these means, and by no other, the bank was put into operation.

This plea is meant to rest upon two grounds to sustain its legal propriety. First, that the subscription of the whole capital stock of \$500,000 was a condi-

tion precedent to the putting of the bank into operation as a corporation. Secondly, that the collusion between the commissioners and the subscribers for the eighteen thousand shares, being fraudulent, made their subscriptions a mere nullity. Various answers have been given at the bar to the legal sufficiency of the matters thus pleaded. In the first place, it is said that the defendants are estopped by the bond to deny the legal existence of the corporation. In the next place, that the charter does not make the subscription of the whole capital stock a condition precedent to the establishment of the bank. In the next place, that the question whether the bank was regularly and *bona fide* put into operation is matter not inquirable into in a suit of this nature, but only upon a *quo warranto*, instituted by the government. And, in the last place, that the whole stock being in fact subscribed, the fraudulent intention and acts of the parties did not make the subscription of the eighteen thousand shares a nullity. Let us then consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to have been (which in terms it is not) incorporated into the plea, and therefore judicially before us. The first section of the act of the 16th of May, 1812, c. 87, provides: "That the subscribers to the Mechanics' Bank of Alexandria, their successors and assigns, shall be and hereby are created and made a body politic, by the name and style of the Mechanics' Bank of Alexandria; and by such name and style shall be and are hereby made able and capable in law, to have, purchase, etc., lands, etc., etc., and the same to sell, etc., to sue and be sued, etc., etc.; subject to the rules, regulations, restrictions, limitations and provisions hereinafter prescribed and declared." In this section there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and, unless there be some restriction or limitation elsewhere in the act, it is most manifest that the court cannot intend that any particular amount of subscriptions is indispensable.

§ 6. *Construction of bank charter; ordinary meaning of language presumed to be intended, unless it would defeat the object of the provisions. Meaning of "may."*

The second section provides: "That the capital stock of said corporation may consist of \$500,000, divided into shares of \$10 each, and shall be paid in the following manner: that is to say, \$1 on each share at the time of subscribing, \$1 on each share at sixty days, and \$1 on each share ninety days after the time of subscribing; the remainder to be called for as the president and directors may deem proper, provided they do not call for any payment in less than thirty days, nor for more than \$1 on each share at any one time." The argument of the defendant is, that "may," in this section, means "must;" and reliance is placed upon a well-known rule in the construction of public statutes, where the word "may" is often construed as imperative. Without question, such a construction is proper in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this as in other cases which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now we cannot say that there is any leading object in this charter which will be defeated by construing the word "may" in its common sense as imparting a power to extend the capital stock to \$500,000, and not an obligation that it shall be that sum and none

other. It is by no means clear, from this section, that the legislature contemplated that there should be a capital of \$500,000 on which the bank was to commence or carry on its operations. On the contrary, three instalments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in only when the president and directors may deem it proper; so that the capital stock, except at the discretion of the board, may never extend beyond the amount of \$150,000 for any practical purposes, either as security to the public or as the basis of discounts. Now the plea itself does not attempt to deny that all but eighteen thousand shares of the stock were *bona fide* subscribed for, so that, for aught that appears, the capital stock on which the bank carried on its operation may have far exceeded that sum. It has been urged that public policy requires such an imperative construction of the clause for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed or can be inferred from the general terms of the act. When the legislature intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so is quite as significant that the legislature did not deem such a restriction subservient to any manifest public policy.

§ 7. *The subscription of the whole of the capital stock not a condition precedent to corporate existence of bank, unless so provided in charter.*

The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders or its agents. The thirteenth section of the charter contains provisions for the security of the public against over issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally have found a place. It declares that no stockholder shall be answerable for any losses, deficiencies or failure of the capital stock for any larger sum than the amount of the stock belonging to him, excepting that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess; and if the directors shall not have property to pay the amount of the excess, then every stockholder shall be liable for their deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank exceeding twice the amount of the capital stock, which may fairly be construed to mean the capital stock actually paid in, the stockholders become ultimately liable for the excess; and this liability furnishes, if not an ample, at least a reasonable security against the public evils which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events, we cannot perceive any clear legislative intention to make the subscription of the whole capital stock a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls and cannot sustain the defense.

§ 8. *Fraudulent subscribers to the capital stock of a bank are bound by their subscriptions, but they cannot avail themselves of the fraud.*

If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made

with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were *bona fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The third section of the act manifestly contemplates cases of fraudulent subscription, and provides "that all the subscriptions and shares obtained in consequence thereof shall be deemed and held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements and engagements in anywise contravening this provision shall be void; and the person, etc., subscribing, etc., shall have, enjoy and receive the share or shares respectively, etc., and all the interest and emoluments thence arising, as freely, fully and absolutely as if they had severally and respectively paid the consideration therefor, any such bargain, etc., to the contrary notwithstanding." This section seems to us conclusive upon the point. It avoids all bargains contravening the provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bona fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud between the original subscribers and commissioners could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bona fide* holders, without any participation or notice of the fraud. For these reasons we are of opinion that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

§ 9. *Pleading; certainty required; allegations of fraud; assignment of breaches in suit on bond.*

The second plea is disposed of by the construction of the charter already intimated, and is further open to fatal objections from its deficiency of proper averments and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for before the bank is to be put in operation. It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts or circumstances, alleges that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the act, so as to entitle the subscribers to bring the action; and that the subscribers did unjustly and unlawfully arrogate to themselves the corporate name, style and privileges, without the capital stock having been filled up by subscription or the corporation having been constituted and composed of actual subscribers, pursuant to the directions of the act. In point of substance as well as form it is bad, upon the established rules of pleading. This view of the case renders it wholly unnecessary to consider the point made as to the estoppel and the necessity of a *quo warranto*; on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance; the third is so, in fact, and pursues the condition of the bond. The fourth is argumentative, and assumes a particular legal interpretation of the condition; that is to say, that the condition covers only wilful defaults and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas special replications were filed, assigning special breaches of duty, upon which the parties were at issue,

and upon this and all the other issues in the cause the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications. The fifth plea states a general performance of duty, in obedience to and in pursuance of the "directions, rules, orders, usages and customs of trade and business, ordained, established and practiced in the said bank, by the authority of the said president and directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, etc., established and practiced by the president and directors, whatever they may be, whether within the scope of their power or not, would be a good and true discharge of duty. To this plea a general replication was put in, "that the said cause-of action, in the declaration mentioned, did accrue, as in the said declaration and breaches are set forth, without this, that the matters set forth in the said plea are true," and this the plaintiffs pray may be inquired of by the country; and the defendants joined in the issue; upon which a verdict was found in favor of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is that the law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. A covenant or condition for general performance is broken by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow that, if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law and by the statute of *jeofails*, defects in this particular are cured by a verdict. It is true that in a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. Com. Dig., Plead., 14. But that is not the present case. Here the declaration does assign a good breach by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon oyer, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defense, and denies the performance of it. The verdict has found that the condition was not performed, and consequently, upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived. The replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principle, no reason shown against the plaintiff's right of recovery. It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet, if a general breach be assigned, the defect is cured by a verdict for the plaintiff. Com. Dig., Plead., 48. The objection, then, to the replication to the fifth plea cannot now be sustained.

It is not necessary to notice the remaining pleas upon which issues were

joined, because a verdict has been found in all of them in favor of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special defenses, and the plaintiffs were not bound to do more than traverse them. The instructions of the court, given and refused at the trial, constitute the next subject of inquiry. It is conceded that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the court in their applications to the other issues were perfectly proper.

§ 10. *If a cashier fails to account for funds, the jury may infer that he has misapplied them.*

The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or to account to the bank for any portion of the moneys of the bank received by him as cashier, then the jury may and ought to infer that the moneys so unaccounted for were wilfully wasted by Minor, or applied to his own use; and under such circumstances the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or misapplication of the funds of the bank by the cashier was a natural conclusion from his failure to pay over or account for the same. It was not put to the jury as a presumption incapable of being rebutted by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power than that of the bank, ought to lead the jury to the presumption of the non-existence of any such negligence or accidental loss.

§ 11. *"Well and truly to execute the duties of the office" includes honesty, reasonable skill, and diligence. Sureties liable for wilful misapplication.*

It has been argued that this instruction is the more material and injurious to the defendants because it proceeds in the latter part upon a misconstruction of the true import of the condition of the bond. The condition that Minor shall "well and truly execute the duties of cashier" of the bank is said to be merely a stipulation for honesty in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. "Well and truly to execute the duties of the office" includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully, if they are violated from want of capacity or want of care, they can never be said to be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we were to narrow down its import to a guaranty against personal fraud only. The remarks already made dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare that the sureties are liable upon the bond for any wilful or permissive misapplication of the moneys of the bank, which the cashier knowingly made or suffered without authority, whereby the same moneys have been lost to the bank. There seems no ground upon which to rest any reasonable objection to such a direction to the jury.

§ 12. *A custom to allow customers of a bank to overdraw is illegal, and cannot be supported by any act or vote of the board of directors. A cashier allows overdrafts at his peril.*

We may now proceed to the consideration of the three instructions prayed for in behalf of the defendants. The first is, in substance, that if it were the

established usage and practice of the bank that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up without present funds in the bank; and for the cashier to receive and pass as cash, checks and drafts upon other banks; and if the balances appearing against such persons, charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the president and directors, practiced and continued with their knowledge for a series of years, from the commencement of the bank to the termination of Minor's cashiership, though the existence of such balances or the particular circumstances attending them, were not formally communicated to the board of directors, the jury may infer the approbation, assent and acquiescence of the president and directors as to such usage and course of business. The refusal of this instruction is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eighth and ninth pleas, to which alone it can be properly applied. Those issues put to the jury the question whether the acts of the cashier, whatever might be their character or kind, were or were not done by the wrong, connivance and permission of the president and directors of the bank. The point of the instruction is that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent and acquiescence of the president and directors, as to such usage and practice, though the balances resulting therefrom were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors, to whom the charter and by-laws submit the general management of the bank and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business would, in general, bind the bank in favor of third persons possessing no other knowledge. In the case of *The Bank of the United States v. Dandridge*, 12 Wheat., 64, the subject was under the consideration of this court, and circumstances far less cogent than the present to found a presumption of the official acts of the board were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to in the instruction were within the legitimate authority of the board, and such as its written vote might justify, there would be no question in this court that it ought to have been given.

The pertinency of such a presumption to these issues cannot admit of dispute. But the real difficulty remains to be stated. Assuming that the court, upon these issues, ought to have given the instruction prayed for, the question is whether, upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given, and there-

upon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues in favor of the defendants? or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial, since in no event could the instruction in point of law have benefited the defendants. Upon deliberate consideration, we are of opinion that the pleas on which these issues are founded are substantially bad. They set up a defense for the cashier that his omission "well and truly to perform" the duties of cashier was by the wrong, connivance and permission of the board of directors. The question then comes to this: whether any act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could by a vote authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance of the board as a justification, and such wrong and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier.

The instruction prayed for proceeds upon the same principles as the pleas. It supposes that the usage and practice of the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice thus attempted to be sanctioned is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but "well and truly executing his duties as cashier." This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants, which substantially turns upon the like considerations.

§ 13. *A cashier's bond covers all defaults in duties annexed to the office from time to time under authority of the charter and by-laws.*

The third instruction prayed for, in effect, was that the court would instruct the jury that the defendants are not chargeable in this action for the conduct

of Minor in the duties distinctly appertaining to the office of teller, whilst he was cashier in the bank, although those duties were duly assigned to him; because it constituted a distinct office, and the accounts and proceedings of the teller were at all times kept distinct, and in separate books from those of the cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the cashier are generally pointed out; and among other things it is provided that he shall "do and perform all other duties that may from time be required of him by the president or board of directors relative to the affairs of the institution." On the appointment of Minor as cashier, who had previously acted as teller, the directors passed a vote "that the present officers of the bank do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible that the duties of teller were, under this vote, assigned to the cashier. If so, then the performance of these duties constituted thenceforth a part of the duties of the cashier, as such; and as much so as if they had been originally affixed to the office of cashier. There is nothing in the nature of the duties of teller incompatible with those of cashier. On the contrary, as is well known, cashiers often perform the functions of both. The circumstance that the office of teller and distinct accounts and books were still kept up does not vary the legal result. It was a matter of mere convenience and regularity for the government of the bank, in its own business, and probably had no higher or other origin than to preserve the same forms and series of accounts which the bank had adopted at its first institution. The office of teller had a nominal but not a real existence; and, from the time of the union of the duties in the cashier, as such, there was a legal extinguishment of the separate official character. If the cashier had originally had the duties of book-keeper and accountant assigned to him, and, in consequence thereof, had kept distinct account books in the bank, no one would have imagined, because he kept separate account books as cashier, for his own convenience, or according to the ordinary usage of banks, that he would not, under his bond, have been responsible for misconduct in keeping the general account books of the bank to its loss or injury. The bond of the cashier must be construed to cover all defaults in duty which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract with reference to the rights and authorities of the president and directors under the charter and by-laws.

§ 14. *Joinder of joint obligors in a bond; right to enter nolle prosequi as to one; nature and effect of a nolle prosequi.*

The remaining inquiry is as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor after he had pleaded, and after judgment was given against the sureties in favor of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh and ninth pleas put in by the sureties; and the question arises whether, under such circumstances (no objection to the judgment appearing to have been made by the sureties), this proceeding is an error for which that judgment ought to be reversed. It is material to state that the bond on which the suit is brought is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number. He must sue all or one. The objection, however, is not fatal to the merits, but is plead-

able in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and, therefore, there is no variance in point of law between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Sergeant Williams' note to the case of *Cabell v. Vaughan*, 1 Saund., 291, note 2, where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed by having sued all the parties, and subsequently entered a *nolle prosequi* against one of the obligors? If not in general, then is there any legal difference, where the party in whose favor the *nolle prosequi* is entered is not a surety, but a principal in the bond? not, indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition. These questions must be decided by authority, if any such exist; if none can be found, then they must be decided by analogy and principle. It may be proper in this view again to notice the fact that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues (which undoubtedly ought to have been, by the regular course of practice, deferred until the cause was at issue as to all the parties, or the steps of the law taken to bring them into default) does not appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants; or whether there might have been several trials and several assessments of damages; and whether, if such several assessments had been made, and differed in amount, any, and what, judgment ought to have been entered, are points upon which the court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi* was not well defined or understood in early times, and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. And this latter doctrine has been constantly adhered to in modern times, and constitutes the received law. In cases of *tort* against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi* as to some of them, and take judgment against the rest. The reason is said to be that the action is in its nature joint and several, and, as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after verdict against several, elect to take his damages against either of them. *A fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in *tort*, as we shall hereafter see, it does not seem to have been denied that cases might exist, in which, if the defendants severed in their pleas, the plaintiff might, after judgment against one, have entered a *nolle prosequi* as to the others. The

doubt was, whether he could do so before judgment, which was finally settled in favor of the right, and in such cases, where several damages were assessed against the different defendants, the difficulty was afterwards cured by entering a *nolle prosequi* as to all but one defendant. And in the same manner a misjoinder of improper parties is sometimes aided. The authorities on this subject will be found summed up with great accuracy in a note of Mr. Sergeant Williams to the case of *Salmon v. Smith*, 1 Saund., 207, note 2. In the same note the learned editor adds: "If an action is brought upon any contract against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto, and he shall not, by entering a *nolle prosequi*, prevent the defendants, against whom the recovery has been had, from calling upon the other defendants for a ratable contribution."

So far as this reason goes, it is inapplicable to the present case; for the defendants are entitled not only to a ratable, but a full, contribution over for the entire sum against the party in whose favor the *nolle prosequi* has been entered; and consequently the *nolle prosequi* does not touch their rights. It is observable, also, that the language is qualified by the words "who join in their pleas," which are printed in italics, and may, therefore, fairly be presumed to have been inserted by the learned editor *ex industria*, with a view to point out an implied distinction between cases where there is a severance, and where there is a joinder in the pleas. If there be any such distinction, it is favorable to the present case; for the plaintiffs severed in their pleas from their principal. The learned editor proceeds to state that "if in such actions the defendants sever in their pleas, as where one pleads some plea which goes to his personal discharge, such as bankruptcy *ne unques executor*, and the like, not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others; for with respect to the bankruptcy, the statute of 10 Ann, c. 5, makes the other defendant, who is not a bankrupt, liable for the whole debt, and, therefore, in that particular instance, the case is exactly the same as where an action is joint and several. So the plea of *ne unques executor* does not deny the cause of action, but only that he is one of the representatives of the testator. When the defendants sever in their pleas, with this limitation as to the extent of the pleas in action upon contracts, it is immaterial what is the form of the action; for the plaintiff may enter a *nolle prosequi* against any of them before verdict, and proceed against the rest." The learned editor is fully borne out in the general position here stated, by the case of *Noke et al. v. Ingham, Wilson*, 89, to which he refers. The only question is, whether there is any such qualification upon it as that the plea should be one going exclusively in personal discharge and not to the merits. That is the point of real difficulty. The case in 1 Wilson, 89, was upon several promises made by the defendants as partners. One of them pleaded a former judgment, and issue being taken upon the replication of *nul tiel* record, judgment was given against him, and a writ of inquiry of damages awarded and final judgment. The other defendant pleaded his bankruptcy, and upon this issue was joined; and afterwards the plaintiff entered a *nolle prosequi* as to him. Upon error brought, the principal objection was that the *nolle prosequi*, upon a joint contract of two, was a discharge of both. Mr. Chief Justice Lee said: "It is agreed on all hands that, in trespass against several, the plaintiff may enter a *nolle prosequi* as to one, and that will not discharge the other; and therefore I cannot see why it may

not be done in this case; and I do not see how so proper an advantage can be taken upon the statute of Ann, as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." Wright, J., was of the same opinion, and so was Dennison, J.; and the latter added that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration; but that this is not the case here. This case is exactly the same as when an action is joint and several; for the statute 10 Ann, c. 15, has made the partner not a bankrupt liable for the whole debt. This case is the very same as to this matter of entering a *nolle prosequi* as if it had been trespass against several defendants."

It is apparent from this summary of the reasoning of the court, that the case turned upon the consideration that the contract, by the operation of the statute of Ann, was several as well as joint; and all the court concurred that, under such circumstances, the *nolle prosequi* would be good, being governed in the analogy to trespass, where the cause of action was several as well as joint. What was stated by Dennison, J., was not the exclusive ground of his particular opinion, but only a suggestion that the case might be (not would be) different upon a plea to the merits. Now the general reasoning comes very close to the case at bar; for here the bond is several as well as joint, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy the practice is, in England, to require all the joint contractors to be sued, as is proved by the case of *Bovill v. Wood*, 2 Maul. & Selw., 23, which makes it really less strong than a joint and several contract. The case of *Moravia* and another *v. Hunter and Glass*, 2 Maul. & Selw., 444, which has been relied on at the bar, was *assumpsit* against four defendants, two of whom were not served; D., one of the other defendants, pleaded: 1. *Non assumpsit*. 2. A special plea of bankruptcy. 3. A general plea of bankruptcy, as to whom the plaintiff entered a *nolle prosequi*. The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the several matters above pleaded by the said D., freely here in court confess that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi*, so entered, had confessed the *non assumpsit*, as well as the other pleas, and therefore the other defendant was also discharged; and the distinction of Dennison, J., in *Noke v. Ingham*, 1 Wils. R., 89, was relied on. But the court held that the *nolle prosequi* was, in effect, only a confession; that, as far as regards D., he had a defense in the matters pleaded by him. This case does not, in terms, overrule the distinction, but it does establish that the court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the court must have considered that the confession of the plaintiffs, that they could not deny the several matters above pleaded, ought not to be deemed an admission of the truth of the pleas, except so far as to waive further proceedings in the suit against the party who sets them up as a defense. This conforms to the definition given in the book of a *nolle prosequi*. "It is," as Sergeant Williams states, 1 Saund. R., 207, n. 2, "a partial forbearance by the plaintiff to proceed any further as to some of the

defendants, or to part of the suit, but still he is at liberty to go on as to the rest."

These are the only cases in England, which the researches of counsel have brought to our notice, bearing directly on the point before the court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities, as see 1 Chit. Pl., 32, 33, 546; Com. Dig. Pl., X, 2, 3, 5; 1 Tidd's Prac., 630; 2 Arch. Prac., 219, 220; 2 Lilly Prac. Reg., 230. In America, the cases have gone a step further. In *Hartness v. Thompson*, 5 John., 160, where an action was brought against three upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants, that was set up at the trial; it was held no ground for a non-suit; but the plaintiff, upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi* as to the infant, and take judgment upon the verdict against the others. In *Woodward v. Newhall*, 1 Pick., 500, in the supreme court of Massachusetts, upon a joint contract and suit, against two persons, one of whom pleaded infancy, it was held that a *nolle prosequi* might be entered as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of *Chandler v. Parkes*, 3 Esp., 76, and *Jaffray v. Frebain*, 5 Esp., 47, but the court thought the practice adopted by themselves was most convenient, and therefore gave it a judicial sanction. These cases were distinguishable from that in 1 Wils., 89, in the fact that the plea went not only in personal discharge, but proceeded upon a matter which established an original defect in a joint contract; whereas the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as matter of principle.

Hitherto the question has been discussed as if the *nolle prosequi* had been entered before, when in fact it was entered after, judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In *Lover v. Salkeld*, 2 Salk., 455, in trespass against two defendants and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other and entered a *non pros.* after the judgment against the infants, and took out execution upon the judgment. Upon error brought it was objected that a *non pros.* could not be entered after judgment, for the judgment could not vary from the demand of the writ. It was argued on the other side that torts were several, and that a *non pros.* might be entered after as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said that he supposed there were interlocutory judgments, wherein it might well be, but a final judgment differed, for, that being once wrong, a subsequent entry would not set it right. The case was, however, adjourned, and nothing more appears of it. This case is not very accurately reported, and it may have been that the judgment was joint and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned shows that the doctrine thrown out by Lord Holt was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of *Parker v. Lawrence*, decided in the exchequer chamber and reported in Hobart, 70. That was trespass against three; one pleaded not guilty and the other two a justification, to which the plaintiff replied, and there

was a demurrer to the replication. Pending the demurrer the issue was tried, and damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error that the *nolle prosequi* discharged all three. It was agreed by the court (in conformity with the doctrine then prevailing) that if the *nolle prosequi* had been before judgment it would have discharged the whole action; and so it would if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two, for a non-suit or release or other discharge of one discharges the rest. But here the action was at an end as to the one by the judgment against him, and no judgment was had against the others; so that they were divided from him, and are not subject to the damages found against him. It was adjudged that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high court. It is cited as authority by Chief Baron Comyns in his Digest, Plead., X, 5, who also cites Plead., X, 3, the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favor of the judgment in Hobart, and it stands supported by a much earlier case, in the year books, 14 Edw. IV; Brooks, Abridg. Tresp. Pl., 331. If the plaintiff may, in any case, recover a judgment against one on a joint action against two who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment in what stage of the cause the suit has ceased to be prosecuted against the other. It is sufficient that in the event the judgment is consistent with the general principles of the action. If a *nolle prosequi* may be entered after verdict and before judgment without discharging the other party, there is no good reason why it may not be done after judgment, when there has been no proceeding which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities is that there is no decision exactly in point to the present case; that there is no distinction between entry of a *nolle prosequi* before and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that therefore this court is left at full liberty to entertain such a decision as its own notions of general convenience and legal analogies would lead it to adopt. We are of opinion that, where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matter of form not absolutely subjected to authority may well yield to the substantial purposes of justice.

Dissenting opinion by MR. JUSTICE JOHNSON.

The facts appearing upon the records, from the count, pleas and replications, are these: This action was on a bond given for the faithful discharge of the office of the cashier by Philip H. Minor. It was joint and several. The defendants craved oyer jointly, and pleaded performance, to which the plaintiff replied. They afterwards had leave to withdraw the joint pleas; and the four securities jointly filed various pleas, to which plaintiff replied, and, issue being taken, proceeded to trial, and obtained this verdict. After the verdict, the

principal to the bond was ruled to plead, and he then files a variety of pleas, similar in effect to those pleaded by the securities. The court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi*; and judgment is given for the principal on the bond. That the plaintiffs take nothing by their bill, but, for their false clamor, be in mercy, and that the defendant go thereof, without day, and receive his costs. It was insisted by the defendants that, in this state of the pleadings and record, the plaintiffs ought not to have had judgment below; that there is error, and the judgment should be reversed. What further order this court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine that, in adjudicating upon questions of practice, a court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice. To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed without shaking as well established principles as adjudged cases, and opening a door to inconveniences which must soon compel this court to retrace its steps. The judgment, as it stands below, is against four out of five joint and several co-obligors; and the obligor omitted, or rather who has judgment in his favor, is the cashier, for whose good conduct in office the other three became bound. Now, this judgment is either a bar to a future suit against the principal, or it is not. If a bar, then the record exhibits the inconsistent case of four being made liable for one who was not liable himself. And if it is not a bar, then, by possibility, it may be established by the verdict of a future jury that the co-obligor, for whose misfeasance alone these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice that may lead to such consequences cannot rest upon public convenience.

§ 15. *Where a joint contract is under seal, all the joint obligors must be sued together, if at all.*

Nor is it more easy to reconcile it to principle. No authority need be cited to establish that, wherever judgment ought to have been arrested below, this court is bound to reverse for error. Now, this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff whether to treat the bond as a joint or several contract. He has elected to treat it as joint, and must, therefore, abide by the law of joint contracts, as to both right and remedy; and upon these, when under seal, it is an invariable rule that all must be sued, if all have sealed the instrument and are in life.

§ 16. *Non-joinder of co-obligors; plea in abatement.*

It is true that, in general, the non-joinder of co-obligors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case in which it was impossible to plead in abatement, and that was precisely this case, since the discharge of the principal from the action was produced by the act of the plaintiff, after judgment, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule on the subject of pleas in abatement, since, by the plaintiff's own showing in his declaration and replication, all the co-obligors named in the instrument sealed it, and were in life at the commencement and close of the suit. This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of *Rice v. Shute*, 5 Burr., 2611, with the case of *Hermer and Moore*, noticed in the report of that case. In the one, it was necessary to plead in abatement, because

the facts did not appear on record which were necessary to maintain the defense. In the other, the judgment was arrested, because the facts of the plaintiff's own showing made out that he ought not to have judgment; which were, all had sealed the instrument, and all were alive. It cannot be questioned that, in a joint contract by five, where all remain equally bound, all in life, and all within reach of the process, more especially where they have been all actually arrested, the plaintiff must recover against all or none. This is that case, and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

§ 17. *Where several joint obligors are sued, and a nolle prosequi is entered as to one before trial, the others may plead it puis darrein continuance.*

It cannot be doubted that, had this *nolle prosequi* been entered before trial, the defendants must have been permitted to plead it, *puis darrein continuance*, and that the plea must have been sustained. And what reason is there for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said they severed in pleading, and suffered the cause to go to trial without objection. But was it in the power of these defendants to compel their co-obligors to join them in pleading? Or, if the plaintiff chose to proceed erroneously to trial, were the defendants under any obligation to arrest him and set him right? It was his own folly if he ruled them to trial, or consented to go to trial, or committed any other error in proceeding to judgment.

§ 18. *Where there are several defendants in a joint action on a contract, a nolle prosequi as to one is a bar as to him.*

I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But, if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestable that this judgment ought to be reversed. And I am yet to learn that, in a joint action in contract against several, a *nolle prosequi* as to the whole action against one is not a bar as to him. The cases are very few in the books in which the effects of a *nolle prosequi*, in such a case, have been tried by the only sufficient test — a plea in bar, to a suit upon the same contract. But, as far as they have gone, they maintain the bar. If a bar, in cases in which the suit is against a single defendant, there can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, Beecher's Case, reported in 8 Coke, 58. Croke, James, 211, is direct and positive. That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action upon the same contract, this was held to be a bar; and it became necessary to remove the judgments, by a writ of error, for some technical informalities, before this obligee could recover in the original contract. It is true that Sergeant Williams has said, in his note to 1 Saund., 207 a, "that a *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff." And, by reference to the next page of his note, it appears that the

exception here introduced is intended to embrace actions for torts; and, therefore, his rule is intended to apply to actions on contracts. But the authorities he cites are far from bearing him out in his doctrine. The case of *Cooper v. Tiffin*, 3 T. R., 511, upon which he relies, decides nothing but a question of costs; and the position that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum*, in case where the point was not presented. So, also, of his other cases, in 1 Wils., 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground that he, being discharged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Sergeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood in former times than it is at this day. That, if it were now better understood, we should perceive fewer of those inconsistencies which are supposed to exist in the decisions on this subject. Thus Sergeant Williams has mixed up the cases on torts with those on contracts in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes *Green v. Charnock*, Croke, Eliz., 762, which was trespass *quare clausum fregit*. And for other cases which, he says, establish the principle, "that a *nolle prosequi* is not of the nature of a *retraxit* or a release; but an agreement only, not to proceed as to some of the defendants on a part of the suit." Without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass or tort. Yet, it cannot be contended that the use of the *nolle prosequi* in cases of tort, in which the defendants may be joined and disjoined at the pleasure of the plaintiff, can afford precedent or authority for the use of it in cases of joint contract; in which the law, regarding the nature of the contract and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly. To me it appears that there is abundant authority to prove that the *nolle prosequi*, though entered by attorney with the judgment that defendant *eat sine die*, has the effect of a *retraxit*. Lord Coke certainly places them on the same foot, both in his Institutes, 1 Inst., 139, and his comment upon *Beecher's Case*, 8 Rep.; and in both instances he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet in one only is the term *retraxit* introduced into the entry of judgment. See, also, 2 Rolle's Abridg., *Nolle Prosequi*.

In *Green v. Charnock*, Cro. Eliz., 762, they are certainly treated as synonymous and equivalent. That was trespass *quare clausum fregit* against C. and S. S. made default, and judgment of *nil dicit* was then taken against him. C. pleaded in bar, plaintiff replied, etc., and judgment in demurrers for plaintiff. A *nolle prosequi* was then entered against S., and writ of inquiry and judgment against C. And the case proceeds: "Thereupon they brought error, and the error assigned was, because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both."

So, again, in the case of *Dennis v. Payn*, Cro. Car., 551, P. and P. gave their joint and several bond to D., who sued the one severally, and, after plea, entered a *retraxit*. He afterwards brought suit upon the bond against the other P., who pleaded the *retraxit* to the first in bar. There was no question made upon its being a bar, either direct or by estoppel; as to the obligor first sued, it is, in terms, admitted. But the benefit of that discharge was claimed by the second P., and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppel, only to be taken advantage of by him in whose favor it was entered; and Croke, who held it to be an estoppel, identifies it with a *nolle prosequi*, by observing that it is "*quasi an agreement that he will no further prosecute; non vult ulterius prosequi.*" So that both admit it to be a bar against the one discharged. So in *Hobart*, 70, and in 8 *Kebble*, 332, p. 31, in the year 1674, *nolle prosequi* and *retraxit* are considered as synonymous. So in *Silley's Practical Register*, in 1719, a *nolle prosequi* is defined thus: "This is that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a non-suit, for a non-suit is a default for non-appearance, but this is a voluntary acknowledgment that he hath no cause of action." Title *Nolle Pros.* So Sergeant Salkeld, who comes down in the time of Queen Ann, refers to *Beecher's Case* for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi*. Title *Retraxit*, 3 Salk. So in 4 *Wood*, 87, in the year 1691, it is distinctly asserted that an entry "of a *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*," is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly I can find no adjudged case to support it. In the case of *Walsh v. B.shop*, in Cro. Car., 239, 243, referred to by Sergeant Williams as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and, after verdict against both, a *nolle prosequi* was entered against one, and the other moved it in arrest of judgment. In that case, it is admitted, in terms, by the court, that as to the one the *nolle prosequi* was an absolute bar. And by reference to the same case, in page 239, it will be seen that the argument rested upon the right of a plaintiff to proceed against one of the several defendants in trespass.

If this plaintiff ever had a right to proceed against these four defendants in originating this suit, I should have felt no doubt. That is the case in trespass; that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*. 1 Wils., 89; 3 Espin., 76. There is a modern book of practice of great respectability (I mean *Sellon*, title *Nolle Prosequi*), in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take nothing by their bill, but for their 'false clamors be in mercy;'" which can, at least, detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates in effect as a *retraxit*. The judgment in this case goes to the whole cause of action, and, as between the plaintiff and the cashier, is of the same effect as if there had been no other defendant to the action. In a subsequent part of the article, the same author (*Sellon*) recognizes the distinction between cases of trespass or tort and cases of contract, and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit: that if

the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendants to deprive them of a legal defense, or subject them to increased difficulties or liabilities, it is error. The case in *Maule & Selwyn*, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumpsit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the language of the court in that case be considered as affording the true *rationale* of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The court say it amounts to an acknowledgment that the one defendant had a defense. But what defense did this co-obligor set up that the other defendants ought to have the benefit of? His pleas were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty. It is a question of no importance — one of no influence upon the law of the case, whether a *nolle prosequi* may be entered before or after judgment, or when it may be entered, otherwise than as it affects the legal relations of the parties and the rules which govern suits at law.

§ 19. *When a nolle prosequi can be entered.*

And here, I think, I may very confidently maintain that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain, or unless the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action. In the first class are comprised all actions of tort, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add, also, the case of bankrupts and infants, both of whom, when joint contractors, may be admitted as defendants upon declaring against their co-obligors, according to the truth of the case. They may, also, without prejudice to their co-defendants, be discharged by *nolle prosequi*; but even as to them it seems the precedents imposed a restriction; for it is not permitted, if they have blended their fate with that of their co-defendants by joining in their pleas. They have, then, waived their privilege. If their pleas impart no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded, because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time when it would place the defendants in a worse situation or deprive them of any advantage of making their defense. Surely the precedents for entering the *nolle prosequi* after judgment in actions of trespass against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here, since it is, in the one case, what the law enjoins; in the other, what it forbids. Nor are the precedents of cases in which the one defendant never was bound or is discharged by operation of law, without discharging the other, any better authority. In all these cases the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them by the judgment than what could have been legally claimed of them by the action.

There is one curious result produced by this decision which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion that it is no bar is now to be deduced from a

string of decisions, in every one of which Sergeant Williams himself admits that no recovery could be had against the defendant who has been discharged by the *nolle prosequi*. It is true he attributes this bar to the nature of the action; but this is, at least, acknowledging that the material question in the trespass cases never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the court, I mean the case of *Green v. Charnock, Croke, Eliz., 762*, in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S., it was adjudged that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C. was reversed in error brought, and yet there they did not join in the pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it is clear that, notwithstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment. 1 Saund., 217. And the distinction between the actions of debt and trespass on this point has been, until now, considered as known and established. 1 Plow., 66, 6; 8 Rep., 120, 133; 2 Lilly Ab., 210, 107. Upon the whole, I am very clear that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.

FLECKNER v. BANK OF THE UNITED STATES.

(8 Wheaton, 388-364. 1823.)

ERROR to U. S. District Court, District of Louisiana.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—The Bank of the United States brought an action in the district court for Louisiana district, against William Fleckner (the plaintiff in error), upon a promissory note of Fleckner, dated the 26th of March, 1818, for the sum of \$10,000, payable to one John Nelder, or order, on the 1st of March, 1820, for value received; and the bank, in their declaration by petition, made title to the same note through several mesne indorsements, the last of which was that of the president, etc., of the Planters' Bank of New Orleans, through their cashier, as agent. The answer of Fleckner sets up several grounds of defense: 1. That the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading within the prohibitions of its charter. 2. That the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per cent. per annum was taken by the Bank of the United States. 3. That the cashier of the Planters' Bank had no authority to make the transfer. 4. That the making of the promissory note was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as a part consideration for the purchase by Fleckner of a plantation and slaves from Nelder, and that the notary before whom the sale was executed and recorded, wrote on the note "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer proceeds to state that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid until the title was made good; and it then prays that the matters thus alleged and put in issue may be inquired of by a jury. The issue was joined, and on trial the jury found a verdict for

the Bank of the United States: and the cause now comes before us upon a writ of error, and a bill of exceptions taken at the trial. The various grounds assumed by the answer, which are substantially the same as taken by the exceptions, will be considered by the court in the order in which they have been mentioned.

§ 20. *There is no violation of charter by Bank of United States in discounting a promissory note.*

And, first, as to the alleged violation of the charter by the Bank of the United States in purchasing the note in question. The act of congress of the 10th of April, 1816, c. 44, incorporating the bank, in the ninth rule of the fundamental articles, declares (s. 11, art. 9; 3 Stats. at Large, 272) that "the said corporation shall not, directly or indirectly, deal or trade in any thing except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It certainly cannot be a just interpretation of this clause that it prohibits the bank from purchasing any thing but the enumerated articles, for that would defeat the powers given in other parts of the act. The seventh section declares that the bank shall have capacity to purchase, receive, etc., lands, etc., goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding fifty-five millions of dollars, and the same to sell, grant, demise, alien and dispose of. And where the act means to prohibit purchases of any particular thing, it uses the very term, as in the prohibition of purchasing any public debt in this very clause. And certainly there is no pretense to say that, if discounting promissory notes be a purchase in point of law, it could have been the legislative intention to include such an act in the prohibition. It is notorious that banking operations are always carried on in our country by discounting notes. The late Bank of the United States conducted, and all the state banks now conduct, their business in this way. The principal profits of banks, and, indeed, the only thing which makes them more valuable than private stock, arises from this source. The legislature cannot be presumed ignorant of these facts; and it would be absurd to suppose that it meant to create a bank without any powers to carry on the usual business of a bank. The act contemplates throughout an authority to make loans and discounts. It provides expressly for the establishment of offices of discount and deposit; and the very clause now under consideration recognizes the power of the bank to make loans and discounts, and restricts it from taking more than six per cent. on such loans or discounts. But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt which arises from the loan? If it is to discount, must there not be some *chose in action* or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. We must suppose that the legislature used the language in this its appropriate sense; and if we depart from this settled construction, there is none other which can be adopted which would not defeat the great objects for which the charter was granted, and make it, as to the

stockholders, a mere mockery. If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase within the meaning of the ninth rule above stated (upon which serious doubts may well be entertained), it is a purchase by way of discount, and permitted, by necessary inference, from the last clause in that rule.

The true interpretation, however, of that rule is, not that it prohibits purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the bank from doing the ordinary business of a trader or merchant in buying or selling goods, etc., for profit, and uses the words "deal" and "trade" in contradistinction to purchases made for the accommodation or use of the bank, or resulting from its ordinary banking operations. And that this is the true sense of the rule is strongly evinced by the twelfth section of the act, which enforces a penalty for the violation of this very rule. It enacts that if the bank, "or any person or persons for or to the use of the same, shall deal or trade in buying or selling goods, wares, merchandise or commodities whatsoever, contrary to the provisions of this act, all and every person, etc., shall forfeit, etc., treble the value of the goods, etc., in which such dealing and trading shall have been." The words dealing and trading are used as equivalent in meaning, and they are connected with "goods, wares, merchandises and commodities," which words, in mercantile language, are always used with reference to corporeal substances, and never to mere *choses in action*. And as there is no reason to suppose that the penalty was not intended to be coextensive with the prohibitions of the ninth rule, the exception of bills of exchange in that rule was either inserted *ex majori cautela* or designed to authorize the purchase and sale of bills of exchange at a price above their par value. At all events, doubtful phraseology of this sort cannot be admitted to overrule a clear legislative intention of authorizing discounts; and if so, as there are no words restricting the discounts to any particular kind of paper, the right must equally apply to all kinds.

The evidence in the case shows that the note in question was discounted for the Planters' Bank by the Bank of the United States, and after deducting, for the time the note was to run, a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which it seems was then indebted to the Bank of the United States in a large sum of money. It is immaterial to the decision of the point now under consideration, whether the discount was for this purpose or not, for whether the proceeds were to be paid over, or carried to the general credit of the party, or applied to the payment of a pre-existing debt, the transaction was still in substance a discount, and, therefore, not within the prohibitions of the ninth rule of the charter. The district judge, therefore, who sat at the trial, was perfectly correct in refusing to charge the jury, as the counsel for Fleckner requested, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." And he was equally correct in charging the jury "that the acceptance of an indorsed note in payment of a debt due is not a trading in things prohibited by the act." And this was the whole of his charge on this point brought up by the exceptions. It may be added, upon this point, that even if the bank had violated the rule above stated, by this particular transaction, it is not easy to perceive how that objection could be available in favor of Fleckner. The act has not pronounced that such a violation makes the transaction or contract

ipso facto void; but has punished it by a specific penalty of treble the value. It would therefore remain to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself could, on this account, be avoided by a party to the original contract, who was not a party to the subsequent transfer.

§ 21. *Discounting from face of a note the interest for the time the note has to run is not usury.*

The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and, probably few, if any, charters contain an express provision authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not usurious.

§ 22. *The taking of usurious interest is a violation of the charter of the bank, but the debtor cannot set it up.*

If, indeed, the law were otherwise, it would not follow that the transfer to the bank of the present note would be void, so that the maker of the note could set it up in his defense. The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment, the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would, doubtless, be a violation of its charter, for which a remedy might be applied by the government; but as the act of congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery. The opinion of the district judge that the discount taken in this case was not usurious, and would not defeat the right of recovery of the plaintiffs, was, therefore, unexceptionable in point of law.

The next point is, whether the indorsement of the note, by the cashier of the Planters' Bank, was sufficient to transfer the property to the original plaintiffs. The evidence on this point was, that the board of directors of the Planters' Bank, on the 21st of October, 1818, passed a resolution, "that the president and cashier be authorized to adopt the most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city [New Orleans], as well as all others presently due, and which may in the future become due to any banks of the city." The indorsement was made to the Bank of the United States on the 5th of September, 1819;

and before the commencement of this suit, namely, on the 27th of June, 1820, the board of directors of the Planters' Bank passed a resolution, to which the corporate seal is annexed, declaring that the two notes of the defendant (of which the present note was one) "were indorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank, and that the said board of directors do hereby ratify and confirm the said act of their said cashier as the act of the president, directors and company of the Planters' Bank." The act incorporating the Planters' Bank has been examined by the court; and as to the appointment of the cashier, and the authority of the board of directors, it does not differ materially from acts incorporating other banks.

§ 23. *Acts done by the cashier of a bank in the ordinary course of his business are prima facie evidence of authority.*

It authorizes the president and directors to appoint a cashier and other officers of the bank, and gives the president and directors, or a majority of them, "full power and authority to make all such rules and regulations for the government of the affairs and conducting the business of the said bank as shall not be contrary to this act of incorporation." Act of 15th April, 1811; 1 Martin's Dig., 568 *et seq.* It contains no regulations as to the duties of the cashier, nor any express authority for the corporation to make by-laws. The whole business of the bank is confided entirely to the directors, and of course with them it would rest to fix the duties of the cashier or other officers. Whether they have in fact made any regulations on this subject does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty.

§ 24. *Acts of a corporation binding although no corporate seal was used.*

The first objection urged against this evidence is, that the corporation could not authorize any act to be done by an agent by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law, that a corporation can only act through the instrumentality of its common seal, has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise is to suppose that the common law is superior to the legislative authority, and that the legislature cannot dispense with forms, or confer

authorities, which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common law mode of acting may be properly inferred; but every corporation created by statute may act as the statute prescribes, and the common law cannot control, by implication, that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of *The Bank of Columbia v. Patterson*, 7 Cranch, 299, and *The Mechanics' Bank of Alexandria v. The Bank of Columbia*, 5 Wheat., 326, principles were established which settle the point that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers. We have no doubt, therefore, upon the principles of the common law, that a vote of the board of directors of the Planters' Bank was as full authority for any act of this nature, to bind the corporation, as if it had passed under the common seal.

But it is to be recollected that the rights and authorities, and mode of transacting business, of the Planters' Bank, depend not upon the common law, but upon the charter of incorporation, and where that is silent, upon the principles of interpretation and doctrines of the civil law which have been adopted in Louisiana. The civil code of that state declares that as corporations cannot personally transact all that they have a right legally to do, wherefore it becomes necessary for every corporation to appoint some of their members, to whom they may intrust the direction and care of their affairs, under the name of mayor, president, syndics, directors, or others, according to the statutes and qualities of such corporations; it further declares that the attorneys in fact, or officers thus appointed, have their respective duties pointed out by their nomination, and exercise them according to the general regulations and particular statutes of the corporation; that these officers, by contracting, bind the communities to which they belong, in such things as do not exceed the limits of the administration which is intrusted to them; and that if the powers of such officers have not been expressly fixed, they are regulated in the same manner as those of other mandatories. Civil Code Louisiana, tit. 10, c. 2, arts. 13, 14. This is all that is contained upon the subject now under consideration in the title of the code professing to treat of corporations and their rights, powers and privileges. There is nothing which in the slightest degree points to the necessity of using a corporate seal in appointing agents or authorizing corporate acts; and the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official acts done by the officers of the corporation; and gives such acts a binding authority if evidenced by a vote.

§ 25. *The cashier is the officer of a bank by whom the moneyed operations are conducted.*

We may then dismiss this point, as to the necessity of the corporate seal, and proceed to consider another objection stated by the counsel for the original defendant. It is, that the cashier had no authority to make this transfer; that the resolution of the 21st of October, 1818, did not confer it originally, and that the subsequent ratification by the resolution of the 27th of June, 1820, does not give any validity to an ineffectual and unauthorized transfer. We are very much inclined to think that the indorsement of notes like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least if his office be like that of similar institutions, and

his rights and duties are not otherwise restricted. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property when payments have been duly made. He draws checks, from time to time, for moneys wherever the bank has deposits. In short, he is considered the executive officer, through whom and by whom the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds as the moneyed capital of the bank, to discharge its debts and obligations. And under these circumstances the provision of the civil code already cited may be justly applied, that where his powers are not otherwise fixed, they are to be regulated as other mandatories, or rather as other agents and factors. In point of practice it is understood, and was so stated by one of the learned counsel, whose knowledge and experience upon this subject entitle his statement to the highest credit, that these duties are ordinarily performed by the cashiers of banks. And general convenience and policy would dictate this arrangement as most salutary to the interests of the banks. And it may be added that the very act done by the cashier in this case with the approbation of the bank, affords some presumption that it was not a usurped authority. But waiving this consideration, let us attend to the actual features of this case upon the evidence. It is true that the resolution of the 21st of October does not directly and in terms authorize this transfer. It is not a resolution conferring a joint authority to the president and cashier to indorse any note for the bank. It simply requires them to take measures to liquidate the balance due to the original plaintiffs and other banks. It is merely directory to them, and leaves them to decide as to the time, the mode, and the means. As they were not restricted in these respects, they had a resulting right to employ any of the funds of the bank for this purpose, and the negotiable paper of the bank was equally within the scope of the authority as the cash funds, if they should deem it proper to use them. They were at liberty to raise money for this purpose from the general funds in any way which the ordinary course of business would justify, and which they should deem the most effectual measures. They might, therefore, agree that the cashier should indorse the note in question, and should procure it to be discounted at the Bank of the United States, and the proceeds to be carried to their credit. The presumption that this was an exercise of authority sanctioned by the president, as well as contemplated by the directors, is almost irresistibly proved by the fact that the Planters' Bank has never complained of, but ratified and approved the whole transaction.

§ 26. "*Liquidate*" defined.

Some criticism has been employed on the meaning of the word "liquidate" in the resolution above stated. It is said to mean, not a payment, but an ascertainment of the debts of the bank. We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away, to lessen debts. And in common parlance, especially among merchants, to liquidate a balance, means to pay it; and this, we are satisfied, was the sense in which the words were used in this resolution, and consequently that the appropriation of this note to the payment of the debt was within the scope of the authority given to the president and cashier. But if this were susceptible of doubt, we think that the subse-

quent resolution of the directors, of the 27th of June, 1820, is conclusive. That resolution is not a mere ratification of the transfer, but declares that the indorsement was made by the cashier on the 4th of September, 1819, by authority of the president and directors. It is therefore a direct and positive acknowledgment of its original validity, binding on the bank; and if so, it is binding upon all other persons who have not an adverse interest. But if it were only a ratification, it would be equally decisive. No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*; at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject. See Civil Code of Louisiana, tit. 3, c. 6., s. 4. We think, then, that the transfer in this case was made upon sufficient authority; and that therefore the opinion of the district judge affirming the same doctrine was perfectly correct.

§ 27. *The words "ne varietur" written on a note do not restrict negotiability.*

The next point made by the counsel for the original defendant is that the writing of the words "*ne varietur*" upon the note restricted its negotiability. It appeared in evidence that the note in question was given as a part consideration for the purchase money of a plantation and slaves, purchased by Fleckner of Nelder. The instrument of conveyance was drawn, executed and recorded before a notary public, according to the usage in countries governed by the civil law. The notary, upon the giving of this and other notes for the purchase money by Fleckner, wrote on each note the words in question. There is not the slightest evidence that, by the law or custom of Louisiana, the introduction of these words affects the negotiability of these notes; and without proof of such law or usage, this court certainly cannot infer the existence of such an extraordinary and inconvenient doctrine. Upon the face of the transaction, we should suppose that the words were written merely for the purpose of ascertaining the identity of the notes; and the statement at the bar, that this is the explanation given by a very learned notary, confirms this supposition. The opinion of the district judge upon this point, also, asserting that the words did not create any restriction upon the negotiability of the note, is, as far as we have any knowledge, a true exposition of the law. It is unnecessary to pursue this subject further. The judgment of the court below is affirmed with interest and costs.

CITY BANK OF COLUMBUS v. BEACH.

(Circuit Court for New York: 1 Blatchford, 425-437. 1849.)

STATEMENT OF FACTS.—The plaintiff bank was located at Columbus, Ohio, and had power, among other things, to "buy, sell and discount bills of exchange." By the laws of Ohio, banks were "authorized to commence and carry on the business of banking at the places severally designated in their certificates of association." This action was brought on two bills of exchange, drawn on the defendants at Auburn, New York, and purchased by plaintiff's agent at Cleveland. The agent testified that he bought the bills for the purpose of remitting funds of the plaintiff to New York. The court was asked to charge that the plaintiff was not entitled to recover on the two bills, because they were purchased contrary to law. The charge was refused. Verdict for plaintiff. Motion for a new trial.

§ 28. *Where the act of incorporation of a bank confers upon it power to deal in exchange without restriction, the purchase by it of bills at another city is lawful.*

Opinion by NELSON, J.

The acts under which the bank became a corporation conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the city of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not in contravention of the charter of the bank, or of any law of the state of Ohio. I think this case falls within the principle of the cases of *The Bank of Augusta v. Earle*, 13 Pet., 519, and of *The Tombigbee Railroad Co. v. Kneeland*, 4 How., 16, and that a new trial ought not be granted.

Opinion by CONKLING, J.

If, according to the true interpretation of the plaintiffs' charter, it in fact conferred on them no power to purchase bills of exchange at the place and in the manner stated in the bill of exceptions, then it follows that no title was in this instance acquired in virtue of such purpose, which can be enforced in a court of justice. It was from their charter that the plaintiffs, as a body corporate, derived their existence and their capacity to make contracts of any kind, and it is to this, therefore, that recourse must be had to ascertain the limits of their capacity, and thus to determine whether or not it extended to the contracts in question. It is conceded that the plaintiffs had the power, granted to them by their charter, of buying and selling bills of exchange. But it is insisted by the defendants' counsel that, under this general grant of authority, the plaintiffs had no right to establish an agency for the purpose of dealing in bills of exchange, and by that means to carry on that business elsewhere than at Columbus, in the manner they are described by the witness Morrison to have done at Cleveland. In answer to this objection it is argued in behalf of the plaintiffs, in the first place, that they are not by their charter restricted to Columbus as the place at which their franchise is to be exercised; but that they are at liberty to establish their bank at any place in the state of Ohio. This proposition, I think, cannot be maintained. It is essential to the convenience and security of the public that every bank should have a fixed, known and permanent place of business, where it is bound to fulfil all its engagements, and where those who have dealings with it may safely resort for the purpose of fulfilling theirs. Bank charters, moreover, are not granted for the benefit of stockholders, but for the sake of those engaged in the productive and in mercantile pursuits; and though a bank may be wanted at one place, it may be unnecessary at another. Persons who apply to the legislature for a banking charter always deem it necessary, therefore, to designate the place at which it is proposed to establish their bank, and to set forth the need of banking facilities at that place; and a charter is granted or withheld, according to the opinion of the legislature respecting the truth or sufficiency of such representations. It may, I imagine, be safely added, also, that bank charters are never intentionally granted with power to the incorporators to select, *ad libitum*, their place of business. The legislature of Ohio, by the act of February 24, 1845, evinced a strong degree of solicitude on this very point. The design of that act was to supersede the necessity of special legislation for the purpose of establishing banks from time to time at places where they might be required, by providing prospectively for the voluntary formation of banking associations. But in

order, as far as possible, to secure a proper distribution of these institutions, the act divides the state into twelve districts and prescribes the maximum amount of banking capital which may be employed in each, and the maximum number of banks which may be established, not only in each of these districts, but also in each of the counties of which they are composed. It is true that the City Bank of Columbus was not formed under this act, nor did the act restrain the legislature of Ohio from disregarding its policy by incorporating a bank ten days afterwards without a local habitation. But it is very improbable that this was intended to be done. A Saving Institution had already, for several years, been in being, carrying on its business, it is presumed, as its name indicates, at the city of Columbus. This institution, by the act of March 6, 1845, was converted into a bank, under the name of The City Bank of Columbus, and, unquestionably, without any intention of authorizing a change of location. But, in reality, this question is of little importance, for the bank was, in fact, established at Columbus, and it would be idle to assert that the corporation had a right, at the same time, to set up another bank at Cleveland. It is equally clear, also, that the legislature intended to place this bank, when organized, on the same footing, in all respects, as the "independent" (in contradistinction to the "branch") banks, to be found under the act of February 24, 1845. This design, indeed, appears to be sufficiently declared in the first and third sections, above recited, of the act of March 6, 1845. It is very unlikely, moreover, that it should have been intended so soon to innovate upon a system so elaborately devised as that established by the preceding general act. The contrary presumption derives additional strength from the solicitude manifested in the sixty-eighth and sixty-ninth sections, by the inducements they hold out to bring the existing banks therein named under the provisions of the act.

It follows, therefore, that the question before the court depends upon the same principles that would govern it if it concerned a bank formed under the general banking act of Ohio; instead of one owing its existence to a separate statute. This point, however, appears to me to be less important than it seemed to be considered by the counsel at the argument. It is true, the act of February 24, 1845, evinces an anxious desire to secure a proper distribution of banking capital among the several districts and counties of the state, and it requires the several associations which may be formed under it to designate beforehand the particular place at which they propose to establish their bank, and, having done so, limits them henceforth to the place selected. But it is to be recollected that the act provides for the establishment, from time to time, of a great number of banks, without any further exercise of legislative discretion; and I am unable to discern, in the scheme of distribution adopted, anything more than an attempt to do at once, prospectively, what the legislature would otherwise have been required to do by successive acts — that is to say, to adapt the supply of bank facilities in different parts of the state to the exigencies of each, as far as they could be foreseen. Viewed in this light, those provisions of the act upon which so much stress was laid ought to have no influence on the decision of the question before the court, for they impose no restrictions with respect to locality not usually imposed by separate acts of incorporation, and import no state policy affecting the rights of the plaintiffs.

§ 29. *A bank having power to deal in exchange, without express restriction as to place, may establish an agency for such purpose in a part of the state other than that of its location.*

The question, then, is resolved into the simple inquiry whether a state bank,

having power by its charter to deal in bills of exchange, without any express restriction as to place, can lawfully establish an agency, for the purpose of buying and selling bills of exchange, in a part of the state other than that of its location. It was argued, indeed, by the plaintiffs' counsel, that the purchases of these two bills of exchange, coming, as they do, separately before the court, are to be regarded as isolated acts, and, as such, free from objection, whatever might be thought of the right of plaintiffs to establish an agency at Cleveland for the purpose of dealing in exchange. But these purchases were shown by the witness Morrison to constitute parts of a series of similar acts, performed by him as the agent of the plaintiffs, by them constituted for this express purpose; and to adjudge all these acts to be severally lawful, and admit them at the same time to have been collectively contrary to law, would seem to be inconsistent. But, whether they are to be considered individually or collectively, unless it can be shown that a bank may lawfully do without, what it cannot lawfully do within, the limits of the state whence it derived its corporate existence, the question before the court has already been authoritatively answered by the supreme court of the United States, in the cases of *The Bank of Augusta v. Earle*, 13 Pet., 519, and of *The Tombigbee Railroad Co. v. Kneeland*, 4 How., 16. In the first of these cases the question was whether a bank incorporated by the legislature of the state of Georgia, and established at Augusta in that state, having power conferred upon it in general terms by its charter to deal in bills of exchange, could lawfully buy bills of exchange in the state of Alabama, through an agent employed there for that purpose. The court decided that it could. The case was in all respects essentially like the present, except that in that case the bill of exchange on which the suit was founded was purchased by the Georgia bank in another state, instead of a different place in the same state. The case decides, therefore, that, if the City Bank of Columbus had employed its agent and purchased these bills at Mobile, instead of Cleveland, its title would have been indisputable. Is its title, then, to be held invalid, because the purchases were made within the limits of the state of Ohio?

§ 30. *Corporation defined.*

A corporation is a legal entity, endowed with those faculties only with which the legislature have seen fit to invest it. The power to purchase bills of exchange is, by the statutes of Ohio, conferred on the plaintiffs, as it was by the statute of Georgia on the Bank of Augusta, in general terms, without restriction as to place. If this grant imports a capacity to deal in exchange, through an agent appointed for that purpose, in other states, by what sound principle of construction can it be maintained that the grant confers no power to do the same thing in any part of the state of Ohio? If, indeed, the statute, while conferring the power, had also, in terms, forbidden its exercise within the state of Ohio, elsewhere than at Columbus, it may be conceded that this action could not be maintained; and it would then be impertinent to inquire whether, notwithstanding this restriction, the plaintiffs might not, according to the doctrine of the case of *The Bank of Augusta v. Earle*, lawfully send an agent into another state to purchase bills of exchange. But, in the absence of any such restriction, I am unable to distinguish the present case from that. Indeed, the principal question in that case was, not whether the bank possessed a more extensive power to make contracts out of the state of Georgia than within it, but whether it had the capacity to contract beyond the limits of that state at all. The question turned upon the comity of nations, supposed to be

recognized by the laws of the several states with respect to each other, and upon certain provisions contained in the constitution of Alabama. It was, however, deemed necessary, before proceeding to the consideration of these points, to determine first the extent of the power to deal in bills of exchange conferred on the bank by its charter; for, said the chief justice, in pronouncing the judgment of the court, "it may be safely assumed that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes." After laying down this fundamental principle, the court proceeded to observe: "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange, and consequently gives it the power to purchase foreign bills as well as inland—in other words, to purchase bills payable in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution, and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter, and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction." Now, it seems quite clear from this language, that the general grant of power to deal in exchange, contained in the charter of the Bank of Augusta, was considered by the court sufficient to warrant the exercise of this power at any place within the state of Georgia, and that, if this had been found to be otherwise, all further inquiry would have been deemed unnecessary. But it is needless to dwell longer upon this point. All that was urged at the argument, to prove that the plaintiffs had unlawfully assumed to exercise their banking franchise through their agency at Cleveland, is fully answered by the case of *The Bank of Augusta v. Earle*, and the other cases embraced in the same report; and especially by the subsequent case of *The Tombigbee Railroad Co. v. Kneeland*, in which the doctrines of the former case were reasserted and more strongly applied.

My opinion, therefore, is, that the motion for a new trial ought to be denied.

DAVIS v. BANK OF RIVER RAISIN.

(Circuit Court for Michigan: 4 McLean, 387, 388. 1848.)

Opinion of the Court.

STATEMENT OF FACTS.—This is an action of *assumpsit*, the general issue being pleaded. The defendants gave to the plaintiffs a draft of the Bank of Brest for \$2,000. It was understood, at the time, that the draft was received by the plaintiffs in payment of a debt due them by the defendant. The Bank of Brest was insolvent, and no part of the draft was ever received. The plaintiffs contend, if the draft was received in payment, it could not operate as such, because the Bank of Brest was organized under the general banking law of Michigan, which the supreme court of the state has held to be unconstitutional. But if the bank was a corporation, the draft was void, it having been issued in express violation of the law.

§ 31. *A draft issued by a bank in express violation of its charter is absolutely void.*

It is not material to inquire whether this Bank of Brest was organized or not. It is enough to know that it was one of a large batch of banks established under a general law of Michigan, which was recommended to the popular sanction, and that numerous banks were organized under it, all of which turned out to be banks without capital. They were all subject to what was called the "safety fund act," which, by the thirty-first section, provided that "no moneyed corporation, subject to this act, shall issue any bill or note of the said corporation, unless the same shall be made payable on demand and without interest." The draft in question was in violation of that law, as it was not made payable on demand. It was, therefore, an instrument which the corporation had no right to create, and being void, it cannot be considered as payment to the plaintiff. And the court so instructed the jury, who found for the plaintiff. Judgment. *Weed et al. v. Snow*, 3 McL., 265.

§ 32. *What is a bank.*—Having a place of business where deposits are received and paid out on checks, and where money is loaned on security, is the substance of the business of a banker. *Warren v. Shook*, 1 Otto, 710. See §§ 36, 332.

§ 33. *When statute goes into effect.*—Where a law provides that banking corporations which are afterwards created shall have no power to issue notes not payable on demand and without interest, a bank which was created on the same day is within the provisions of the act. *Weed v. Snow*, 3 McL., 267.

§ 34. *Void drafts.*—Where a bank is prohibited from issuing any bill or note payable otherwise than on demand, without interest, and it accepts drafts before they are signed by the maker, and which are evidently intended to circulate, and which are issued by the bank substantially in payment of its debts, such drafts are void as having been drawn in violation of law. *Weed v. Snow*, 3 McL., 267. See §§ 5, 34, 40, 59.

§ 35. *Officers bound to know condition of assets.*—Members of the board of directors of a branch bank are presumed to know the value of the assets; and where two of them, with other parties, become joint purchasers of such assets from the parent bank, all the purchasers are chargeable with notice of the condition of such assets. *Lyman v. Bank of United States*, 12 How., 245.

§ 36. *What is not a bank.*—A company whose only business is investing its own capital in mortgage securities on real estate and selling such mortgages with its guaranty, and which does not collect or receive any deposit of money subject to be paid or remitted by draft, check or order, nor receive deposits, issue notes, or make any discounts whatever, is not a bank within the meaning of the word used in R. S., 3407, relating to the revenue. (*Approving S. C.*, 16 Alb. L. J., 16.) *Selden v. Equitable Trust Co.*, 4 Otto, 419. See § 32.

§ 37. *A corporation loaning its own funds upon notes and mortgages is not thereby a banking corporation.* *Oregon & W. T. & I. Co. v. Rathbun*, 5 Saw., 85.

§ 38. *Statute as to set-off valid.*—A state statute, which enacts that the outstanding bills of a bank shall be applied as an offset to any judgment of the bank against a debtor, is valid, at least between the bank and the debtor. But it seems that if the rights of other creditors of the bank intervened, who had the right to demand that the judgment be paid in legal tender, the case might be different. *Blount v. Windley*, 5 Otto, 178.

§ 39. *Ultra vires.*—Where a bank issues notes in violation of its charter, or of the public law, such notes are void *ab initio*, and are equally so in the hands of a *bona fide* holder. All persons dealing with the paper of a bank are presumed to know the provisions of the public law applicable thereto. If the bank exceeds its powers its acts are void, and a want of notice is no defense. *Root v. Wallace*, 4 McL., 9. See § 178.

§ 40. *Void bank notes.*—Notes issued by a bank in violation of law are void, and being void *ab initio* are void in the hands of an innocent holder. *Root v. Godard*, 3 McL., 103; *Root v. Wallace*, 4 McL., 9. See §§ 34, 59.

§ 41. *Void discounts.*—Under a state law which forbade unincorporated banks to make discounts, if such an institution discounts a note and assigns it to its secretary, such assignment is void, and no action is maintainable by him thereon; and this though the note is payable in another state. *McClintick v. Cummins*, 3 McL., 160.

§ 42. *Vested rights.*—The charter of a bank gave it power to acquire and dispose of goods, chattels and effects, "of what kind soever, nature and quality," and the power to discount

bills and notes. *Held*, that under this provision the bank had the right to sell notes discounted by it, and that a law passed subsequently which prevented the bank from transferring any bill or note, or other evidence of debt, was a violation of the contract contained in the above clauses of the charter. *Planters' Bank of Mississippi v. Sharp*, 6 How., 320. See §§ 46, 47, 58, 82.

§ 43. Power of unincorporated bank.—It seems that an unincorporated bank has power to incur and pay indebtedness. *Ibid*.

§ 44. Power of bank over dividends.—Upon the death of a stockholder of the Bank of Washington who was, at the time of his death, indebted to the United States and also to the bank, the bank has no right to offset dividends accruing after his death against his indebtedness to it. *Brent v. Bank of Washington*, 2 Cr. C. C., 518.

§ 45. Banking contrary to statute.—The statute of Tennessee of 1827, to prohibit private banking, covers and prohibits all transactions relating to the organization and carrying on of such banks, and a bill of exchange drawn in Tennessee on a party in Mississippi, which is intended by both parties to be in furtherance of such a scheme for illegal banking, is void as to the drawer in the hands of a party with notice. *Davidson v. Lanier*, 4 Wall., 454.

§ 46. Law impairing obligation of contract.—The provision of a bank charter, that the bank shall set aside six per cent. of its semi-annual dividends for the use of the state, and that the sum thus set aside shall be in lieu of all taxation, is a contract within the inhibition of the constitution relating to the passage of laws impairing the obligation of contracts. *Jefferson Branch Bank v. Skelly*, 1 Black, 448; *Piqua Branch Bank v. Knoop*, 16 How., 377. See §§ 42, 330, 383.

§ 47. What is not a vested right.—The general banking law of New York provided that stockholders should be liable for the debts of the bank to the amount of their stock only, unless the articles of incorporation should otherwise provide. *Held*, that by incorporating this article into their articles of association the stockholders could give it no additional effect, and that it did not thereby become a contract so that the legislature could not change the general banking law so as to make stockholders personally responsible, when in the general law power was given to alter or repeal it at any time. *Sherman v. Smith*, 1 Black, 590. See §§ 42, 53.

§ 48. Banking at common law.—At common law the right of banking and all its ramifications belonged to individual citizens, and might be exercised by them at their pleasure. *Bank of Augusta v. Earle*, 18 Pet., 595.

§ 49. Seal.—Although in Kentucky a corporation can assume under seal only, yet where by its act of incorporation a bank is empowered to receive money on deposit without giving its written obligation to repay it, *assumpsit* will lie for such deposit when the promise of the bank is without seal. *Bank of Kentucky v. Webster*, 2 Pet., 318. See the case, §§ 265-269.

§ 50. Organization, presumption.—Where the charter of a bank prescribed that it should give notice of its organization on or before a certain day, and it is afterwards found in operation, it must be presumed that it was organized on that date and that it had power to enter into a contract after that date. *Bank of United States v. Lyman*, 1 Blatch., 299.

§ 51. Power to discount.—The power conferred by a provision of a bank charter "to discount upon banking principles" refers to the taking of interest in advance, and is not a prohibition against taking a higher rate than six per cent. *M'Lean v. Lafayette Bank*, 3 McL., 597.

§ 52. A bank authorized by its charter to discount notes has incidental authority to dispose of such notes if no limitation on such authority is apparent in its charter. *Planters' Bank of Mississippi v. Sharp*, 6 How., 324.

§ 53. Bank must pay its bills.—It is the duty of a bank to pay its bills in specie on demand, if such demand is made at the bank within the usual banking hours. Every bank is bound either to have its specie weighed or counted and ready for delivery, or to have servants sufficient to count and weigh it, and to pay it out for all demands made during the usual banking hours. *Suffolk Bank v. Lincoln Bank*, 3 Mason, 2.

§ 54. Tender.—Where a bank presents to another bank a quantity of the latter's bills, it is not a good tender to offer in return the bills of the former, or *a fortiori*, the bills of another bank. *Ibid*.

§ 55. Bills of credit.—Where a bank is incorporated by a state, with the usual officers and the usual powers of a bank, with the power to sue and be sued, and with a capital stock pledged for the redemption of its bills, such bills are not bills of credit within the prohibition of the constitution, even though the state is the sole stockholder of the bank, and entitled to all its profits. *Briscoe v. Bank of Kentucky*, 11 Pet., 317.

§ 56. It seems the only thing which prevents bills issued by state banks from being bills of credit within the inhibition of the constitution, when a state is the sole stockholder, is the fact that such bills do not rest upon the credit of the state, but on that of the bank, and that,

should a charter provide that the state, in such a case, might at any time withdraw its capital, then the bills of the bank would be bills of credit, and could not be issued under the constitution. *Curran v. State of Arkansas*, 15 How., 317.

§ 57. The charter of a state bank provided that its capital should be a certain sum, and that it should not commence the transaction of business until one-half that sum was deposited in its vaults. This sum was raised by the sale of the bonds of the state; the credit of the state was pledged to pay the notes, and the state was the only stockholder of the bank. The bank could sue and be sued, and had the ordinary powers of a bank. The president and board of directors were elected annually by the legislature, and, in certain cases, they became liable personally. The bills of the bank were payable in specie on demand, and were signed by the president and cashier. *Held*, by the supreme court, that such bills were not bills of credit within the meaning of the inhibition of the constitution. *Darrington v. State Bank of Alabama*, 13 How., 15.

§ 58. When charter is a contract.—Where a state is the sole stockholder in a bank, its charter as a whole cannot be deemed to be a contract within the clause of the constitution prohibiting the passage of a law impairing its obligation. But certain of its provisions may constitute such a contract. If the charter provides that the state shall transfer to the bank certain state funds and the proceeds of certain state bonds as a capital stock, and provides that this shall be held to meet its liabilities, then such capital stock becomes a trust fund; and having invited the public to give credit to it under an assurance that it had been placed there for the purpose of paying the liabilities of the bank, a contract arises whenever credit is given by any person to the bank. The charter, followed by the deposit of the capital stock, amounts to an assurance, held out to the public by the state, that any one who shall trust the bank may rely on that capital for payment. As soon, therefore, as a person parts with his property on the faith of this state of facts, the transaction has all the elements of a binding contract, and the state cannot withdraw such fund, or any part of it, without impairing the obligation of the contract. *Curran v. State of Arkansas*, 15 How., 318. See §§ 42, 46, 47.

§ 59. When discounted notes are void.—Where a safe deposit and saving institution does a general banking business contrary to law and its charter, notes discounted by it in the regular course of such illegal business are void, and cannot be presented as a claim in bankruptcy against the estate of the bankrupt. *In re Jaycox*, 12 Blatch., 318. Nor can a claim for the money loaned be maintained against such estate. S. C., 13 Blatch., 75. See §§ 5, 84, 40, 59.

§ 60. When bank is estopped.—Where, by the established usage of a bank, its actuary was held out to the public as having power to borrow money for its use, and he, acting *bona fide* and according to established usage, borrowed money for the bank and afterwards transferred certain securities held by it in satisfaction of the debt, it was held that the creditor took a good title to such securities, and that he could hold them against the commissioners appointed to wind up the affairs of the bank. *Creswell v. Lanahan*, 11 Otto, 351.

II. DIRECTORS.

§ 61. Who may be directors.—A writ of *mandamus* was applied for to compel the defendant bank to admit petitioners as directors, in place of certain named persons who were not practical mechanics in actual practice. *Held*, that it is not necessary that any of the directors should be mechanics in actual practice. *Gray v. Mechanics' Bank*, *2 Cr. C. C., 51.

§ 62. Liability of directors.—Under the act of 1837 the directors of a bank are liable for all excess of debts above three times the amount of the capital stock paid in, and also for all deficits occasioned by the insolvency of the bank. *White v. Howe*, *3 McL., 111. See § 85.

§ 63. When bank is bound by knowledge of president.—If the president of a bank, who is also the president of a railway company, declines on account of such relationship to take any part in the proposed discounting by the bank of a note indorsed by the railway company, then his knowledge of any facts relating to such note does not bind the bank; otherwise if he takes part in such discounting. *Waynesville National Bank v. Irons*, 8 Fed. R., 8.

§ 64. Bank is owner of indorsed paper, when.—Where a bank loans money on business paper indorsed to it, it will be presumed, on the bankruptcy of the borrower, that the bank holds such paper as owner, and not as collateral security. *In re Weeks*, *13 N. B. R., 270.

§ 65. President, bound to know what.—The president of a bank is bound to know all the facts about the affairs of the bank which are disclosed by its books and records, or can be ascertained on close inquiry. He cannot be heard in law to say that he did not know these things. It is his duty to know them, and the law will conclusively presume that he did know them. *Main v. Mills*, 6 Biss., 103.

§ 66. *Mortgage taken by president.*—Where the president of a bank takes a mortgage in his own name to secure the payment of loans made by the bank at his instance, it seems that the bank becomes the creditor of the mortgagee, and the president is surety for the debt, and he may be compelled to surrender the securities to the bank, and may be held in equity for the debt. *Ripley v. Harris*, 3 Biss., 202.

§ 67. *Fraudulent acts of directors.*—Where the cashier and director of a bank take its property, and for their own fraudulent purposes place it in the sub-treasury of the United States to cover the defalcation of a government official, the ownership of the bank is not divested, and the act of the cashier and director does not make the bank a party to the fraud. *First National Bank of Newton v. United States*,* 16 Ct. Cl., 73.

§ 68. *Directors are trustees.*—The directors of a bank are trustees for the benefit of the stockholders, depositors and creditors of the bank, and as such are personally liable for frauds and losses resulting from their gross neglect of their trust as such directors. *Trustees v. Boaseux*, 3 Fed. R., 823. See §§ 285, 289, 294, 303, 310.

III. STOCK.

§ 69. *Capital of bank must be kept intact.*—A bank is bound to keep its capital stock intact. If there is any reduction of the capital funds, the bank can bring suit against any one who has appropriated them wrongfully, or if the bank does not, any creditor or party aggrieved may do so. *Main v. Mills*, 6 Biss., 104.

§ 70. *The capital stock is a trust fund.*—The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation, and no stockholder is entitled to any share of such stock till all the debts of the corporation are paid; and if a stockholder obtains any of such capital stock he becomes *pro rata* liable to contribute to the payment of its debts. This rule is not changed by the fact that a state is the sole stockholder of such bank. The obligation of the contracts of the bank, and the equitable rights of its creditors, are in no way affected by the fact that a sovereign state paid in its capital and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same extent and for the same reasons as it would have been if contributed by private persons. *Curran v. State of Arkansas*, 15 How., 308.

§ 71. *The capital stock of a bank is a trust fund for the payment of the creditors of the bank, and where a bank divides three-fourths of its capital stock among its stockholders and the residue is insufficient for the redemption of its outstanding bills, the holders of such bills may follow the capital stock into the hands of those who have received it. If all the stockholders cannot be brought before the court, those which are brought before the court are liable only for a share of the bills held by the plaintiff proportioned to the share which each has received of the capital stock.* *Wood v. Dummer*, 3 Mason, 311.

§ 72. *Though a state is the sole stockholder in a state bank, it cannot, by statute, after the bank becomes insolvent, appropriate its assets to the payment of the debts of the state. Such assets are a trust fund exclusively for the benefit of the bank.* *Barings v. Dabney*, 19 Wall., 9. See § 90.

§ 73. *Right to collect unpaid subscriptions passes to assignee.*—The liability of stockholders of a bank upon their unpaid subscriptions is that of debtors to the bank, and is a claim which passes to the assignee of the property and credits of the bank. And where creditors of the bank have procured the appointment of an assignee, and have been parties to a suit to compel such assignee to close up the trust, but have taken no steps to compel him to collect the balance due on such subscriptions, the decree discharging the assignee is a bar to proceedings by such creditors to collect such balance. *Terry v. Anderson*, 5 Otto, 636.

§ 74. *Liability of stockholders.*—Stockholders having unpaid balances of subscription standing against them are liable therefor to the creditors of the bank, though they have each redeemed their share of the bills of the bank. *Marsh v. Burroughs*, 1 Woods, 473. See §§ 44, 47, 270.

§ 75. *Right of stockholder to vote.*—A stockholder of a bank, who has pledged his stock to the bank as collateral security for the payment of his notes not yet due, has a right to vote as a stockholder at an election of directors. *Scholfield v. Union Bank*, 2 Cr. C. C., 115.

§ 76. *Rights of the bank as against partners holding its stock.*—The members of a bankrupt firm were stockholders in a bank, a by-law of which provided that if any stockholder should owe the bank anything, such debt should be a charge upon the stock, and that it might be sold to satisfy the debt. *Held*, that the bank had a right to apply the proceeds of such stock to the satisfaction of the debts of the copartnership due to it, and also to the satisfaction of the debts of the individual partners. *In re Bigelow*, 2 Ben., 471.

§ 77. **Rights of stockholders under Indiana statute.**— Under the general banking act of Indiana, no suit can be maintained against the stockholder of a bank upon bank notes regularly issued and protested, unless it is shown that the funds of the bank are exhausted, and that the stock deposited with the auditor of the state to secure the redemption of the circulation of the bank is also exhausted. *Toucey v. Bowen*, 1 Biss., 88.

§ 78. **Transfer must be made to pass title of stock.**— The delivery of bank stock to the cashier, which by its terms is only transferable upon the books of the corporation, with a request that he transfer it to another party, passes no title to such stock unless the transfer is actually made upon the books. *Brown v. Adams*, 5 Biss., 181.

§ 79. **Between parties an irregular transfer passes title to stock.**— The provision in the charter of a bank, that no transfer of its stock shall be valid unless made upon the books of the bank, is designed for the protection of the bank and of purchasers without notice, but as between vendor and vendee a transfer not in conformity to such provision will pass the equitable title and divest the vendor of all interest therein. *Black v. Zacharie*, 3 How., 513.

§ 80. Though the charter of a bank provides that stock shall be transferred only on the books of the bank, and in a certain way, and that the bank has a lien on such stock for all debts due from the stockholder to the bank, yet an equitable assignment of such stock may be made, *bona fide*, in any other way, unless a paramount lien exists. *M'Lean v. Lafayette Bank*, 3 McL., 604.

§ 81. **Lien on stock for debt is waived by taking collateral.**— Though a bank, by its charter, has a lien on the stock of any stockholder for the amount of his indebtedness to it, yet where the bank accepts collateral security from such debtor the statutory lien is waived. *Ibid.* See §§ 85, 91.

§ 82. **Statute creating lien on stock is valid.**— A state statute making the stockholders of a bank personally liable for the debts of the bank incurred after its passage is not a law impairing the obligation of a contract within the meaning of the federal constitution. *Sherman v. Smith*, 1 Black, 594. See § 42.

§ 83. **Where the charter so provides the debts of the holder must be paid before transfer.**— Where the charter of a bank provides that transfers of stock shall not be made while the holder is indebted to the bank on any demand past due without the consent of the president and directors, an action will not lie against the bank for its refusal to transfer a small portion of the stock of a stockholder before a debt due from him to the bank is satisfied, though the amount of the balance of the stock is far in excess of the debt. *Pierson v. Bank of Washington*, 8 Cr. C. C., 334.

§ 84. **Bank must have notice of transfer before third parties are bound.**— Where the charter of a bank provides that stock shall be transferable at the bank, the clause is construed to mean at the bank only, and the delivery of the stock certificate with a power of attorney confers no title as far as the bank is concerned; and the interest of the owner may be attached in the hands of the bank, notwithstanding such transfer, unless the shares were transferred at the bank, or the bank had notice of the transferee's title before the attachment. *Williams v. Mechanics' Bank of New Haven*, 5 Blatch., 61.

§ 85. **Where the charter of a bank provides that stock shall only be transferred upon its books, and that the bank shall have a lien on the stock for debts due to it from the holder, no person can acquire a legal title to any shares except upon a regular transfer according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, and he is bound to take notice of the provisions of the charter relating to such transfer.** Neither does the bank waive its lien by taking other security of the shareholder. *Union Bank v. Laird*, 2 Wheat., 398. See §§ 81, 91.

§ 86. **Liability of stockholders for debts of bank.**— Where the charter of a bank provides "that the persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of the bills and notes of the bank at any time issued, in proportion to the number of shares that each individual may hold and possess," such stockholders are liable as principals and not as sureties, and are liable for the full amount of bills presented to the bank and not paid, even though the funds of the bank in the hands of the assignee are not exhausted. *Hatch v. Burroughs*, 1 Woods, 443. See §§ 44, 47.

§ 87. **Unpaid subscriptions are a trust fund.**— The unpaid subscriptions of stockholders in a bank are a trust fund for the benefit of the creditors of the bank. The power to call in such unpaid balance, or not, is not within the discretion of the bank, and such stockholders are liable for such unpaid balance at the suit of creditors who have exhausted their other remedies. *Marsh v. Burroughs*, 1 Woods, 468.

§ 88. **When transfer of stock will be compelled.**— The charter of a bank provided that its original subscriptions should be made only in the name of the real party in interest, that all transfers of stock should be made upon the books of the bank, and that no stock should be transferred if the holder was indebted to the bank, unless by consent of the president and di-

rectors. A person held stock in his own name on the books of the bank, but, as was known to the bank, he held it only as trustee. Both trustee and *cestui que trust* desired the transfer of such stock to the *cestui que trust*, but the bank refused to make the transfer, on the ground that the trustee was indebted to the bank on a private debt. *Held*, that such refusal on the part of the bank was unjustifiable, and that equity would compel the transfer. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 307.

§ 89. A court of equity will compel a bank to open its transfer books, and permit a transfer of its stock, which it has refused. *Ibid*.

§ 90. State cannot take assets until debts are paid, although it be the sole stockholder.—Where a state furnishes all the capital of a bank, and is its only stockholder, it can withdraw no part of such capital when the bank becomes insolvent, any more than a private stockholder. When a bank becomes insolvent its capital no longer belongs to the stockholders, but becomes a trust fund for the payment of its debts. So where a state, which is the sole stockholder of a bank which becomes insolvent, passes any law which withdraws any part of the capital of the bank, or which disposes of it in any way other than for the benefit of the creditors of the bank, such law is a violation of the implied contract that the capital stock shall be applied only to the debts of the bank, and is consequently unconstitutional. *Curran v. State of Arkansas*, 15 How., 315; *Barings v. Dabney*, 19 Wall., 9. See § 72. The fact that the bonds of the state were sold to furnish the capital of the bank does not make the state a creditor so that the capital may be used in payment of such bonds to the exclusion of those holding the bank's unredeemed bills. Nor can the state divest the bank of its title to its lands and revest it in the state. *Ibid*.

§ 91. Bank has no lien on its stock.—The Union Bank of Alexandria, before incorporation, and while it was a private banking firm, had no lien on the shares of a stockholder for his debts to it. *Neale v. Janney*, 2 Cr. C. C., 189. See §§ 81, 85, 287, 288, 318-320. See CORPORATIONS.

IV. CASHIER.

SUMMARY.—*Powers and duties of*, §§ 92, 94, 96.—*Bank liable for money had and received*, § 93.—*Cannot bind bank by indorsement of his own paper*, § 95.—*Can receive nothing but money*, § 96.—*Power to indorse and transfer securities*, § 97.

§ 92. A cashier, without being thereunto specially authorized by the board of directors, cannot bind his bank by a letter representing that the bank has empowered one of the directors to contract on its behalf. The cashier is the executive officer of the bank by whom its funds are kept, its debts received and paid, and its securities taken and transferred. *United States v. City Bank of Columbus*, §§ 99, 100.

§ 93. If the cashier, without authority to so do, purchases coin for his bank, and it actually goes into the bank, the latter is liable for money had and received, notwithstanding such lack of authority upon his part. *Merchants' Bank v. State Bank*, §§ 101-118.

§ 94. Where the act of the cashier is within the power of the bank, and within the apparent sphere of his duties, any limitation upon his authority would not affect those to whom such limitation was unknown. *Ibid*. See §§ 127, 128.

§ 95. The cashier cannot bind his bank as an accommodation indorser of his own promissory note. There are no presumptions in favor of any such delegation of power; and a purchaser of such paper takes it with notice of a possible want of power. *West St. Louis Savings Bank v. Shawnee County Bank*, § 119. See § 126.

§ 96. A cashier, by virtue of his office, in the settlement of a debt due the bank, can take nothing but money. His authority is a limited one. When he acts outside of that limit, his authority, like that of any other agent, must be shown. *Sandy River Bank v. Merchants', etc., Bank*, § 120. See § 321.

§ 97. The defendant bank loaned some money to C., and took as collateral security what purported to be a certificate for two hundred shares of stock. The certificate was originally a genuine certificate for two shares. C. subsequently paid the loan, and the cashier of the bank transferred to him the certificate, with the usual printed form of transfer on the back, signed by the cashier officially. C. afterwards obtained a loan from M., the plaintiff, and gave him the certificate as security. C. was declared a bankrupt, and M. sued the bank for the damages sustained. *Held*, that the act of the cashier was within the scope of his authority, and that the bank was liable. *Matthews v. Massachusetts National Bank*, §§ 121-125. See §§ 138, 246, 247.

§ 98. The acts of a cashier, within the scope of the general usage, practice and course of business, will in general bind the bank in favor of third persons having no other knowledge. The signature of the cashier in this case was the signature of the bank, and so far a warranty of the genuineness of the certificate as to estop the bank from setting up the forgery. *Ibid*.

[NOTES.—See §§ 126-148.]

UNITED STATES v. CITY BANK OF COLUMBUS.

(21 Howard, 356-366. 1858.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

§ 99. *Cashier has not authority to bind the bank by a letter representing that a director has authority from the bank to contract on its behalf.*

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—The only question arising on this record is whether the court erred in so much of the charge to the jury as is set out in the bill of exceptions. Objections were taken in the course of the trial to testimony, but no exceptions were taken to the rulings of the court upon them. The declaration in the case contained two counts, one of them alleging that a contract had been made between the City Bank of Columbus and the United States, by which the bank agreed, on the 1st November, 1856, to transfer \$100,000 of the public money from New York to New Orleans by the 1st of January, 1851, free of charge; and the other account for money had and received by the bank for the use of the United States. The charge given by the court was confined to the first count. The bill of exceptions sets out the following evidence, which was introduced by the United States to show a contract with the bank. The following letter was written by the cashier of the bank:

CITY BANK OF COLUMBUS,
COLUMBUS, OHIO, 26th October, 1850.

SIR: The bearer, Colonel William Miner, a director of this bank, is authorized, on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of \$100,000. He is also authorized, if consistent with the rules of the treasury department, to contract, on behalf of this institution, for the transfer of money from the east to the south or west, for the government.

I have the honor to be, sir, your obedient servant,

HON. THOMAS CORWIN,

THOMAS MOODIE, Cashier.

Secretary of Treasury, Washington City.

This letter was presented by Mr. Miner to Mr. Corwin on the 1st of November, 1850. On the same day Mr. Corwin wrote to Mr. Miner the following letter:

TREASURY DEPARTMENT, November 1, 1850.

SIR: Your proposition of this date, to transfer \$100,000 from New York or Philadelphia to New Orleans, by the 1st January next, free of charge to the department, is accepted. You will receive herewith a transfer draft on the assistant treasurer at New York, in favor of the assistant treasurer at New Orleans, for \$100,000, with the authority indorsed to make the payment at New York to you.

I am, very respectfully,

THOMAS CORWIN, Secretary.

This was followed by an undertaking for the transfer of \$100,000 for the government from New York to New Orleans.

WASHINGTON CITY, November 1, 1850.

This will certify that I have contracted with the United States treasury, as the agent of the City Bank of Columbus, to transfer \$100,000 from New York to New Orleans, to be deposited in the treasury at the latter-named city by the 1st day of January, 1851, free of charge. I have, in pursuance of said contract, this day received a draft in my own hand for \$100,000 on the treasury at New York city, which is to be accounted for in said contract.

WILLIAM MINER.

Miner received the draft and cashed it in person on the 2d November, 1850; but what he did with it no one knows, or this record does not show. It is certain that it was not repaid in New Orleans according to the contract; and there are no proofs on this record which can raise a presumption that the Bank of Columbus ever received a dollar of it. There is proof that Miner was all that time a director of the bank, and that Moodie, who gave him the letter to the secretary of the treasury, was the cashier, and that he signed his name to the letter as cashier, and that the letter had been copied into the letter book of the bank. A by-law of the bank was also put in proof to show that it might be inferred from it that he had authority, as cashier, to empower Mr. Miner, as a director of the bank, to enter into such a contract as he had made with the secretary of the treasury. The by-law is: "A committee of two shall be appointed every six months to advise with the president and cashier. In their absence, all the ordinary business of the bank may be done by the president and cashier; and if either of them be not present, then by the other alone; but any discount, negotiation, or contract, whether made by the board or committee, is to be done by the consent of all present." It was also shown that there had not been a meeting of the directors in either July or August, 1850. That there had been a meeting on the 21st September, 1850, and another November 4, 1850, nine days before the cashier gave his letter to Miner, and three days after the date of Miner's contract to transfer the money from New York to New Orleans. The minutes of the bank, as kept by the cashier, of the meetings of the directors, do not show any intention upon the part of the directors to enter into a contract for the purpose of buying stock of the United States, or for the transmission of the money of the United States from the east to the south or west, as Moodie expresses it in his letter; or that after the negotiation of Miner, and his receiving the money from the assistant treasurer in New York, that the directors or president of the bank had any knowledge of the transaction until after Miner's default to pay the amount at New Orleans. Moodie testifies that he wrote the letter of the 26th of October, 1850, for Miner to negotiate with the secretary of the treasury, without the knowledge of the president or any of the directors of the bank, except Miner himself, and that the fact that such a letter had been written was not communicated by him to any of the directors until January after, though he had caused a copy of it to be put in the letter book. All of the directors, at the time of the transaction, have sworn that Moodie had not been authorized by the board or by any of themselves to constitute Miner such agent; that they had no knowledge of Moodie's letter, and that they never sanctioned the same. And there is other testimony in the case, that Moodie, as cashier, had not the power to depute Miner for any such purpose, and that it would not have been done but by a resolution of the board of directors. Upon this evidence, and some other which it is not material to notice, the court charged the jury. After they had retired, and consulted for some time, they came into the court and asked for further instructions, and the court gave them the following charge in reference to the contract set out in the first count of the declaration: "That if they should find that the letter written by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier, except such as belonged to

the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the secretary had, in contracting with Miner, relied upon it as the act of the bank."

§ 100. *Cases defining the powers and duties of cashier.*

To this charge the plaintiff excepted, and, on account of that exception alone, the case has been brought to this court by writ of error. In our opinion, no charge could have been more comprehensive of the merits of the case, more precise in its application to the particulars of the testimony introduced by the plaintiff and the defendant, or more expressive of what the law is upon such a state of facts. It is all that the litigants could have expected, and is liberal to both. It is also in coincidence with the views generally entertained of the powers and duties of the cashiers of banks, by those most familiar with the management and business of banks, and perfectly so with such as have been expressed by this court in previous reported cases. In *Fleckner v. The Bank of the United States*, 8 Wheat., 338, 356, 357, this court said, the charter authorizes the president and directors to appoint a cashier and other officers of the bank, and gives the president and directors, or a majority of them, full power and authority to make all such rules and regulations for the government of the affairs and conducting the business of said bank as shall not be contrary to the act of incorporation. It contains no regulations as to the duties of cashiers; with the directors it would rest to fix the duties of cashier or other officers. Whether they have made any regulation upon this subject does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty. In the case of *Bank of the United States v. Dunn*, 6 Peters, 51, the court would not permit the president and cashier of the bank to bind it by their agreement with the indorser of a promissory note, that he should not be liable on his indorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which they may think proper in loaning money. The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business.

The term ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create

an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary. The case of *Kirk v. Bell* (12 Eng. Com. L. R., 389), and that of *Hoyt v. Thompson*, were very appropriately cited by the counsel of the appellee, in this connection; and we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is to test that fact by an inquiry into the corporate ability which has been given to them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them. Such was the view of this court when it decided, in the case of *The Bank of the United States v. Dunn* (6 Pet.), that a release given by its president and cashier to the indorser of a promissory note, of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind. The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the president or directors of the company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the City Bank of Columbus became a corporation does not, in any part of it, give any power to a cashier to act independently of the directors. No specific power is given to the directors to appoint a cashier. In the general power given to the directors to appoint officers to do the ordinary business of the bank, they have an authority to appoint a cashier, and such an appointment is a limitation of that officer's executive function in doing the business of the bank. It cannot be pretended that the directors, as a whole, or any one of them, except Miner, consented to the cashier's designation of Miner for any such purpose as was concluded between them, to induce the secretary to believe that Miner was the agent of the bank, either to buy stock of the United States or to enter into contracts for the transmission of money, free of charge, to those posts where the United States should designate it to be put. Such a power in the secretary of the treasury is a necessary one for the transaction of the business of the government, pervading, as it does, every part of the country. The exercise of it, however, requires great care and caution in the selection of agents for such a purpose, and no authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into such a contract with the secretary.

The United States, as plaintiff in this action, has failed to establish the contract which it alleges in its declaration had been made with the City Bank of Columbus, for the transmission of money; and we direct the judgment given in the court below to be affirmed.

MERCHANTS' BANK v. STATE BANK.

(10 Wallace, 604-676. 1870.)

ERROR to U. S. Circuit Court, District of Massachusetts.

The facts are stated in the opinion, and in the dissenting opinion.

§ 101. *Instruction that plaintiff is not entitled to recover, when proper.*

Opinion by MR. JUSTICE SWAYNE.

This is a writ of error to the circuit court of the United States for the district of Massachusetts. The plaintiff in error was the plaintiff in the court below. It appears, by the bill of exceptions, that, upon the evidence in behalf

of the plaintiff being closed, the defendant's counsel moved the court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration. This instruction was given. The jury found for the defendant. The plaintiff excepted, and has brought that instruction here for review. This renders it necessary to examine the entire case as presented in the record. According to the settled practice in the courts of the United States, it was proper to give the instruction, if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court. The facts disclosed in the bill of exceptions are neither numerous nor complicated. The defendant called no witnesses. There is no conflict in the testimony. The questions which it is our duty to examine are questions of law. None are made upon the pleadings, and it is unnecessary to consider them. It is sufficient to remark that the declaration is so framed as to meet the case in every legal aspect which it can assume.

STATEMENT OF FACTS.—On the 26th of February, 1867, Fuller, the plaintiff's cashier, received from the Second National Bank of Boston \$200,000 of gold certificates, and paid the bank, upon their delivery, the amount of their face and a premium of twenty-five per cent. Payment was made in currency and legal tender notes. The next day he received from the same bank \$200,000 more of like certificates, and paid for them at the same rate in currency and a ticket of credit by the Merchants' Bank in favor of the National Bank for \$175,000. Both transactions were pursuant to an arrangement with Mellen, Ward & Co., brokers, in Boston. The market premium upon gold at that time was forty per cent. It was understood between Fuller, the cashier, and Mellen, Ward & Co. that the latter might receive the same amount of gold from the Merchants' Bank, at any time thereafter, by paying the amount advanced, compensation for the trouble the bank had incurred, and interest at the rate of six per cent. There had been like transactions upon those terms between the parties prior to that time. The president of the bank was consulted in advance as to both the purchases from the Second National Bank, and approved them. The following testimony is taken from the record:

"George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the 1st of January, 1867, and previous to the 23d of February, the bank several times received gold or gold certificates from Mellen, Ward & Co., for which it paid currency at the rate of \$125 for \$100 in gold. At that time they had deposited in the bank about \$90,000 in gold. No note, memorandum or check was taken, connected with it in any way. The gold was added to the gold of the bank; on my cash book it was added to the item of gold, and the gold was mixed with the gold of the bank in the vault. If it consisted of certificates, they were put in a pocket-book kept in my trunk with other certificates and bills. (The paying teller's book was put in, and from the entries in it on the 26th, 27th and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co. was added to the gold of the bank.)" On the 28th day of February, Carter, of the firm of Mellen, Ward & Co., and Smith, the cashier of the State Bank, called together at the Merchants' Bank. Carter said to Fuller, "We have come in for gold." Smith, the

cashier, said, "We have come to get an amount of gold," and that he would "pay for it by certifying these checks," referring to two papers which Carter held in his hand. The teller handed Fuller eighty-four gold certificates of \$5,000 each, making the sum of \$420,000. Fuller announced the amount. Smith said that was the amount wanted and the amount covered by the checks. He received the certificates, certified the checks, and handed them over to the plaintiff's cashier. They were drawn by Mellen, Ward & Co. upon the State National Bank in favor of Fuller, the plaintiff's cashier, or order, and were certified, "Good; C. H. Smith, cashier." One was for \$250,000 and the other for \$275,000. Smith thereupon left the bank with the certificates in his possession. Nothing was said by Fuller to Carter, or by Carter to Fuller, in relation to the checks, and Fuller did not know what checks Smith referred to until they were delivered to him. Smith did not certify or deliver the checks until he had got possession and control of the funds upon which his certificates were apparently founded, and this was known to the plaintiff's agent when he received the checks. Later, on the same day, Smith and Carter called again at the Merchants' Bank. Fuller was absent. Smith received \$60,000 more of gold and gold certificates from the teller, and gave in return a check for \$75,000, drawn by Mellen, Ward & Co. on the State Bank, payable to "gold or bearer." Like the two previous checks, it was certified, "Good; C. H. Smith, cashier." This arrangement was in pursuance of the same agreement as that under which the gold certificates were delivered in the earlier part of the day. Both transactions were alike within its scope.

On the 1st of March, Havens, the president of the Merchants' Bank, called at the State Bank and complained that Smith had not paid the checks. Smith said he was going out to get the money. Havens inquired, "Didn't you have the money—the gold? Were not gold certificates delivered to you?" He answered, "Yes; I had them here, but they are not here now. I am going out to get it, and will come in and attend to it." Subsequently, in the same conversation, he said, "You hold the State Bank." Later in the day Havens called upon Stetson, the president of the State Bank. Stetson denied that Smith was authorized to certify the checks, and appealed to a director who was present. The director was silent. In an account which Fuller rendered to Mellen, Ward & Co. after their failure, showing the disposition of various collaterals which Mellen, Ward & Co. had deposited from time to time with the Merchants' Bank, the amount paid for gold was put down as a loan, and interest was charged; but in his testimony before the jury he denied that the money was loaned, and insisted that the gold was bought by the Merchants' Bank. The agreement between Mellen, Ward & Co. and the Merchants' Bank rested wholly in parol. No written voucher was given or received on either side touching any of the transactions between the parties. The record discloses nothing else in this connection which it is material to consider.

The State Bank was organized under the act of congress "to provide a national currency," etc., of the 3d of June, 1864. 13 Stat. at Large, 99. The eighth section of that act authorizes such associations, by their directors, to appoint a cashier and other officers, and to exercise, "under this act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of this act," etc. It is further

provided that the directors may, by by-laws, regulate the manner in which its business shall be conducted and its franchises enjoyed; and that its general business shall be transacted at an office "located in the place specified in its organization certificate." The fifth of the articles of association authorizes the board of directors to appoint a cashier and such other officers as may be necessary, and to define their duties. The seventh by-law declares that the cashier "shall be responsible for the moneys, funds and other valuables of the bank, and shall give bond," etc. The seventeenth by-law requires that all "contracts, checks, drafts, receipts, etc., shall be signed by the cashier or by the president, and that all indorsements necessary to be made by the bank shall be under the hand of the cashier or president," unless absent. The by-laws contain nothing further upon this subject. The directors failed to define more specifically the powers and duties of the cashier.

Smith, the defendant's cashier, exercised habitually very large powers without any special delegation of authority. An account was kept on the books of the bank with him as cashier, which represented these transactions, and printed blank checks were kept in the bank to facilitate them. The checks given by him for the proceeds of bills discounted and for the purchase of exchange during the five months preceding the 23d of February, 1867, amounted in the aggregate to two and a half millions of dollars. This was exclusive of his clearing house checks. His checks for money borrowed of other banks, during the six months preceding the same 23d of February, amounted to \$1,547,000. A large number of the cashiers of other banks in Boston were examined, and testified that they exercised the same powers under like circumstances. There is no proof that either they or Smith ever certified checks. It is not shown what became of the gold. Perhaps some light is thrown on the subject by the remark of the president of the Merchants' Bank to the president of the State Bank, "that the latter had better go to the sub-treasury, and that he would perhaps find his gold there." We find no reason to doubt that both banks, as represented by their cashiers, acted in entire good faith throughout the transactions, until they were closed by the delivery of the last of the certified checks. Neither could then have anticipated the difficulties and the conflict which subsequently arose.

The first question presented for our consideration is, what was the title of the plaintiff, and what were the rights of Mellen, Ward & Co., in respect to the gold certificates delivered by the Second National Bank to the Merchants' Bank? No very searching analysis of the facts disclosed is necessary to enable us to find a satisfactory answer to this inquiry. It does not appear that Mellen, Ward & Co. had any connection with the certificates received from the Second National Bank until after the plaintiff took the action which they invoked, and came into possession of the property.

§ 102. *Where a bank made a contract for the purchase and delivery of gold certificates, but it was not agreed that the identical certificates should be delivered, the bank cannot be regarded as holding the certificates in pledge.*

The Merchants' Bank applied for them, bought them, paid for them, received them, and deposited them with its other assets of like character. It does not appear that any special mark was put upon them, or that anything was done to distinguish them from the other effects of the bank with which they were mingled. Upon the face of the transaction it was a simple sale by the Second National Bank, whereby the entire title and property became vested in the plaintiff. But gold was then at a premium of forty per cent. in currency.

The Merchants' Bank paid, but twenty-five, according to the contract between the bank and Mellen, Ward & Co. The latter were to pay, and it is to be presumed did pay, the additional fifteen per cent. This was a part of the consideration upon which the Merchants' Bank entered into the contract. It is evident that the bank did not agree to deliver to Mellen, Ward & Co. the identical gold certificates which were purchased, but gold, or its equivalent in certificates, to the same amount, and any gold or any certificates would have satisfied the contract. The bank cannot, therefore, be regarded as holding the certificates in pledge. The want of the element, that the identical certificates were to be delivered, is conclusive against that view of the subject. If Mellen, Ward & Co. had tendered performance and called for gold, and the bank had failed to respond, Mellen, Ward & Co. could have sustained an action for the breach of the contract. But they could not have maintained detinue, trover or replevin against the bank. The real character of the transaction was that the bank took the title and entire property, but Mellen, Ward & Co. had the right to purchase from the bank the like amount of gold, or its equivalent in certificates, according to the terms of the contract, which were, that they should pay what the bank paid, compensation for its trouble, and interest from the time the purchase by the bank was made.

In respect to the \$60,000 of gold and gold certificates delivered by the teller in the absence of the cashier, and the excess of gold certificates over \$400,000 delivered by the cashier, the facts are substantially the same as those in regard to the \$400,000, except that the excess of certificates and what was delivered by the teller had reference to gold and gold certificates deposited in the bank by Mellen, Ward & Co. This difference is not material. With this qualification the same remarks apply which have been made touching the \$400,000 of certificates, and we are led to the same legal conclusions. The transactions between the State Bank and the Merchants' Bank were apparently of the same character as that between the Merchants' Bank and the Second National Bank. What the understanding between Mellen, Ward & Co. and the defendant was is not disclosed in the evidence. But it is fairly to be inferred that it was the same as that between them and the Merchants' Bank. When the arrangement was proposed by Carter to Fuller, on the 22d of February, Carter said that "when the gold was taken from the Merchants' Bank he thought it would go through some other bank or banks." The assent of Mellen, Ward & Co. to the sale to the State Bank by the Merchants' Bank extinguished their claim upon the latter. The Merchants' Bank certainly had a title of some kind, and whatever it was it passed to the State Bank unless the contract was void, because the State Bank had no corporate power, or its cashier had no authority to make the purchase. The act of congress expressly authorizes the banks created under it to buy and sell coin. No question of *ultra vires* is therefore involved.

§ 103. *The holder of a pledge has a special property which may be sold and assigned; and the assignee becomes invested with all the legal rights of the assignor.*

If the Merchants' Bank held the certificates as a pledge, it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period. *Mores v. Conham*, Owen, 123; *Anon.*, 2 Salk., 522; *Coggs v. Bernard*, 3 id., 268; *Whitaker v. Sumner*, 20 Pick., 399, 405; *Thompson v. Patrick*, 4 Watts, 415; *Story on Bailm.*, § 324. But we are entirely satisfied with the other view we have expressed upon the subject. *Modus et conventio vincunt legem*. It is insisted by

the defendant's counsel that the transaction was a loan to Mellen, Ward & Co. As the bank parted with its title, if there were a loan in the eye of the law, it would not in any wise affect the conclusions at which we have arrived.

§ 104. *If a cashier, without authority, buy coin for his bank and the bank receive it, then the bank is liable for money had and received.*

Recurring to the subject of the authority of the cashier of the State Bank to make the purchase, and excluding from consideration for the present the certified checks, three views, we think, may be properly taken of the case in this aspect:

1. If the certificates and the gold actually went into the State Bank, as was admitted by Smith to Havens, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury.

2. It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank.

§ 105. *Rights of a party dealing with a corporation.*

3. Where a party deals with a corporation in good faith — the transaction is not *ultra vires* — and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. The jury should have been instructed to apply this rule to the evidence before them. The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court. *Supervisors v. Schenck*, 5 Wall., 784; *Knox Co. v. Aspinwall*, 21 How., 539; *Bissell v. Jeffersonville*, 24 id., 288; *Moran v. Commissioners*, 2 Black, 722; *Gelpcke v. Dubuque*, 1 Wall., 203; *Mercer Co. v. Hackett*, id., 93; *Mayor v. Lord*, 9 id., 414; *Royal British Bank v. Turquand*, 6 Ell. & Black., Q. B. & Ex., 327; *The Farmers' Loan and Trust Co. v. Curtis*, 3 Seld., 466; *Stoney v. American Life Ins. Co.*, 11 Paige, 635; *Society for Savings v. New London*, 29 Conn., 174; *Commonwealth v. The City of Pittsburg*, 34 Penn. St., 497; *Commonwealth v. Allegheny County*, 37 id., 287.

§ 106. *Corporations are liable for their torts.*

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *Philadelphia & Baltimore Railroad Co. v. Quigley*, 21 How., 209; *Green v. London Omnibus Co.*, 7 C. B., N. S., 290; *Life and Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend., 31.

§ 107. *Corporations are liable for the acts of their servants.*

Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances. *Ranger v. The Great Western Railway Co.*, 5 House of Lords Cases, 72; *Thayer v. Boston*, 19 Pick., 511; *Frankfort Bank v. Johnson*, 24 Me., 490; *Angell & Ames on Corp.*, §§ 382, 388. Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon

another. *Swan v. The British North Australasian Company*, 7 Hurlst. & Nor., 603; *Hern v. Nichols*, 1 Salk., 289. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result. *Dezell v. Odell*, 3 Hill, 216.

§ 108. *He who trusts another with powers that enable him to commit a fraud ought to suffer, rather than the injured party.*

Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party. *Farmers' and Mechanics' Bank of Kent Co. v. Butchers' and Drovers' Bank*, 16 N. Y., 133; *Welland Canal Co. v. Hathaway*, 8 Wend., 480. In the *Bank of the United States v. Davis*, 2 Hill, 465, Nelson, Chief Justice, said: "The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud." The director had fraudulently appropriated the proceeds of a bill discounted for the drawer. It was held the drawer was not liable. The reasoning of Justice Selden in the *Farmers' and Mechanics' Bank of Kent Co. v. The Butchers' and Drovers' Bank*, *supra*, is also strikingly apposite in the case before us. He said: "The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, *so far as is known or can be seen by the party dealing with him*, he is guilty of misrepresentation, ought not the bank to be responsible?" The same principle was applied in the *New York & New Haven Railroad Co. v. Schuyler*, 38 Barb., Supreme Court, 536; S. C., affirmed, 34 N. Y., 30. It was explicitly laid down by Lord Holt, in *Hern v. Nichols*, 1 Salk., 289. He there said: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger," "and upon this the plaintiff had a verdict." Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him.

§ 109. *Bank checks are not inland bills of exchange, but have many of their properties.*

We have thus far examined the controversy as if the certified checks were void or had not been given. It remains to consider that branch of the case. Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropri-

ation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. Grant on Banking, 89, 90; Keene v. Beard, 8 C. B., N. S., 372; Serle v. Norton, 2 Moody & Rob., 404, n.; Boehm v. Sterling, 7 Term, 430; Alexander v. Burchfield, 7 Man. & Grang., 1067. All the authorities, both English and American, hold that a check *may be* accepted, though acceptance is not usual. Robson v. Bennett, 2 Taunt., 395; Grant on Banking, 89; Ch. on Bills, 10th ed., 261; Boyd v. Emmerson, 2 Adolph. & Ell., 184; Kilsby v. Williams, 5 Barn. & Ald., 816; Story on Promissory Notes, §§ 489, 490.

§ 110. *The certification by a bank that a check is good is equivalent to acceptance.*

By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in "a certified check account," and when the check is paid to debit that account with the amount. Nothing can be simpler or safer than this process. The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money. It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity. Our conclusions as to their legal effect are supported by authorities of great weight. Bickford v. First National Bank, 42 Ill., 238; Willets v. Phoenix Bank, 2 Duer, 121; Barnet v. Smith, 10 Foster, N. H., 256; Meads v. Merchants' Bank, 25 N. Y., 143; Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 4 Duer, 219; affirmed, 14 N. Y., 624; Brown v. Leckie, 43 Ill., 497; Girard Bank v. Bank of Penn Township, 39 Penn. St., 92. Congress has made them the subject of taxation by name. 13 Stat. at Large, 278.

§ 111. *Where the act of the cashier is within the powers of the bank itself, any limitation of his authority will not affect those to whom the limitation is unknown.*

But it is strenuously denied that the cashier had authority to certify the checks in question. To this there are two answers: 1. In considering the ques-

tion of his authority to buy the gold, the evidence that he had given his checks for loans to his bank, and for the proceeds of discounts, was fully considered. Our reasoning and the authorities cited upon that subject apply here with equal force. We need not go over the same ground again. The questions whether the requisite authority was not inferable, and whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury. 2. As before remarked, the organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible "for the moneys, funds and all other valuables of the bank;" and that "all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier or president." The power of the bank to certify checks has also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. *Wild v. The Bank of Passamaquoddy*, 3 Mason, 506; *Burnham v. Webster*, 19 Me., 234; *Elliot v. Abbot*, 12 N. H., 556; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Lloyd v. The West Branch Bank*, 15 Penn. St., 172; *Badger v. The Bank of Cumberland*, 26 Me., 428; *Bank of Kentucky v. The Schuylkill Bank*, 1 Parsons' Select Cases, 182; *Fleckner v. Bank of the United States*, 8 Wheat., 360.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501; *Bank of Vergennes v. Warren*, 7 id., 94; *Beers v. The Phoenix Glass Company*, 14 Barb., 358; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 14 N. Y., 624; *North River Bank v. Aymar*, 3 Hill, 262, 268; *Barnes v. Ontario Bank*, 19 N. Y., 156, 166. The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly. In *Barnes v. The Ontario Bank*, 19 N. Y., 156, the cashier had issued a false certificate of deposit. In the *Farmers' and Mechanics' Bank v. The Butchers' and Drovers' Bank*, 14 N. Y., 624; *S. C.*, 16 N. Y., 133, and in *Mead v. The Merchants' Bank of Albany*, 25 N. Y., 143, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

§ 112. *The national currency act of 1864, as to the place of business of banks, does not invalidate checks certified by a cashier away from his banking house.*

It is objected that the checks were not certified by the cashier at his banking house. The provision of the act of congress as to the place of business of

the banks created under it must be construed reasonably. The business of every bank, away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection. *Bank of Augusta v. Earle*, 13 Pet., 519; *Pendleton v. Bank of Kentucky*, 1 T. B. Munroe, 182.

§ 113. *A certified check does not require an additional stamp.*

It is also objected that each of the checks, after being certified, required an additional stamp. The act of congress relating to the subject directs certified checks to be included in the circulation of the bank for the purpose of taxation. 13 Stat. at Large, 273, ch. 173, § 110. This is a conclusive answer to the objection. In *Brown v. London*, 1 Levinz, 298, judgment in a suit upon two accepted bills of exchange was arrested after verdict because "entire damages" were given, and the count, upon one of the bills, failed to aver that by the custom of merchants and others trading in England the acceptor was obliged to pay. This was in 1671. Other decisions in this class of cases, not less remarkable, are familiar to those versed in the learning of the elder reports. The *law merchant* was not made. It grew. Time and experience, if slower, are wiser law makers than legislative bodies. Customs have sprung from the necessities and the convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions. We have disposed of this case as it is before us. How far it may be changed in its essential character, if at all, by a full development of the evidence on both sides in the further trial, which will doubtless take place, it is not for us to anticipate.

The judgment below is reversed, and a *venire de novo* awarded.

MR. JUSTICE MILLER took no part in the decision.

. Dissenting opinion by MR. JUSTICE CLIFFORD, MR. JUSTICE DAVIS concurring.

Persons uniting to form an association for carrying on the business of banking are required, as a condition precedent to their right to do so, to make an organization certificate, specifying, among other things, the name assumed, by the association, the place where its operations of discount and deposit are to be conducted, designating the state, territory, or district, and also the particular county and city, town or village, and shall transmit the same, duly acknowledged, to the comptroller of the currency, to be recorded and carefully preserved in his office; and the provision is that the usual business of the association shall be transacted at an office or banking house located in the place specified in their organization certificate. 13 Stat. at Large, 101. Such an association, when duly organized, have a succession by the name designated in the organization certificate for the period of twenty years, and they may adopt a common seal, may make contracts, sue and be sued, complain and defend in any court of law or equity as fully as natural persons, and may elect or appoint directors, and may exercise all such incidental powers as may be necessary to carry on the business of banking. They may also, by their board of directors, appoint a president, vice-president, cashier and other officers, and define their duties, . . . and they may, by their directors, dismiss said officers, or any of them,

at pleasure, and appoint others to fill their places. By the terms of the act the directors shall consist of "not less than five," and the express enactment is that the affairs of the association shall be managed by the directors. Evidence that that requirement is regarded as one of importance, and that it is intended to be peremptory, is also found in the provision prescribing the qualifications of directors as well as in the one defining their duties. None but citizens of the United States are eligible under any circumstances, and the further regulation is that three-fourths of the number must have resided in the state, territory, or district, one year next preceding their election, and that they must be residents of the same during their continuance in office. Besides these guaranties of fidelity, the additional requirement is that each director shall own in his own right at least ten shares of the capital stock, and when appointed or elected shall make oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of the act under which the association was formed. 13 Stat. at Large, 102. Organized under that act, as both of these banks were when they assumed the name and character of national associations, they are both subject to its provisions and bound by its regulations.

STATEMENT OF FACTS.—Three checks were held by the plaintiffs, each dated Boston, February 28, 1867, and signed, Mellen, Ward & Co., with the words, Good — C. H. Smith, cashier, written across the face of the checks. Separately described they read as follows: (1) State National Bank pay to J. K. Fuller, cashier, or order, two hundred and fifty thousand dollars. (2) State National Bank pay to J. K. Fuller, or order, two hundred and seventy-five thousand dollars. (3) State National Bank pay to gold, or bearer, seventy-five thousand dollars. Smith was the cashier of the defendant bank, and the plaintiffs claimed that the defendants, inasmuch as Mellen, Ward & Co. had failed, were liable to pay the whole amount, as the words written across the face of the respective checks were in the handwriting of their cashier; and the defendants refusing to pay the same as requested, the plaintiffs commenced an action of *assumpsit* against them in the circuit court, the declaration containing eleven counts. Eight of the counts are founded upon the checks, of which it will be sufficient to refer to the first, which alleges in substance that the signers of the checks made the same to enable the defendant bank to obtain from the plaintiff bank certain gold certificates held by the latter, of great value, and that the plaintiff bank received the checks and delivered to the defendant bank the gold certificates, and that the defendants, in consideration thereof, declared that the checks were good, and promised to pay the same on presentment, as more fully set forth in the record. Two of the counts, to wit, the ninth and tenth, allege a sale and purchase of the gold certificates for the sum of \$600,000, and that the defendants have refused to pay as they promised. Superadded to these is a count for money had and received for the same amount, which is in the usual form. Process was issued and served, and the defendants appeared and pleaded the general issue, and upon that issue the parties went to trial.

Pursuant to the usual course the plaintiffs introduced the checks described in the declaration, and examined the officers of their bank in support of the cause of action therein set forth. They also read from the books of the defendant bank, produced for their use by the order of the court passed on their motion, the fifth of the articles of association of that bank, and article seventeen of their by-laws. Besides the officers of their own bank, they also examined

the book-keeper of the defendant bank in respect to the account of their cashier as exhibited in the general ledger of the bank. Twenty-two of the cashiers of the national banks doing business in that city were also examined by the plaintiffs in respect to the powers of a cashier as exemplified in the usage there of such institutions, no one of whom testified that he, as cashier of a national bank, ever certified as good the check of a third person under any circumstances. Certain other exhibits were also introduced in the course of the examination or cross-examination of the witnesses, as for example the letter of the president to the comptroller of the currency, and the exchange slip, so called, showing that the checks in suit were not sent to the clearing-house with the other transactions of that day, and that they remained in the hands of the paying teller until the president took the same the next day to present them to the State Bank. No testimony was introduced by the defendants, but the court, when the plaintiffs rested, on the prayer of the defendants, instructed the jury that the plaintiffs, on the whole evidence, were not entitled to recover, and the jury, under that instruction, returned a verdict for the defendants. Exceptions were taken by the plaintiffs to that ruling, and they sued out a writ of error and removed the cause into this court.

§ 114. *Peremptory non-suit.*

Power to grant a peremptory non-suit is not vested in a circuit court, but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and that their verdict should be for the defendant, as was done in this case. Such a motion is not one addressed to the discretion of the court, but it presents a question of law which it is the duty of the court to decide in view of the whole evidence, and the decision of the court in granting or refusing the motion is as much the subject of exceptions as any other ruling of the court in the course of the trial. In considering the motion, the court proceeds upon the ground that the facts stated by the witnesses examined by the plaintiff are true, but that those facts as proved, with every inference which the law allows to be drawn from them, would not warrant the jury in finding a verdict in his favor. When viewed in that light, the plaintiff's case, as shown in the evidence, presents a question of law, and it is well settled by the decisions of this court, that it is the duty of the circuit court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as the foundation of a verdict. *Schuchardt v. Allens*, 1 Wall., 370; *Parks v. Ross*, 11 How., 362; *Bliven v. N. E. Screw Company*, 23 How., 433.

Founded, as the ruling was, upon the assumption that the cashier of the State Bank had no authority, under the circumstances, to certify the checks in suit, it becomes necessary to examine that question. Whether he had such authority or not presents a mixed question of law and fact dependent upon the evidence and the legal principles applicable to the case. Testimony was introduced by the plaintiffs showing that the president of the plaintiff bank exercised very comprehensive powers, including the loan of money, discounts and the general superintendence of all the affairs of the bank, he reporting and holding himself responsible to the directors for the performance of his duties. On Saturday, the 23d of February, 1867, the cashier of the plaintiff bank informed the president, as the latter testified, that Mellen, Ward & Co. were going to purchase in New York a large amount of gold, and that they desired to know whether the bank would take it as it arrived and pay for it at the rate

of \$125 in currency for every \$100 in gold. Inquiries were made upon the subject by the president and explanations were given to him by the cashier, but the result was that the president told the cashier that he might take the gold and pay for it on the same terms that he had taken gold on several previous occasions from the same parties. Reference is there made to the conceded fact that those parties had, at several times within two or three months previous, brought gold into that bank and received currency for it on the same terms as those proposed to the cashier, and the president testified that he told the cashier that he might take the gold as it arrived on the same terms, and that he, the cashier, might give the parties the right to come into the bank at any time afterwards "and take the gold from the bank, paying the bank for the gold \$125 in currency for every \$100 in gold, and such premium or compensation as would be equivalent to interest," taking no obligation or note of any kind, but to rely entirely on the purchase of the gold.

Two hundred thousand dollars of the gold arrived on the 26th of the same month, and the president states that he was informed by the cashier on that day that it was in the Second National Bank, in gold certificates. Not being familiar with such certificates he advised the cashier that he had better go to the office of the assistant treasurer and ascertain whether the certificates were correct before taking them, as previously arranged. On the following day \$200,000 more in similar certificates arrived, and similar directions were given by the president to the cashier. Due inquiry was made at that office in both cases, and all of the certificates, amounting to \$400,000, were received and transferred to the plaintiff bank. Correspondence ensued between the comptroller of the currency and the president of the bank, and the president, in reply to the letter of the comptroller, stated that on the 26th of the same month the cashier of the bank made an advance to Mellen, Ward & Co. of \$250,000 in legal tender notes and currency upon \$200,000 in gold certificates; that no note or security was taken for the amount of the advance except a check signed by the parties for \$50,000, to be kept in the teller's cash in order to balance his cash account; that on the following day a similar advance upon gold (certificates) was made by the cashier for the same amount to the same parties and in the same manner in all particulars, no note or obligation being taken for the amount so advanced. Prior to the first of these transactions the same parties, as the president states in the communication, had deposited in the bank the sum of \$90,000 in gold, and received therefor currency at the rate of \$125 for \$100 in gold, the bank taking no note or obligation on account of the transaction.

Fuller, the cashier, was also examined, and he testified that the inquiry whether the bank would take the gold on its arrival and pay for it was made of him by Carter, the junior member of that firm, and that he, the witness, stated to him to the effect that he could not answer the question; that he should have to consult the president in regard to it; that he did consult the president of the bank, and that the president told him that if it would not interfere with their ability to make their regular discounts he might take the gold on the same terms as the bank had taken gold of those parties on previous occasions. Notice was accordingly given to Mellen, Ward & Co. by the cashier, as he states, either on that day or on the Monday following, that the bank would afford them the accommodation.

Gold had been taken by the bank of that firm before, and the cashier testified that "they asked if the bank would take gold and pay for it at such time

as either party might wish — either the firm of Mellen, Ward & Co., or the Merchants' Bank — at \$125 currency for \$100 gold, *they paying the bank for the trouble, etc., a sum equal to the interest on the amount of the currency loaned*, and the witness, in response to that question, after having consulted the president, *said we would do it.*" Evidently both parties understood that the deposit of the gold with the bank was only for a brief period, and in confirmation of that theory the cashier also testified that Carter said to him, in their preliminary interview, that they, the firm, wanted the bank "to take the gold and pay for it, and that it would be taken away again in a few days, mentioning perhaps the last day of the month or the first day of the following month." He also admits that when the first instalment was received he took a check from the parties for \$50,000, but he says it was without the knowledge of the president. On the 28th of February, which was the last day of the month, at half-past one o'clock, Carter and the cashier of the defendant bank called at the plaintiff bank and went together to the desk of the cashier, they being outside of the counter. Carter said, "We have come for the gold." Smith, the cashier of the defendant bank, said, "We have come in to get an amount of gold," and that he would pay for it by certifying the two checks which he held in his hand when he saw that the gold was all right.

Responsive to that remark the cashier of the plaintiff bank said, step to the paying teller, and he did so, passing on the outside of the counter to that desk, the cashier of the plaintiff bank passing to the same desk on the inside of the counter, and that the latter said to the paying teller, the cashier of the State Bank has come to take some gold, and the paying teller immediately handed to the cashier of the plaintiff bank the package containing eighty-four gold certificates of \$5,000 each, saying, there are eighty-four in the package, to which Smith, the cashier of the State Bank, standing outside the counter, replied, that is the amount wanted, that is the amount of these checks. They were passed out to Smith and he certified the two checks and handed them to the cashier of the plaintiff bank. Both were certified in the bank by the cashier of the State Bank subsequent to the delivery to him of the gold certificates and not until he had examined the certificates; and the president, in his letter to the comptroller of the currency, states that the two checks, amounting to \$525,000, were certified as good "on the spot" by the cashier of the State National Bank. Davis, the paying teller of the plaintiff bank, was also examined by the plaintiffs, and he testified that the cashier on that day came down to his desk, on the inside of the counter, the cashier of the defendant bank, *accompanied by Carter*, being on the outside; that he, the paying teller, handed to the cashier of his bank eighty-four gold certificates of \$5,000 each; that the cashier counted the same and passed them over the counter to the cashier of the State Bank; that the cashier of the latter bank handed back two checks drawn by Mellen, Ward & Co. on the State National Bank, one for \$250,000, the other for \$275,000, certified "Good — C. H. Smith, cashier." They were handed to the cashier and by him to the paying teller, and by the latter to the receiving teller to be added to his account for that day.

Later on the same day, and after the cashier had left the bank, Ward, of the firm of Mellen, Ward & Co., called at the bank and said to the paying teller, "We shall want some more gold," and immediately left the bank, and in a few minutes the cashier of the State Bank and Carter, of the same firm, came in, and the former handed to the paying teller a check for \$75,000, signed by Mellen, Ward & Co., with the words, "Good — C. H. Smith, cashier," written

across the face of the check, which is the third check described in the declaration. Carter wrote the check in the bank at the desk for customers, situated outside the counter, and it was certified at the same time by the cashier of the State Bank before it was handed to the paying teller. The check, as the teller testified, called for \$60,000 in gold, and he states that he handed thirty thousand, to wit, \$10,000 in gold certificates and four bags of gold of five thousand each, to Smith, passing it over the counter, and that Carter took the gold and carried it away, but whether or not he also took the gold certificates he cannot state. Thirty thousand remained to be paid, and after Carter left, he, the teller, took from the vault of the bank six bags of gold, of five thousand each, and placed the same outside the counter in charge of Smith, he being the only person present. Some third person, however, came in while the gold was there, and the impression of the witness is that it was Mellen, of the firm of Mellen, Ward & Co., and that he assisted in carrying it away from the bank.

§ 115. *Power of cashier to certify checks.*

Evidently the first question upon the merits is whether the State Bank received the gold or the gold certificates, withdrawn from the Merchants' Bank, when the checks in suit were given; for if they did, or if they authorized their cashier to certify the same, they are clearly liable for the whole amount claimed by the plaintiffs. Evidence to show that they authorized their cashier to certify the checks is entirely wanting, and it is quite obvious from the whole case that neither the State Bank nor any of its officers, except the cashier, had the slightest knowledge of the transaction or of any of its incidents until the president of the plaintiff bank, at a quarter past two in the afternoon of the following day, presented the checks to the president of the State Bank for payment. When presented, the president of the State Bank took them and read them, and immediately replied that they had not authorized their cashier to certify checks, to which the president of the plaintiff bank rejoined in substance and effect as follows: "He has certified checks, and those checks were given to the Merchants' Bank for gold, the property of that bank, delivered to him, and that he," the president of that bank, "wanted payment for that gold." He did not pretend that they had conferred any actual authority upon the cashier to certify the checks, but evidently based his claim upon the ground of an implied legal liability, and there is not a scintilla of evidence in the case tending to show any express authority on the part of the cashier to certify the checks. Suppose that is so, still it is suggested that there is some evidence tending to show that the gold and gold certificates, when they were withdrawn from the Merchants' Bank, were transferred to, and actually deposited in, the defendant bank, and the argument is that the circuit court erred in not submitting that question to the jury.

Before the president of the plaintiff bank visited the president of the State Bank he called on the cashier of that bank, and whatever evidence there is in the case applicable to the issue which it is supposed should have been submitted to the jury, consists of the conversation which took place between those officers during that interview before the other officers of the defendant bank knew anything of the transaction. Just after one o'clock of that day the president of the plaintiff bank called on the cashier of the State Bank with the checks in his hands, and he states the conversation as follows: "I said to him, I thought you were coming in to pay the gold for those checks early in the morning. Question.—To pay the gold? Answer.—To pay the money. I didn't say gold; to pay the money on those checks early in the morning. The cashier replied,

Yes, I am going out now to attend to it and get the money. Get the money! said I; didn't you have the money — the gold? Were not the gold certificates delivered to you? Yes, said he, I had them here, but they are not here now; I am going out to get it, and will come in and attend to it. I spoke rather abruptly and said he should do it immediately. He looked up and said, You hold the State Bank. I came back and laid the checks on the desk of the teller."

Grave doubts were entertained by the circuit judges whether the evidence, if it had been objected to, would have been admissible, as it can hardly be maintained that the cashier, under the circumstances, was the agent of the bank to make any such admission in respect to a past transaction; and still graver doubts were entertained whether the supposed admission was understandingly made, as it was obvious that the cashier was abruptly and unexpectedly arraigned for his unauthorized and illegal acts in terms of complaint and in tones of accusation and command, but the judges were quite satisfied, even if the language as reported was deliberately employed, that the statement was untrue; that the admission, even if it was made, was contrary to the fact; that every dollar of the gold and of the gold certificates went directly from the Merchants' Bank to the office of the assistant treasurer for the benefit of the drawers of the checks, as the circumstances abundantly prove. Regarded in that light, it is settled law that the remark of the cashier was entitled to no weight, as it was an admission contrary to the fact. Direct proof to that effect was not introduced in this case, as the defendants did not introduce any testimony, but the circumstances shown in evidence were equally persuasive and convincing, leaving no doubt in the mind of the circuit court that the whole fund withdrawn from the Merchants' Bank was transferred directly to the office of the assistant treasurer to supply a corresponding deficiency in the deposits in that institution which had been embezzled and loaned to the persons whose firm name was signed to the checks.

Some of the circumstances referred to have already been mentioned, and there are many others reported in the transcript which tend very strongly in the same direction. Enough is exhibited in the record to show beyond all doubt that Mellen, Ward & Co. were extensively engaged in speculations; that they were largely interested in copper stocks; that in their first interview with the cashier of plaintiff bank they disclosed to him the fact that they only wanted the bank to take the gold for a few days, naming the day when they would desire to withdraw the same, and the arrangement as completed with the cashier, and as sanctioned by the president of the bank, gave them the right to call for that amount of gold whenever they might see fit by paying for the same at the same rate, and an additional sum equal to interest from the time the gold was deposited in the bank to the time it should be withdrawn. Authority was given to the cashier to take the gold as it arrived, on the terms proposed, and he was told at the same time that the parties depositing it would be allowed to call for the same amount on the same terms, paying also for the trouble a sum equal to interest while it remained in the bank. Weighed in the light of these explanations it must require the exercise of much incredulity not to see in the acts, conduct and declarations of the parties plenary proof that the gold and gold certificates, for which the checks were given, were withdrawn from the bank in pursuance of that arrangement. First Carter appears, then Ward, then Carter again, and finally Mellen, the three being all the members of the firm. They had informed the cashier through their junior partner that the gold "would be taken away" on the last day of the month, or the

first day of the following month, and on the last day of the month Carter called and said, "we have come for the gold;" and when Ward came at a later hour on the same day to give notice that their necessities were not fully supplied, he made no inquiry, nor did he submit any proposition, but said, "we shall want some more gold," and immediately left, showing conclusively that the contract had been previously made; and finally Mellen, the senior partner, called to assist in carrying away the last thirty thousand dollars, which, with the thirty thousand previously taken, was delivered by the teller in the absence both of the cashier and of the president.

Loaned and withdrawn, as the gold and gold certificates were, but for one day, the president, the next forenoon, when he found that the same were not returned, nor the amount of the checks paid, immediately took the matter into his own hands. He at once, or just before one o'clock, having previously "*heard that there was trouble at the sub-treasury*," called upon the cashier of the State Bank, and failing to obtain satisfaction there, he proceeded, at a quarter before two on the same afternoon, to the room occupied by the president and directors of that bank, and he states that he found the president of the bank and two or three other persons present. Much of what was said on the occasion has already been narrated, and need not be repeated. Two of the persons present were the president of the State Bank and his predecessor in that office, and the president of the plaintiff bank testified that they were considerably excited; that he informed them that *he had just heard that there was trouble at the sub-treasury*; that he thought *they had better go to that office*, adding that if they did, *perhaps they would find their gold there*, offering at the same time to go with them if they desired him to do so; and it appears that *he and those two persons* went to the room of the assistant treasurer, and that he introduced them to that officer, saying that they had come to see *if a large amount of gold had not been placed there* to the credit of the State Bank. What further was said or done on the occasion does not appear, as the plaintiffs' testimony stopped there in respect to that interview, and none was introduced by the defendants. Sufficient, however, was given to satisfy the court beyond doubt that every dollar of the gold and gold certificates was transferred to that institution for the benefit of the drawers of the checks, and that no part of the same was ever received by the defendant bank.

§ 116. *When the court should instruct against the plaintiff.*

Courts of justice have sometimes said that it is necessary in all cases to leave the question to the jury if there is any evidence, even a scintilla, in support of the issue, but it is well settled law that the question for the judge is not whether there is literally no evidence, but whether there is none that ought *reasonably* to satisfy the jury that the fact sought to be proved is established. *Ryder v. Wombwell*, Law Rep., 4 Exch., 39. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of that party. Law Rep., 2 Privy Council Appeals, 335. Formerly it used to be held, say the court in that case, that if there was what is called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury, but that a course of recent decisions has established a more reasonable rule, to wit, that in every case, before the evidence is left to the jury, there is or may be a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party produc-

ing it, upon whom the *onus* of proof is imposed. *Jewell v. Parr*, 13 C. B., 909; *Toomey v. L. & B. Railway Company*, 3 id., N. S., 156; *Wheelton v. Hardisty*, 8 Ell. & Black., 262, 266. Apply that rule to the present case and it is clear to a demonstration that the ruling was correct, as there is no evidence reported which would warrant a jury in finding that the gold or gold certificates, or any part of the same, ever went into the defendant bank. *Schuchardt v. Allens*, 1 Wall., 369.

Express authority in the cashier, either from the directors or under any act of congress, to certify the checks of third persons is not pretended, and it appearing that no part of the funds withdrawn from the plaintiff bank was ever received by the defendant bank, or that they had any knowledge of the transaction prior to the interview between the presidents of the respective banks, the plaintiffs are forced to invoke usage as the source of the cashier's authority to certify the checks, or to put their case, as in the opinion of the court, upon the legal proposition that the power of the cashier to perform those acts is inherent in the office; that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the bank, and that it makes no difference whether the acts were performed in the banking house of the institution or elsewhere, provided it appears that he added to his signature the word cashier, at the time he certified the instruments.

§ 117. *Doctrine of usage.*

Whether a usage exists or not, to confer power to do an act which otherwise would not be authorized, is a question of fact dependent upon the evidence, and he who alleges that such a usage exists must prove it, unless it is general and of such long standing that it has become incorporated into, and may be regarded as, a part of the commercial law, which cannot be pretended in this case, as it clearly appears that no such usage exists in the state where the transaction took place. No such evidence was introduced, and the settled rule of law in the highest judicial tribunal of the state is that the cashier of a bank possesses no such authority, unless it is specially delegated to him by the directors, which is in exact accordance with the rule prescribed in the act of congress giving to the directors the power to appoint or elect a cashier, and to manage the affairs of the institution. 13 Stat. at Large, 102; *Mussey v. Eagle Bank*, 9 Metc., 313. Such a power, say the court in that case, that is, the power of certifying checks, is in fact a power to pledge the credit of the bank to its customers, and is a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them, and consequently it cannot be implied as a resulting duty or authority *in any individual officer*. Evidence of usage, therefore, cannot confer any original, inherent and implied power to certify such instruments. Checks had been certified in that case by the teller, but the rule as laid down is equally applicable to cashiers, as the court say that the authority is vested in the president and directors, and that it cannot be implied as a resulting duty *in any individual officer*, which includes the cashier as well as the teller. 9 id., 313. Established as that rule was in that state more than twenty-five years ago, by the unanimous decision of the highest court of the state, it is not strange that no cashier in the state could be found who would testify that there was any such usage as is supposed by the plaintiffs. They called twenty-two cashiers, including the cashier of their own bank, but they did not venture to ask the question at all whether there was any such usage, though one or more of the number volunteered to say that none such existed, which was equally well proved by the silence of all the

others. Proof of usage authorizing a cashier to certify checks, even if such proof would confer such an authority, which is denied, is certainly wanting, as there is not a scintilla of evidence to that effect to be found in the record.

Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense, and different from the sense which they ordinarily import, and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admissible to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous and doubtful, but it is never admissible to vary or contradict what is plain. Where the language employed is technical or ambiguous, such evidence is admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general principle or rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. *Oelricks et al. v. Ford*, 23 How., 63; *Barnard v. Kellogg*, 10 Wall., 383; *Insurance Company v. Wright*, 1 id., 457; *Simmons v. Law*, 3 Keyes, 219; *Beirne v. Dord*, 1 Seld., 97; *Bliven v. Screw Co.*, 23 How., 431; *Dickinson v. Gay*, 7 Allen, 37; *Dodd v. Farlow*, 11 id., 428; *Spartali v. Benecke*, 10 C. B., 212; *Trueman v. Loder*, 11 Adolph. & Ell., 598; *The Reeside*, 2 Sumn., 567. Whether such evidence is admissible or inadmissible to prove such an authority, it is quite clear that there was none in this case of any kind, and certainly none which would have warranted the jury in finding that the cashier of the defendant bank had any authority whatever to bind his bank by his certificates that the checks were good.

Interrogatories, however, were put to the cashiers examined as witnesses touching their powers in respect to other transactions, and they testified that the business at the clearing-house was usually conducted by the cashier of the bank, and that in adjusting balances occurring there the cashiers whose banks belonged to that association were accustomed to draw checks for that purpose, and that they were in the habit of receiving each other's checks in such adjustments as the checks of their respective banks; and they also testified that they bought and sold New York funds, as their banks redeemed very largely in that city, which created a necessity for the daily use of such funds in conducting the usual and regular operations of the banks; but the circuit court was of the opinion that the evidence was entirely unimportant in this case, as there was no evidence of any usage showing that the cashiers were authorized to certify the checks of third persons, and the judges were confirmed in that conclusion by the fact that it had long been the settled law of the state that no individual officer of a bank possessed any such authority. Giving full effect to the usage proved, it only shows that a cashier may borrow money of the other banks, in the settlement of balances through the clearing-house, and that he may sign the checks given for the same, and that he may buy and sell New York funds, that is, he may buy for use in redeeming their bills, and he may sell the same when they have an excess beyond what is necessary for that purpose; but the evidence, in the opinion of that court, had no tendency to prove that the cashier of a national bank might certify the checks of a third person, as in this case, as the settled law everywhere is, that a power evidenced by usage must be considered as defined and limited by the usage. *The Floyd Acceptances*, 7 Wall., 678.

Nothing remains but to examine the question whether there is any such inherent power in the office of a cashier as is supposed by the plaintiffs, as it is clear that the act of congress confers no such power, and that there is no proof of any such usage in the case, even if it be admitted that evidence of usage would be sufficient to establish that theory. Special reference to the by-laws of the bank is unnecessary, as it is not pretended that they confer any such power upon the cashier, and there is not a particle of evidence that the directors, directly or indirectly, ever gave him any such power. Before attempting to answer the inquiry, what are the usual and ordinary duties of a cashier, it becomes necessary to look somewhat more closely at the circumstances which attended the transaction at the time the checks were certified. None of the checks were signed by the drawers or certified by the cashier in the banking house of the defendants. On the contrary, the cashier left his own bank and went to the banking house of the plaintiffs, and there, in the presence of the cashier of the plaintiffs, who knew full well what the arrangement was between his bank and the signers of the checks, and that by virtue of that arrangement they had a right to withdraw from the bank on that day that amount of gold and gold certificates, and that he, as cashier, was fully authorized by the president of his bank to deliver it to them on the terms and conditions specified in the arrangement. He knew, also, that he himself, as cashier, had no authority to certify checks; that the law of the state did not authorize such an act; that he had never done such an act; that it had never been done by the cashier of a national bank in that city; that the act of certifying these checks had not been done *in the usual course of business* nor in the presence of the directors of the defendant bank, as he testifies that the first two checks, amounting to \$525,000, were certified "in the bank after the delivery and examination of the certificates;" and the president of the bank, in his letter to the comptroller of the currency, states that they were "certified as good on the spot by the cashier of the State National Bank."

Known to the cashier of the plaintiff bank as all the antecedent circumstances were, the judges of the circuit court did not entertain a doubt that he knew full well that the gold and gold certificates were withdrawn for the benefit of the drawers of the checks, and that the cashier of the defendant bank certified the checks as a mere surety or guarantor. Unmistakably he knew that the funds were withdrawn only for a day, for he testified that he was informed when the arrangement was made that the same would be taken away on the last day of the month or the first day of the following month, and the president, in his interview with the cashier of the defendant bank the next day, just before one o'clock, opened the conversation by saying: "I thought you were coming in to pay the gold or the money on those checks early in the morning." Both the president and cashier of the plaintiff bank knew what that arrangement was, and the cashier also knew all the circumstances which attended the execution of the checks and the delivery of the funds. Actual knowledge of all the circumstances on the part of the cashier of the plaintiffs is fully proved, and if he wanted more information he knew that the means of knowledge were at hand, as the cashier of the State Bank was there in his presence, and that if he was not satisfied with his answers he could ascertain the whole truth from the directors. Suppose it be conceded, for the sake of the argument, that the checks were negotiable instruments, standing upon the same footing as bills of exchange and promissory notes, still the plaintiffs cannot recover if the cashier had no power to execute the certificates, as all the facts

and circumstances were known to the cashier of their bank. Indorsees of such negotiable instruments for value in *the usual course* of business are not obliged to make inquiries, as was held in *Goodman v. Simonds*, 20 How., 367; but it was also held in that case, and is believed to be settled law everywhere, that an indorsee in such a case must not wilfully shut his eyes to the means of knowledge which he knows are at hand, for the reason that such conduct is equivalent to notice, and is plenary evidence of bad faith. *Stagg v. Elliott*, 12 C. B., N. S., 380.

Precisely the same rule was laid down by Baron Parke in the case of *May v. Chapman*, 16 Mees. & W., 355, and the same rule has been applied by this court in the case of *The Lulu*, 10 Wall., 192, decided at the last term. He knew that he himself had no authority to do such an act as cashier; that the law of the state forbade it; that no cashier of a national bank in that city had ever exercised any such authority, and that the means of ascertaining whether the cashier of the defendant bank had such authority were at hand, and the rule, under such circumstances, is well settled that the party must inquire before assuming to act or take the risk that the necessary authority exists. Examined in the light of the undisputed circumstances, the case is as strong for the defendants as it would be if the defect of authority had been apparent on the face of the instruments, as it in fact was to one having such knowledge. Where the defect or infirmity appears on the face of the instrument, the question whether the party who took it had notice or not is a question of law, and must be determined by the court as matter of construction. *Goodman v. Simonds*, 20 How., 365; *Andrews v. Pond*, 13 Pet., 65; *Fowler v. Brantly*, 14 id., 318; *Brown v. Davies*, 3 Term, 80. Unable to maintain the suit upon these grounds, the plaintiffs are forced back to the grounds assumed by their president in his first interview with the president of the defendant bank, when he said, in effect, that your cashier has certified those checks and I want payment for the gold; and to that it comes at last. Undoubtedly the cashier of the defendant bank certified the checks, but the circumstances show that the cashier of the plaintiff bank must have known that he did so without the knowledge of the directors, and if the cashier of the defendant bank had no authority, and the cashier of the plaintiff bank knew it, it is clear to a demonstration that the defendant bank is not liable. Circumstances, altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute the most convincing and conclusive proof. *Castle et al. v. Bullard*, 23 How., 187.

Repeated decisions of this court have determined the question that the power to certify the checks of third persons in behalf of the corporation is not inherent in the office of the cashier of a bank, and also that the exercise of such a power is not within the scope of his usual and ordinary duties. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank, and their acts, within the scope of such usage, practice and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. *Minor v. Mechanics' Bank*, 1 Pet., 70. So where a contract was made by the president and cashier of a bank with the indorser of a promissory note due to the bank, that he should be discharged in a certain event, this court held that it was not a part of their duty to make such a contract, and that they had no power to bind the bank except in the performance of their ordinary duties, which was a much stronger case than the one before the court, as the president

of the bank joined with the cashier in making the contract. *United States Bank v. Dunn*, 6 Pet., 59. His ordinary duties are quite extensive, but it is settled law in this court that they do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. *United States v. Bank of Columbus*, 21 How., 364. Authority to certify the checks in this case, except what is supposed to be implied, is not pretended, and if it were the theory could not be supported for a moment, as there is no such evidence reported and none such was introduced. Recurring to the two principal checks, it will be seen that the plaintiff bank, or their cashier, which is the same thing, is the payee, and inasmuch as the same were certified in the presence of the cashier of the plaintiffs, who knew all the circumstances, the suggestion that they are innocent holders, as against the defendants, cannot be supported. If a bank may be held liable in any case upon a certificate of their cashier that a check is good when they have no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized. *F. & M. Bank v. B. & D. Bank*, 16 N. Y., 131.

Substantially the same concession is also made in the case of *North River Bank v. Aymar*, 3 Hill, 266, and in *F. & M. Bank v. B. & D. Bank*, 14 N. Y., 631. Like concession is also made in the case of *Railroad Co. v. Schuyler*, 34 N. Y., 72. Evidently the case of the *Mechanics' Bank v. Railroad*, 3 Kern., 615, makes the same concession, even if it does not fully sustain the English doctrine as exemplified in the leading case of *Grant v. Norway*, 10 C. B., 686, which, in the judgment of the circuit court, contains the true rule. *Kirk v. Bell*, 12 Eng. L. & Eq., 389; *Coleman v. Riches*, 29 id. 329. Much vacillation is exhibited in the decisions of the New York courts upon this subject, but they agree at present that the certificate of the cashier or teller, as the case may be, if regular in form, and unattended with any special circumstances, amounts to a representation that the drawer of the check has funds in the bank to meet the same, and that the certificate, unexplained, binds the bank whether accurate or erroneous, but that no such consequences will follow if there is anything on the face of the instrument to show the contrary, or if the payee or holder knew that the authority of the cashier to make the certificate depended upon the existence of funds in the bank to meet the liability, and that the bank had none such at the time, and that the payee or party presenting the check knew that fact. *Clarke National Bank v. Bank of Albion*, 52 Barb., 596; *Irving Bank v. Wetherald*, 36 N. Y., 337; *Mead v. Merchants' Bank*, 25 id., 143. Carefully examined it will be found that in every one of the cases decided by the courts of that state, where the more stringent rule is applied, the check was presented at the bank in the *usual course of business*, and that the act of the cashier, in making the certificate, did in fact amount to an actual representation that the bank held the funds of the drawer to meet the demand. Some of those decisions are doubtless inconsistent with the decisions of this court and with the English decisions and those of the supreme court of Massachusetts upon the same subject, but there is not one of them, if the facts of the case before the court are properly examined and understood, which will sustain the claim of the plaintiffs.

Beyond all question the cashier of the plaintiff bank represented his bank; he was an agent with full authority, and what he knew in respect to the transaction in question must be regarded as known to his bank. Viewed in the light of the circumstances, it is clear that he did not receive the certificates as a

representation that funds to that amount were in the State National Bank to meet the checks. He knew that the fact was not so, as the drawers were the customers of his own bank, and the case does not show a single instance in which they ever had any dealings with the defendant bank. Instead of that, he regarded the acts of the certifying cashier as constituting the defendant bank a surety of the drawers of the checks to his bank, and the conduct of the president the next day in first arraigning the signer of the certificates before he presented the checks to the president of the defendant bank strongly confirms that view of the evidence. Agents, held out as such by their principals for certain defined purposes, well known to the public, cannot bind their principals by any acts done outside of the scope of their authority, as defined by the well-known purposes of their agency. Masters of vessels are authorized to sign bills of lading, and the instruments, when duly executed in *the usual course of business*, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master; but it is well settled law that the owners are not liable if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board nor delivered into the custody of the master. The Schooner Freeman, 18 How., 187. Like principles are applied in all cases where the authority of the agent is limited, and the limitations, as defined by the purposes of the agency, are well known to the public. *Mussey v. Beecher*, 3 Cush., 511; *Lowell Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 id., 528; *Grant v. Norway*, 10 C. B., 686; *Stagg v. Elliott*, 12 id. (N. S.), 380; *Hubersty v. Ward*, 8 Exch., 330; *Alexander v. Mackenzie*, 6 C. B., 766. Persons dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at their peril, see in each case that the paper on which they rely "comes within the power under which the agent acts." *The Floyd Acceptances*, 7 Wall., 676.

Where the plaintiff in the suit is the payee of the instrument, the correctness of that rule cannot be questioned, and this court decided in that case that the same rule applies to every *subsequent taker* of the paper, adding, what is certainly correct, where the suit, as in this case, is in the name of the payee, "that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." Cashiers are forbidden by the express decision of this court from making contracts on behalf of their banks not within the scope of their usual and ordinary powers, involving the payment of money, without an express delegation of authority from the directors. *United States v. Bank of Columbus*, 21 How., 364. Checks signed at the clearing-house and contracts for the purchase and sale of New York funds are authorized by the directors, and are sanctioned by usage, but cashiers have no such authority to certify checks for third persons, which was well known to the cashier of the plaintiff bank.

§ 118. *Banks ought to be confined, in their business transactions, to their place of business.*

Associations organized under the act of congress to carry on the business of banking are required by the express words of the act to transact *their usual business* at an office or banking house, located in the place specified in their organization certificate, and no individual officer ought to be allowed to leave his bank and go elsewhere to make large contracts without the instruction of the directors. Unless his power in that behalf is limited to the established place of business, he may go wherever he pleases for that purpose, and if he certifies

checks anywhere within the four seas of our continent, the bank is bound by his contracts. Stockholders and depositors should take warning, if such is the law, as the national banks are liable at any moment to be overwhelmed with pecuniary obligations, and involved in utter ruin.

WEST ST. LOUIS SAVINGS BANK v. SHAWNEE COUNTY BANK.

(5 Otto, 557-560. 1877.)

APPEAL from U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.—Parmelee, the cashier of the Shawnee County Bank, gave his individual note to the plaintiff, with his indorsement as cashier. The note was given for a loan of money, and Parmelee also gave as collateral security a certificate of stock of the bank. He told plaintiff that he wanted the money to pay for the stock. The note was not paid, and the question in this case is whether the bank is liable on the indorsement.

Opinion by WAITE, C. J.

The testimony in this case satisfies us beyond all doubt that the liability of the Shawnee County Bank, if any liability exists, is that of an accommodation indorser or surety for Parmelee, its cashier, and that this was known to the St. Louis Bank when it made the discount. The note itself bears upon its face the most unmistakable evidence of this fact. It is made payable directly to the St. Louis Bank, and the Shawnee Bank appears only as an indorser in blank of a promissory note before indorsement by the payee and while the note is in the hands of the maker. Such an indorsement by a bank is, to say the least, unusual, and sufficient to put a discounting bank upon inquiry as to the authority for making it. But we are not left in this case to inquiry or presumption. Both the correspondence and the testimony of the cashier of the St. Louis Bank show conclusively that this was the understanding of the parties. Parmelee, in transmitting the note for discount, wrote for himself, and not as cashier. He spoke of his own note, and authorized a draft upon himself personally for the interest. He pledged his own stock for the payment of the note. Wernse, the St. Louis cashier, says the negotiations opened with an application by Parmelee for a loan to enable him to pay for his stock in the Shawnee Bank, upon the pledge of the stock as collateral. There is not a single circumstance tending in any manner to prove that the transaction was looked upon as a rediscount for the Shawnee Bank, except the entries in the books of the St. Louis Bank, and these are far from sufficient to overcome the positive testimony as to what the agreement actually was. This being the case, the question is directly presented as to the liability of the Shawnee County Bank upon such an indorsement. It is certain from the testimony that no indorsement of the kind was ever expressly authorized by the bank. None of the officers, except Parmelee, and Hayward, the vice-president, ever knew that it had been made until long after the last discount had been obtained. The books of the Shawnee Bank contained no evidence of such a transaction, and the accounts of the St. Louis Bank, as rendered, gave no indication of the actual character of the paper discounted.

§ 119. *The cashier of a bank has no authority to bind the bank as an accommodation indorser of his own paper. (a)*

Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for

(a) The lower court found against Parmelee, but dismissed as to the bank. The opinion is reported in 3 Dill, 406—West St. Louis Savings Bank v. Shawnee County Bank.*

such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss.

Decree affirmed.

SANDY RIVER BANK v. MERCHANTS' AND MECHANICS' BANK.

(Circuit Court for Illinois: 1 Bissell, 146-148. 1857.)

STATEMENT OF FACTS.—Plaintiff was incorporated in 1853, with a capital of \$50,000, of which \$38,000 belonged to defendant. Bronson, at the time, was defendant's cashier, and managed to have Jones appointed cashier of plaintiff, with a secret understanding that his salary was to be \$2,000, although plaintiff agreed to pay him only \$850. In 1855 Bronson and Jones made a settlement between the banks, Jones giving a receipt in full, and Bronson turning over his own private paper, and a balance in cash. This cash consisted of Bronson's private drafts indorsed officially by Jones. This paper was dishonored when it became due, and plaintiff was compelled to pay it on its indorsement. Plaintiff sues for a balance of account, contending that Jones, as cashier, had no power to make the settlement.

Charge by DRUMMOND, J.

Mr. Bronson, as the cashier of the Merchants' and Mechanics' Bank, had no right, because he was cashier merely, to make the contract he made with Mr. Jones of the 28th of September, 1853, so as to bind the bank; there must have been an express authority from the bank, or one resulting from necessary implication. And in order to be binding on the bank at all, it would have to be in the nature of the appointment of an agent, and not an appointment to the cashiership of a bank in another state. A bank, undoubtedly, may appoint agents in another state to perform any act which it could perform itself, and which is not prohibited by law. If the items in the account which it is alleged are charged to the defendant, as salary of Mr. Jones, have been admitted or allowed by the bank, as a bank, for services performed, then the jury may charge the defendant with them; or if, with a full knowledge of all the facts attending its payment, the bank has admitted or allowed it, in the nature of compensation for services performed, and not as salary merely, then the defendant was bound by it, but not otherwise.

§ 120. *Duties, rights and liabilities of cashier.*

The cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act, ac-

cording to the general usage, practice and course of business, and all acts done by him within the scope of such usage, practice and course of business, bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed, without proof and merely from his office, that he is authorized to receipt and discharge debts and deliver up securities on payment or discharge of the debt for which they were held, and he may have power to indorse bills, notes, etc., for collection. He may draw checks for funds in other banks. Possibly these powers might be inferred from his official position. But still his authority is a *limited authority*, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof. As a general rule, a jury have not a right to infer that a cashier of a bank, as such, has the authority to compromise and discharge debts without payment, or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must exist and be established by the particular usage, or practice, or mode of doing business of the bank, or it must be ratified or acquiesced in by the bank, in order to be binding.

MATTHEWS v. MASSACHUSETTS NATIONAL BANK.

(Circuit Court for Massachusetts: 1 Holmes, 396-412. 1874.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—The defendant, the Massachusetts National Bank, loaned to one James A. Coe \$22,000, payable on call, with interest, taking from him his memorandum of indebtedness for that sum, with, as collateral security therefor, what purported to be a certificate of two hundred shares of the capital stock of the Boston & Albany Railroad Company, issued to said Massachusetts National Bank, as collateral. This instrument was originally a genuine certificate for two shares of the capital stock of the Boston & Albany Railroad Company issued to H. E. Coe, but, by false and forged erasures and interlineations, it had been so altered as to purport to be a certificate for two hundred shares of its stock, issued by said railroad corporation to the Massachusetts National Bank, as collateral. The bank received the said certificate in good faith and without any suspicion of its fraudulent character, and in supposed fulfilment of the promise of James A. Coe to give as security for the loan aforesaid two hundred shares of the capital stock of said railroad corporation. Subsequently, upon payment by said Coe to the bank, he received back his memorandum of indebtedness; and the cashier of the bank, for the purpose and with the intention of restoring the collateral to Coe, returned to him the fraudulent certificate, with the usual printed form of transfer on the back thereof, signed by H. K. Frothingham, cashier of said bank, in blank.

About two weeks after the surrender by the bank of this certificate to Coe with the transfer in blank of the cashier on the back of it, the plaintiff Matthews, pursuant to his agreement to loan Coe \$25,000 on call, with interest, received from Coe, in good faith, the said fraudulent certificate with the blank assignment on the back thereof, supposing the same to be a genuine certificate for two hundred shares of said stock issued by the corporation and duly transferred and assigned so as to enable him to obtain a new certificate therefor in his own name; and on receipt thereof loaned the sum of \$25,000. The signa-

ture of the cashier was well known to Matthews, who correctly supposed the signature on the blank assignment to be genuine. Coe was tried and convicted for obtaining money by false pretenses; and indictments for forgery are now pending against him, and he has been declared bankrupt. The next day, or very soon after the day when the money was loaned by Matthews, the fact first became known to plaintiff and defendant of the fraudulent alteration of the certificate before it came into possession of defendant, and plaintiff thereupon notified the bank that he should hold it responsible for any loss sustained by him by reason of the premises. This action is brought for the recovery of the damages thus sustained. The real question presented in the case is, whether the bank, by signing the blank transfer, has so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defense to this action.

§ 121. *Power of cashiers to bind bank.*

Defendant denies that the cashier had authority or right to bind the bank by the contract declared on. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank. Their acts, within the scope of such usage, practice and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. *Morse v. Mass. Nat. Bank*, 1 Holmes, 209; *Minor v. Mechanics' Bank*, 1 Pet., 70; *Merchants' Bank v. State Bank*, 10 Wall., 604. One of the ordinary and well known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals, when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice and course of business in which cashiers of a bank are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such transfer than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office.

§ 122. *Indorser warrants signatures.*

The signature of the cashier must therefore be considered as the signature of the bank, and the question returns, whether such blank assignment on the back of the certificate by the bank be so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defense. In the case of forged negotiable instruments, it is well settled that the indorser warrants that the instrument itself and the antecedent signatures thereon are genuine. *Story on Prom. Notes*, sec. 135; *State Bank v. Fearing*, 16 Pick., 533; *Hortsmann v. Henshaw*, 11 How., 183; *Critchlow v. Parry*, 2 Camp., 182; *Canal Bank v. Bank of Albany*, 1 Hill, 287. The indorser's liability in these cases is properly placed upon the ground of estoppel. "This proceeds," says Judge Story, "upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and

all the antecedent indorsers. It is in this confidence that the holder takes the note without further explanation; and if each party is equally innocent, and one must suffer, it should be the one who has misled the confidence of the other and by his acts held out to the holder that all the indorsements are genuine, and may be relied on as an indemnity in case of the dishonor thereof." This is a statement of the grounds upon which the rule of law rests as applicable to negotiable instruments, but the reasoning would seem to apply with equal force and pertinency to the case of a transfer of a certificate of stock by indorsement in blank. Stock certificates are sold in open market like other securities, and form the basis of commercial transactions. In the language of Davis, J., in *Bank v. Lanier*, 11 Wall., 377: "Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable." In *Leitch v. Wells*, 48 N. Y., 613, it is said: "Since the decision of the case of *McNeil v. Tenth National Bank*, 46 N. Y., 325, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." The common practice of passing the title to stock by delivery of the certificate, with the blank assignment and power, has been repeatedly proved and sanctioned in cases which have come before the courts in New York. In *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y., 41, the rights of parties claiming under such instruments were fully recognized by the court, and such mode of transfer was shown to be the common practice of the city of New York. It is well settled that the form of assignment printed on the back of stock certificates, when signed in blank, may be filled up by a subsequent purchaser of the stock. *Kortright v. Commercial Bank of Buffalo*, 20 Wend., 91, and 22 Wend., 348; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn., 273.

§ 123. *The signature of its cashier to an assignment of certificate of stock issued to a bank will bind the bank as a warranty of title.*

The certificate in this case, as it came from the bank, contained on the same piece of paper, and on the back of the certificate, a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendant must, therefore, be held to have intended and agreed that whoever should present the certificate so issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name, and to have a transfer of the stock made to himself on the books of the company. The certificate accompanied with the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessities of modern commerce to make such certificates available in commercial transactions. Even when such blank assignments, or powers of attorney to transfer stock, are under seal, the blanks may be filled up according to the agreement of the parties at the time. *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn., 274, 275; *Redfield on Railways*, sec. 35, and cases cited. The decisions to the contrary in the English courts have not been followed in this country, and they were influenced not merely by a rigid adherence to the technical rules of the common law in relation to instruments under seal, but by the policy of the stamp system. But the case of *Walker v. Bartlett*, 36 Eng. L. & Eq. 368, and later English decisions recognize the validity of blank transfers of stock, and that such transfers of stock impose upon the holder of them the obligation to pay calls upon the shares while they remain his property. In *Kortright v. Buffalo Commercial Bank*, 20 Wend., 94,

speaking of the filling up of a blank transfer of stock and power of attorney, Nelson, C. J., after stating that this is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks according to the proof in the case, goes on to say: "Even without the aid of this usage, there could be no great difficulty in upholding the assignment. The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank; Barker might have completed the instrument." The right to fill the blank in a blank transfer of stock is recognized by the supreme court of Massachusetts in *Sewall v. Boston Water Power Co.*, 4 Allen, 277.

Matthews clearly had the right, having advanced the sum of \$25,000 upon the supposed security of this blank assignment of stock, to fill up the blank with his own name and with the place of his residence, and whatever was necessary to make the instrument complete as an assignment and transfer to him of the shares described in the certificate. The case finds that the cashier signed the assignment in blank for the purpose and with the intention of restoring the pledge to Coe. But even if he went further and agreed with Coe that Coe should fill the blank with his own name, such private understanding between him and Coe would not have affected the rights of third parties who parted with their property in good faith without negligence, upon the faith of the certificate of the cashier that the bank undertook to assign, and did assign to whoever might be the lawful holder of the instrument, the amount of stock described therein. As above quoted from Nelson, C. J., "If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank." Frothingham "might have completed the instrument." What possible explanation can be given of the course of the cashier in giving to Coe an assignment in blank rather than a transfer to Coe himself, other than to enable Coe to dispose of the certificate so that the holder could take his title directly from the bank, and that the instrument might be used according to the well-known usage of dealing with stock certificates, passing from one purchaser to another without the inconveniences and delays consequent upon manifold transfers on the records of the corporation? If the bank intended to limit the assignment to a particular assignee, or to a less number of shares than the number described in the certificate, the limitation should have appeared in the assignment. The assignment in blank purports to assign what is described in the certificate to the lawful holder, whoever he may be, who may fill the blank. The signature is given for the purpose of transferring title; and whenever the blank is filled, a contract of sale is established between the party who has signed the blank assignment and the person whose name is rightfully filled in as assignee.

It is contended in behalf of the bank that the transfer in blank created no liability or obligation on the part of the bank to Matthews, because the circumstances under which the certificate was received by the bank and surrendered to Coe indicate clearly that the act of the cashier in signing and transferring the certificate to Coe was performed with the intention of restoring the pledge to Coe in discharge of the duty of the bank as pledgee after the purposes of the pledge were answered, and not with any purpose of a sale of the certificate or the stock supposed to be represented by it. But there is nothing in the case to show any knowledge on the part of Matthews of any such intention on the part of the cashier. The certificate purports to be a certificate that the bank

held the shares as collateral, but does not show that they were collateral for a debt of Coe's to the bank. Such a certificate of stock with the transfer in blank of a responsible bank might in the ordinary course and usage of dealing in stocks pass through the hands of many successive purchasers. The possession of the certificate would afford no indication that the holder of it was the person who had originally transferred it to the bank as collateral. If Coe had consented to a sale by the bank of the collateral to pay his debt, or if the bank had in any way acquired the right to sell it, and had sold it, if the assignment had been in blank, the purchaser would have been in the same condition, and Matthews, in dealing with such a purchaser, would have received no better evidence of title against the bank than he received from Coe. Had the bank desired to sell this stock, and placed it in the hands of a broker with a blank transfer in the usual course of business, Matthews, in buying from the broker, would have received no better evidence of title against the bank than in the present case. The mere words "as collateral" in the instrument do not tend to put the purchaser on inquiry, except so far as relates to the authority of the bank to dispose of the collateral as between the bank and its debtor. If this inquiry had been made, it would only have resulted in the information that the assignment was made in its actual form by the joint act and consent of the debtor and the bank. The name of the pledgor was not stated in the certificate, as is required by the statute of Massachusetts (Gen. Stats. of Mass., chap. 68, sec. 13). In fact, if Matthews had gone to the bank to make inquiries, he could only have learned that, Coe having paid his debt to the bank, the certificate had been surrendered to him by the bank with a transfer in blank. There would have been nothing in this information to lead him to doubt the genuineness of a certificate to which the bank had given currency by its signature, and on the faith of which he would have learned the bank had loaned \$20,000, which had been paid. The bank or the cashier did not then doubt the genuineness of the instrument, and no inquiry at the bank would have inspired doubts in the mind of Matthews, there being no such doubts in the minds of the officers of the bank. Nor is it perceived how the bank can contend with any show of reason that Matthews was negligent in not inquiring at the office of the railway corporation. If the duty of making such an inquiry was incumbent on any one, it was surely incumbent on the bank to ascertain the genuineness of the instrument before they gave currency to it, and lulled suspicion and doubt by the responsibility of their own signature. The answer to all the positions taken by the defendant as to notice to Matthews from the words "as collateral" in the instrument, is that there is nothing to connect Coe with those words. There is nothing on the face of the papers, and there was nothing in the fact of the possession of the instrument by Coe, to show that he was the person for whose debt the stock was held as collateral. Had not Matthews a right to suppose, upon receiving this certificate authenticated by the signature of the bank, that they had obtained the certificate themselves from the railroad company in the usual way, thus preventing the possibility of fraud or forgery before receiving as collateral for a loan and before authenticating it with their signature? It is difficult to see in what respect Matthews was negligent.

The defendant, on the other hand, negligently placed confidence in Coe to obtain a transfer from the railroad company of the two hundred shares on which they loaned the sum of \$22,000, instead of taking their certificate directly from the company. But the negligent act which especially imposes upon them a liability in this case is that they delivered the forged instrument to Coe, au-

thenticated by their signature in blank to a transfer, thus giving to it a currency and negotiability which it would not have possessed had they made the transfer directly to Coe. Thus the bank put it in the power of Coe to commit the fraud on Matthews on which this suit is founded. In *McNiel v. Tenth National Bank*, the language of the opinion is precisely applicable to a case like the present: "Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy towards persons who in reliance upon those documents have, in good faith, advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims as against them that he cannot be deprived of his property without his consent, cannot he be truly answered, that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his own property,' and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?" If the bank only intended to revest in Coe whatever it acquired from him, it would have been perfectly easy to have limited the transfer to that extent only. A private understanding that such was the intention between Coe and the cashier could not affect the rights of those who, if misled, were misled by the acts of the bank. If the bank, by giving Coe the transfer in blank with its signature, exhibited him to the money-dealing public as having the competent right of pledge and disposal, with all the usual evidences of such right, it substituted its trust in the honesty of Coe for the control which the bank should have exercised itself over the transfer of the instrument, and should suffer the loss consequent upon his betrayal of the trust, rather than to suffer it to fall upon an innocent stranger.

If the conditions upon which the apparent right of control which the bank conferred upon Coe were not expressed on the face of the instrument, but remained in confidence between the bank and Coe, the case is not distinguishable in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. *Jarvis v. Rogers*, 15 Mass., 389; *Pickering v. Busk*, 15 East, 38; *Fatman v. Lobach*, 1 Duer, 354; N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y., 31.

§ 124. *Two innocent parties—the most negligent must suffer.*

One of two innocent parties must suffer in this case by the fraud of Coe. Under similar circumstances, courts have repeatedly held that the party must suffer who has exhibited the greater degree of negligence. The leading case on the indorsement of bills of lading, *Lickbarrow v. Mason*, 2 T. R., 63, is an authority on this point. See, also, *Lobdell v. Baker*, 3 Met., 469; *Polhill v. Walter*, 3 B. & Ad., 114. The bank is precluded from setting up the fact of the forgery of the instrument, because it would be a wrong on its own part and an injury to others whose conduct has been influenced by the acts and omissions of the bank. *Swayne, J., in Merchants' Bank v. State Bank*, 10 Wall., 645, says, "*Estoppel in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another." *Clifford, J.*, recognizes this principle in his dissenting opinion in that case: "If a bank may be held liable in any case upon a certificate of their

cashier that a check is good when they have no funds of the drawer, it is not because the cashier is authorized to make such certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized." An estoppel is a salutary rule which prevents a man from proving that to be false which he has once represented to be true, when others have acted on the faith of his representation.

§ 125. *Right of action against wrong-doers.*

The fact that Matthews has also a right of action against Coe, who is a convict and a bankrupt, does not preclude him from a remedy against the bank. *Gurney v. Womersley*, 4 E. & B., 133. Upon the facts as agreed in this case, the plaintiff is entitled to judgment, and, according to the agreement of parties, the case is to be referred to an auditor to assess the damages.

Judgment accordingly.

§ 126. *Cashier cannot bind his bank as to accommodation paper.*—The cashier of a bank has no authority to indorse accommodation paper, not passing through his bank in its usual line of business, so as to bind the bank. The indorsement, to be binding upon the bank, must be within the scope of his duties as such cashier. *Blair v. First Nat'l Bank of Mansfield*, 2 Flip., 117. See § 95.

§ 127. *Duties of cashier.*—Where the bank is authorized to deal in bills of exchange, the cashier can receive and negotiate the same. This he has a right to do *virtute officii*. *La Fayette Bank v. State Bank of Illinois*,* 4 McL., 209. See § 94.

§ 128. *Acts of cashier in usual course of business.*—Where a note is indorsed by the cashier of a bank in the usual course of his business, the presumption is that he has the right and the authority to make such indorsement, in the absence of any evidence that the regulations of the bank have limited or abrogated this authority. *Lanning v. Lockett*, 10 Fed. R., 458. See §§ 94, 188.

§ 129. *An outside party, dealing with the cashier of a bank while he is acting in the regular course of his business, and without notice of any irregularity, takes a good title to commercial paper.* *Blair v. First Nat'l Bank of Mansfield*, 2 Flip., 117.

§ 130. *It seems that cashiers of banks are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank, and their acts, within the scope of such usage, practice and course of business will, in general, bind the bank in favor of third persons possessing no other knowledge.* *Morse v. Massachusetts National Bank*, 1 Holmes, 211. See § 138.

§ 131. *The cashier of a bank is, virtute officii, generally intrusted with the notes, securities and other funds of the bank, as its general agent in the negotiation, management and disposal of the same. Prima facie, therefore, he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and on its behalf. No special authority for this purpose need be proved.* *Wild v. Bank of Passamaquoddy*, 8 Mason, 508.

§ 132. *Acts done by the cashier of a bank in the ordinary course of his business are prima facie evidence of authority. The cashier is the executive officer through whom all the moneyed operations of the bank are conducted.* *Fleckner v. Bank*, 8 Wheat., 338. See the case, §§ 20-27.

§ 133. *Limitation on power of cashier.*—It seems that the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money without the express authority of the directors, unless it be such as relates to the usual and customary transactions of the bank. *Morse v. Massachusetts National Bank*, 1 Holmes, 211.

§ 134. *Liability of cashier.*—If a cashier, upon leaving a bank, fail to pay over or account for any moneys of the bank received by him as cashier, he is presumed to have wasted the same, and his sureties upon his official bond are liable. A cashier's bond covers all defaults in duties annexed to the office from time to time under authority of the charter and by-laws. "Well and truly to execute the duties of the office" includes honesty, reasonable skill and diligence. *Minor v. Mechanics' Bank*, 1 Pet., 46. See the case, §§ 6-19.

§ 135. *Bond of cashier.*—It having come to the knowledge of the Bank of the United States that the cashier of a branch bank had been guilty of a breach of trust, the board of directors suspended him by resolution on the 27th of October, and ordered that its property be taken from him. The notice of this action was sent to the president of the branch bank, and by him received on the 29th, that day being Sunday. *Held*, in an action on the cashier's bond, that his sureties were liable for his defalcations occurring between the 27th and the 29th, and the fact that the notice was received on Sunday and was not communicated by the pres-

ident to the cashier till the following day did not relieve the sureties from their obligation to make good the defalcations of the cashier on Sunday. *Bank of United States v. Magill*, 1 Paine, 635; affirmed, *M'Gill v. Bank of the United States*, 12 Wheat., 513.

§ 136. To give the bond of a cashier validity, it is not necessary that it should be accepted by formal action of the board of directors; but it is sufficient that the person appointed acted notoriously as cashier, and with the assent of the directors, and that the giving of the bond was required before he could enter upon the duties of the office, and the bond was found among the papers of the bank. *Bank of the United States v. Dandridge*, 12 Wheat., 66.

§ 137. The sureties on the official bond of a cashier, who was to be elected annually, are not liable for the defalcation of the cashier occurring one or two months after his first term of one year had expired, though he was re-elected, but gave no new bond. *Harris v. Babbitt*, 4 Dill., 188.

§ 138. Cashier may indorse and transfer a note belonging to the bank.—A cashier may indorse a note of the bank and transfer it, and the transferee, if he has no notice of any want of authority in the cashier, takes a good title. The powers of a cashier are very large. He is the general agent for the bank in all its banking transactions. Whether he have specific authority to do certain things or not, if within the scope of his general duties, the outside world have a right to presume the authority, and his acts bind the bank. *Blair v. First Nat'l Bank of Mansfield*, 2 Flip., 114. See §§ 97, 128, 130.

§ 139. — and the purchaser need not look to the disposition of the purchase money.—If a note belonging to a bank is indorsed by the cashier and sent to another bank for discount, and is there discounted, and the proceeds are returned to the cashier, it is immaterial, so far as the rights of the discounting bank are concerned, what was done with the money. *Ibid.*

§ 140. Notice to the cashier of a private banking association is notice to the association. *Duncan v. Jaudon*, 15 Wall., 177.

§ 141. Overdraft.—If the cashier allow a customer to overdraw, he does so at his peril. *Minor v. Mechanics' Bank*, 1 Pet., 46. See the case, §§ 6-19.

§ 142. Certified check.—It seems that the certificate of a cashier that a check is "good," is a representation of a present existing fact within his knowledge as cashier; and if that certificate is made by him in the ordinary scope of his business as cashier, it will bind the bank in favor of innocent third parties, upon the principle of *estoppel in pais*, even if the certificate be not true, and the drawer of the check has no funds on deposit in the bank. *Morse v. Massachusetts National Bank*, 1 Holmes, 211. See CHECKS, *infra*; also BILLS AND NOTES.

§ 143. Cashier and teller's bond.—The neglect of the cashier of a bank to settle daily the accounts of the teller, as required by the by-laws of the bank, does not discharge the sureties on the teller's bond. *Union Bank of Georgetown v. Forrest*, 8 Cr. C. C., 227. See § 321.

§ 144. Note to order of cashier.—Where a note is given payable to "H., cashier," it may be shown that in taking the note H. was acting for the bank, and the legal effect of the note is the same as if the particular bank of which H. was cashier was written in the note. *Bank of Newbury v. Baldwin*, 1 Cliff., 520; *Blair v. First Nat'l Bank*, 2 Flip., 114.

§ 145. A bank cannot maintain an action on a note made "payable to J., cashier, or order," without indorsement to it, or anything in the note to show that the bank has any interest therein. *Bank of United States v. Lyman*, 1 Blatch., 308.

§ 146. An indorsement to "W., cashier of the office of the Bank of the United States, in B.," is an indorsement to the bank, and may be so declared on. *Bank of United States v. Davis*, 4 Cr. C. C., 533.

§ 147. Cashier is agent of directors.—It seems that where the cashier of a bank has disposed of the assets, it will be presumed that he has done so as the agent of the board of directors, and that he holds the proceeds as the agent of the bank, and not as the agent of the several stockholders, and that he is not chargeable in such a case, at the suit of the different stockholders, with the distributive shares of each. *Brown v. Adams*, 5 Biss., 132.

§ 148. Suit by cashier.—The cashier of an unincorporated banking partnership, to whose individual name a check was drawn, can maintain a suit thereon in his own name. *O'Brien v. Smith*, 1 Black, 100. See §§ 286, 293, 309.

V. BANKER AND DEPOSITOR.

SUMMARY — *How contracts with customers are construed*, § 149.—*Relation between banker and depositor*, § 150.—*Bank acts as agent or trustee, when*, § 151.

§ 149. Contracts between bankers and their customers are required to be performed and are construed in the same way as contracts between other parties. If the banker agree to pay in a particular kind of coin, he must do so; if the deposit be general, he may pay in any

money that is a legal tender. The rule is that on a deposit of money with a bank the title thereto passes to the bank; evidence of a custom or usage to control such rule of law is not admissible. *Thompson v. Riggs*, §§ 152-156.

§ 150. The relation of a bank with its depositors is that of an ordinary debtor. Money deposited by one of its customers in the ordinary way ceases to be the money of the customer, and becomes the money of the bank. The only obligation resting upon the bank is to refund an equivalent sum. *In re Bank of Madison*, §§ 157-161.

§ 151. The general relation of a bank and a depositor is that of debtor and creditor. But where a bank kept the money of a city on deposit, subject to be drawn out on check, and a sum was transmitted to another bank to pay bonds of the city, the transfer being made by a check drawn by the city treasurer on the home bank, it was held that the bank acted as agent or trustee of the city, and that the city was the owner of the sum transmitted as against the receiver of the home bank. *City of St. Louis v. Johnson*, §§ 162, 163.

[NOTES.—See §§ 164-181.]

THOMPSON v. RIGGS.

(5 Wallace, 668-690. 1866.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Substance of the declaration was that the defendants were bankers, exercising the trade and business of banking, and that the plaintiffs were their customers, and as such were in the habit of making their deposits at their bank; and that the defendants, as such bankers, were accustomed to receive as deposits gold and silver coin, and other money currency, of their customers, to be paid and returned in kind, agreeably to the custom of their bank and all other banks in the city of Washington; and that the plaintiffs, on the 28th day of February, 1864, having a balance due them at the bank of the defendants of \$5,761, as deposits previously made there in gold and silver coin, demanded payment and return of the same, and that the defendants then and there refused to make such payment and return as they had promised to do. Defendants pleaded the general issue and that they, at a certain time prior to the suit, tendered and offered to pay to the plaintiffs the sum of money in their declaration mentioned in treasury notes, made a legal tender in payment of debts, and that, from that time, they have been, and still are, ready to pay the same, and now bring the same into court.

1. Parties went to trial at a special term of the court, and the verdict and judgment were for the defendants. Objection was duly taken by the plaintiffs to one of the rulings of the court in excluding certain testimony offered by them to show the usage and mode of dealing of other banks, and the bill of exceptions to the ruling was regularly drawn out and duly signed and sealed. Prayers for instructions to the jury were duly presented by the plaintiffs and they were refused by the court, and other and different instructions were given in their place, but no bill of exceptions in that behalf was tendered by the plaintiffs or signed or sealed by the court. Statement in the minutes is that the plaintiffs excepted in law as well to the refusal of the court to instruct the jury as requested as to the instructions given, and that the exceptions and the evidence are hereby made record. Plaintiffs also made a motion for new trial, assigning two causes: (1) Because the court refused to instruct the jury as prayed by the plaintiffs. (2) Because the court instructed the jury as prayed by the defendants. Order of the court was that the motion should be heard before the court at general term. Both parties were heard before the full bench, and the court affirmed the judgment as rendered at the special term. Writ of error to this court was sued out by the plaintiffs.

2. Principal questions discussed at the bar are presented, if at all, in the

prayers for instructions which were refused, and in the instructions which were given to the jury. Defendants contend that neither the prayers for instructions nor the instructions given are before the court, as they are not exhibited in any bill of exceptions signed and sealed by the justice who presided at the trial.

§ 152. *The rulings of the court on evidence or on the instructions must be saved by bill of exceptions.*

Settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions, can be brought here for revision in any other mode than by a regular bill of exceptions. Final judgments in a circuit court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instructions as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way. *Suydam v. Williamson*, 20 How., 432. None of the other modes suggested, say the court, in the case of *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall., 602, enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions, and we reaffirm that rule. *Bulkeley v. Butler*, 2 Barn. & Cress., 434; *Seward v. Jackson*, 8 Cow., 406; 2 *Tidd's Prac.*, 896; 4 *Chitt. Gen. Prac.*, 7; 2 *Institutes*, 427; *Dougherty v. Campbell*, 1 Blackf. (Ind.), 39; *Cole v. Driskell*, id., 16; *Strother v. Hutchinson*, 4 Bing. N. C., 89. Instructions requested or given rest in parol and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial; and it is the well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably reduces the same to form and causes it to be sealed by the judge. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall., 598.

§ 153. *The eighth section of the act of 1863, to reorganize the courts of the District of Columbia, does not refer to appeals or writs of error to or from this court.*

Views of the plaintiffs are that the bill of exceptions is not necessary in cases removed here from the supreme court of this District. Reference is made to the eighth section of the act to organize the courts in this District, as furnishing support to the proposition, but it is quite evident that the section referred to relates exclusively to the practice in the subordinate court, and not to the proceedings for the removal of the cause into this court for examination and revision. Exceptions taken in the trial at the special term, before a single justice, as there provided, may be reduced to writing at the time, or may be entered in the minutes of the justice and settled afterwards in such manner as the rules of the court provide. Such exceptions must be "stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised; but the case or bill of exceptions need not be signed or sealed." 12 Stat. at Large, 764. Motion for new trial may also be entertained by the justice who tries the cause, at the same term, in the manner therein described. When such motion, however, is made upon the minutes, an

appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner. Our only purpose in referring to that section is to show that no part of it has anything to do with the question before the court. No one of the clauses mentioned makes any provision whatever for a writ of error or appeal to this court. Regulations upon that subject are made by the eleventh section of the same act, which provides that any final judgment, order or decree of the court may be re-examined, and reversed or affirmed, in the supreme court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgments, orders or decrees of the circuit court of the United States for this District. Writs of error and appeals were required to be prosecuted under that law in the same manner and under the same regulations as in the case of writs of error or appeals from judgments and decrees rendered in the circuit court of the United States. 2 Stat. at Large, 106; *United States v. Hooe et al.*, 1 Cranch, 318. Conclusion is that the regulations respecting the removal of cases from the supreme court of this District on writs of error or appeal are the same as from the circuit courts of the United States, and of course the questions presented in the prayers for instruction and in the instructions given to the jury in this case are not before the court, as neither the prayers for instruction nor the instructions given are any part of the record.

3. Remaining question arises under the exception to the ruling of the court in excluding the testimony offered by the plaintiffs to show the usage and mode of dealing of other bankers in this city. The teller of the defendants called by the plaintiffs testified that the defendants, prior to the suspension of specie payments in April, 1861, paid all checks drawn upon the bank by their customers in gold or its equivalent, except when the deposit had been made in depreciated paper; that after that time they uniformly made a difference with their customers in receiving and paying their deposits between coin, or specie and paper money, and that in all cases where the deposit had been made in coin, if requested, they paid the checks in coin; that after the suspension of the banks the defendants refused to receive currency as the equivalent of specie; that currency continued to be received and credited to customers as before, but went into the general funds of the bank, and the same money was never returned to the customer, and it was not received on special deposit; that the plaintiffs had never made any special deposits with the defendants; that the books of the bank and the pass-books were kept as before the suspension, except that the different deposits were designated as coin, cash, checks or treasury notes.

4. Testimony of the teller of the bank is express to the point that the plaintiffs never made any special deposit with the defendants, and there is no testimony in the case to support any such theory. On the contrary, it is clear that they made their deposits for their own convenience and were credited for the amount in the usual way on the books of the bank.

§ 154. *Contracts between bankers and their customers are to be performed and are construed in the same way as contracts between other parties. Rule as to deposits.*

Clear inference from the whole testimony is that the deposits of the defendants were made without condition or special agreement of any kind, and in such cases the law is well settled that the depositor parts with the title to his money and loans it to the bank. *Marine Bank v. Fulton Bank*, 2 Wall., 256. Deposits may be made under circumstances where the legal conclusion would be that the title to the thing deposited remained with the depositor, and in

that case the bank would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property. Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or in coin he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promisee can recover only its market and not its nominal value. *Robinson v. Noble*, 8 Pet., 198; *McCormick v. Trotter*, 10 Serg. & R., 96. But where the deposit is general, and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender. *Bank of Kentucky v. Wister*, 2 Pet., 325. Moneys deposited with the bank in this case were entered in a pass-book in figures, expressing the amount in dollars and cents, and it appears that the character of the money deposited is marked against each sum as coin, cash, check, or treasury notes, as the fact was in each particular instance. Such marks, however, are wholly insufficient to overcome the testimony of the teller, who was introduced by the plaintiffs, and who was the only witness examined upon the subject. Proof that those words were written against the several deposits for any such purpose as is supposed by the plaintiffs is entirely wanting; and in the absence of such proof it is much more reasonable to infer that they were put there as matter of convenience to the depositor, or to assist the memory as to the amount of the respective credits, in case of misrecollection or dispute.

§ 155. *Usage cannot control a rule of law or the intention of the parties.*

No evidence of general usage or custom, in the ordinary sense of those terms, was offered by the plaintiffs or appears in the record. Customary rights and incidents universally attaching to the subject matter of the contract in the place where it was made are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. But evidence of usage is not admitted to contradict or vary express stipulations restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure. *Bliven v. New England Screw Co.*, 23 How., 431; *Addison on Contracts*, 853; *Greenl. Ev.*, § 292. Judge Story expressed himself strongly against local usages or customs in particular trades or kinds of business, set up to controvert or annul the general liabilities of parties under the common law as well as under the commercial law, and remarked that there was great danger in admitting evidence of such loose and inconclusive usages and customs, often unknown to parties, and always liable to great misunderstanding and misinterpretations, and allow it to outweigh the well-known and well-settled principles of law. *Schooner Reeside*, 2 Sumn., 569. Usage contrary to law, or inconsistent with the contract, is never admitted to control the general rules of law or the real intent and meaning of the parties. *Dykers v. Allen*, 7 Hill, 499; *Woodruff v. Merchants' Bank*, 25 Wend., 674. Evidence of

local usage to sell commercial paper, pledged as a security for a loan, at private sale, after demand of payment, and notice that such sale would be made in case of default, was held to be inadmissible in the court of appeals in the state of New York, all the judges concurring. *Wheeler v. Newbold*, 16 N. Y., 395. Evidence of the usage of banks to regard drafts drawn upon them, payable at a day certain, as checks, and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper. *Bowen v. Newell*, 4 Seld., 194.

§ 156. *The title to money deposited in bank passes to the bank; this rule cannot be controlled by usage.*

General rule of law is, that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control that general rule of law, as it is not pretended that the evidence showed a special deposit or any special contract. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law.

Judgment affirmed, with costs.

IN RE MADISON BANK.

(Circuit Court for Wisconsin: 5 Bissell, 515-522. 1874.)

STATEMENT OF FACTS.—The Madison Manufacturing Company, on August 18, 1873, deposited a note of \$500 with the Madison Bank for collection. The company's account was overdrawn at the time to an amount exceeding the amount of the note. The note was paid in instalments by drafts on a Chicago bank. The bank refused to deliver the drafts, and they were turned over to its assignee in bankruptcy. Deposits were made from time to time after the 6th of September, and when the drafts were received the bank owed the company, exclusive of the credit on the note. The company petitions for an order on the assignee to pay over \$517.40.

Opinion by HOPKINS, J.

Notwithstanding the special circumstances shown by the petitioner, the fact nevertheless remains that the note was credited to the company in the ordinary way, and subject to its order, like any other deposit, and the company had the benefit of it in the payment of its overdrawn account at the bank from the 18th of August to the 6th of September. The note and the avails belonged to the bank during that period at least, and if the note had been collected during that time the company would not have been entitled to these drafts or the avails of the note. That being so, has the company, by making good its account on the 6th of September in the ordinary way of depositing, without any special agreement to that effect, changed its relation or condition so as to be entitled to the drafts as the proceeds of the note? And further, does this case fall within the law governing or relating to principal and agent so as to authorize the company, as principal, to follow the proceeds and reclaim them from the hands of the assignee in this manner?

§ 157. *Property held by an agent does not pass to his assignee in bankruptcy.*

In case of the insolvency or bankruptcy of an agent, property consigned to him to sell, and notes left with him to collect, and the proceeds of such, whether in notes or money, so long as the same can be distinguished from the mass of

the agent's or factor's property, do not pass to the assignees in bankruptcy, and if received by them may be recovered by the principal at law, or, in other words, the right of the principal thereto ceases only when the means of ascertainment or identification fail. The petitioner's counsel contended for the application of this doctrine to this case, and claimed that no property or choses in action held by the bankrupt in a *fiduciary* capacity passed to the assignee, citing, in support thereof, *Price v. Ralston*, 2 Dal., 60; *Denston v. Perkins*, 2 Pick., 86; *Taylor v. Plumer*, 3 Maule & Selw., 562; 3 Parsons on Contracts, 478 *et seq.*; *Rodriguez v. Heffernan*, 5 Johns. Ch., 417. As to the correctness of these general principles there can be no question. But for the decision of this case it becomes necessary to ascertain the nature of the business between bankers and their customers, and to see whether such business comes within these principles; if not, then we must look in some other rule for its determination.

§ 158. *The relation of a bank with its dealers and depositors is that of an ordinary debtor.*

In deciding this case, it must be borne in mind that the petitioner was a customer of this bank, and that the relation of banker and customer existed between him and the bank, and as a regular dealer with the bank he had an open and running account, in which he was credited with all sums paid into the bank, and with the proceeds of all notes and bills discounted or collected, and was charged with all checks drawn on the institution. In *In re Franklin Bank*, 1 Paige, 249, 254, the chancellor says: Whenever money is specially deposited in a bank for safe keeping, it is at the risk of the depositor. If the same is stolen, lost or destroyed without the fault of the bank or its officers, the depositor sustains the loss. Not so with a general depositor. The money, checks or bills which he deposits become the property of the bank, and he becomes a creditor; he has no claims upon the money or bills deposited. The officers may use them as they please, and he is to all intents a general creditor of the bank, and the bank may use them as it sees fit, and there is an implied assent to such use by the depositor. According to that doctrine, the relation of a bank with its dealers and depositors is that of an ordinary debtor, and must be governed by the law relating to transactions between debtor and creditor. In *Smedes v. Bank of Utica*, 20 Johns., 372, which was an action for damages against the bank for omitting to duly present and protest a note left with it for collection, the bank set up a want of consideration for its undertaking to collect the bill. Woodsworth, J., who delivered the opinion of the court, page 379, says: "It will be conceded that had this been an undertaking by an individual to demand payment and give notice, it would be a *nudum pactum*; . . . but the case of banking institutions is widely different. They are established to aid the commerce of the country, by giving facilities to the moneyed corporations of the community, . . . to enlarge the amount of actual capital. . . . The operations of a bank principally consist in loaning money and discounting notes, which are direct and immediate sources of profit. Incident to the business of a bank is the receiving of notes from their customers for collection; when paid, the money is placed to the credit of the depositor, and remains in bank until called for." And as profits might arise from such a transaction and deposit, it was held a sufficient consideration for the defendant's undertaking to collect the note. I cite this to show the great dissimilarity between the way an agent transacts the business of his principal, and the duties and obligations assumed by an agent towards his principal, and

the way a banker deals with his customers and the duties of such banker, in reference to the money collected for or deposited by his customers. It is the duty of an agent to pay over the money received or collected by him to his principal, not to use it for his individual benefit; whereas there is an implied understanding that a banker may use and loan for the benefit of the bank the money of his customers, including that collected for them as well as that deposited.

§ 159. *Money deposited by a customer ceases to be his money, and the bank is merely required to refund an equivalent sum on demand.*

That case shows, further, that there is an implied understanding that the money to be received from collections is to go on deposit in the bank, and in the absence of proof of an agreement that it was not to be passed to the account of the dealer, courts should give to such understanding the force of a contract that it was to be deposited in the ordinary way, and to be drawn out by checks as other money. Indeed the proof here is that the proceeds were to be deposited. The relation between bankers and their customers is most clearly laid down and defined in the case of *Foley v. Hill*, 2 House of Lords Cases, 28, decided in July, 1848. It is there held to be the ordinary relation between debtor and creditor, with a superadded obligation to pay the customer's checks on demand, and it is there further held that it does not bear any analogy to the relation between principal and agent or factor, and does not partake of a fiduciary character. It is there said that "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it. . . . He is guilty of no breach of trust in employing it; . . . he is not bound to keep it or deal with it employing it as the property of his principal; . . . he is simply required to refund an equivalent sum." That case distinguishes the relation of bankers and their customers from that of principal and agent, and shows that the obligations incurred by a banker, in the ordinary course of his business as such, with his customers, is not fiduciary in its nature, but, on the contrary, the liability is that of an ordinary debtor.

§ 160. — *the rule applies to notes deposited for collection.*

The case of *Smedes v. Bank of Utica*, *supra*, holds, what we all know to be the fact, that the collection of notes is, in this country at least, a part of the ordinary business of a banker. Hence it follows that a banker, in receiving a note for collection from one of his customers, does not act as an agent, but is presumed to have undertaken the collection for the profit that might result to it from the deposit and use of the money as a banker. So that when a banker collects money for his dealers it is regarded as deposited and in the light of any other deposit, not as the money of the customer; nor is the customer entitled to it, but only to its equivalent as any other deposit. This, it seems to me, is an answer to the claim of the petitioner in this case. These authorities show that the principle upon which the counsel rested the claim upon the hearing is not applicable, and cannot be invoked to authorize a recovery of this claim. But as hereinbefore stated, the testimony does not sustain the position insisted upon, to wit, that the note was taken simply for collection. I think the transaction in its legal aspect widely different from such a case. The note was, in fact, discounted, and the proceeds deposited and credited to the petitioner, and up to the time that its account was made good belonged to the bank; and I cannot believe that the making good of the account afterwards changed the

relation between the parties in contemplation of law. To grant the relief asked would be, in fact and in legal effect, paying the subsequent deposits of the petitioner in full. To do this under so thin a disguise as that put forth, to wit, that the petitioner was not to draw from the funds until after the collection of the note, when at the time the account was overdrawn to an amount exceeding the proceeds, would be sacrificing the substance to preserve the shadow. One of the cardinal doctrines of a court of equity is that equality is justice, and in all cases in bankruptcy, whether heard in this court sitting in bankruptcy, or a court of equity, a creditor who claims a preference must show a clear legal right to it. Cases of extreme hardship cannot but exist in all cases of bank failures. In such failures the loss generally falls upon those least able to bear it—upon the poorer classes and laborers, the aged and dependent, the friendless and unprotected, whose little all has been left on deposit without the thought of the possibility of losing it, and who are wholly unprepared for such an event.

§ 161. *Burden of proof on petitioner to prove that he is entitled to a preference.*

And it is not exacting too much to require that a party dealing with the insolvent bank in the ordinary way, as the case shows the petitioner was, should make out a very clear case before a court should sustain a preference in favor of such parties over the other creditors. The petitioner, in order to avoid the effect of the overdraft, proved by Mr. Hudson, the superintendent, that he had, standing in his individual name and as his own money, more than enough to balance the deficiency in the company's account, and that he had previously told the bank officers that his account should stand as a guaranty for any amount due from the company. This I have disregarded altogether, for the reason that, if he had so stated, it would be void under the statute as being a promise to pay the debt of another, and not in writing. The bank charged the company with the money, and his undertaking, if made as he said, would be collateral and void under the statute, for the reason above stated. I therefore deny the prayer of the petition, and, as this matter has assumed the form of a regular suit or proceeding, and testimony been introduced as upon an ordinary trial, I think it just and proper that the petitioner should pay the costs to be taxed, including a docket fee of \$20, to the attorneys of the assignee. Many of these principles apply to the case of J. H. Rountree, who has filed and submitted a petition praying that the assignee be ordered to refund to him the amount of a draft drawn by J. Hodges & Co. upon the Second National Bank of Chicago, for \$42.40, made payable to H. H. Rountree, his son, a minor, then a student in the University at Madison. The draft was dated on the 20th of September, 1873, and was presented to the bank to be cashed, and, as alleged in the petition, was not cashed, but was taken to be collected.

The bank received it to collect, and sent it forward, and the amount thereof, instead of being returned, was credited to the Bank of Madison by the Second National Bank, which was then a creditor of the Bank of Madison to quite a large amount, so in point of fact, neither the bank nor assignee ever received the money upon it. The Second National paid it by crediting the overdrawn account of the Bank of Madison with the amount. The officers of the bank must have known such would be the result when they received it to collect, and their conduct in so doing is deserving of the severest censure. These facts are a sufficient answer to the petition of Mr. Rountree, and the prayer of his petition is therefore denied. But as no counsel were employed, or argument had by either party, no costs are charged to either party in his case.

CITY OF ST. LOUIS v. JOHNSON.

(Circuit Court for Missouri: 5 Dillon, 241-253. 1879.)

STATEMENT OF FACTS.—The National Bank of the State of Missouri was the regular depository, under bond with security, subject to the lawful orders of the city officers, of the money of the city of St. Louis. Some of the bonds and coupons of the city were payable at the Bank of the Republic, and others at the Bank of Commerce, in New York. To meet such bonds and coupons at maturity, the city treasurer was accustomed to draw his check on the National Bank of Missouri, and indorse and deliver the same to said bank, with written instructions to remit the amount to either or both of the banks in New York. The National Bank of Missouri would remit, or provide a credit, with instructions to the New York banks to pay the bonds and coupons, and forward them, canceled, to the National Bank of Missouri. The National Bank of Missouri suspended payment, and this suit is a contest between its receiver and the city of St. Louis for a balance remaining in the Bank of the Republic at New York. The money of the city was deposited by its treasurer, and was kept in a general current account (pass-book "H," referred to in the opinion), subject to be drawn out on checks. There were two special accounts, pass-books "G" and "E," the first the "coupon account, gold," and the second the "bond and coupon account, currency."

Opinion by DILLON, J.

The receiver succeeds to all the rights of the National Bank of the State of Missouri, and, as there is no question of fraud, actual or constructive, in the case, he succeeds only to the rights of the bank as against the city to the balance on hand in the Bank of the Republic at the date of the failure of the Missouri bank. As between the Missouri bank and the city, did those moneys in the Bank of the Republic belong to the city? Suppose the Missouri bank had not failed, and a contest had arisen between it and the city as to the balance on hand in the Bank of the Republic, would the city have been entitled to a judgment or decree that this balance was in law or in equity its money? If so, the same rights still remain. If, however, as respects this balance, the Missouri bank sustained towards the city the relation of a debtor only, this relation still remains, and the receiver is entitled to the fund, and the city must come in as a general creditor. Suppose the Bank of the Republic had failed with the amount here in dispute on hand, on which would the loss have fallen, the city or the Missouri bank? Such an inquiry would involve the same principle which is presented in the cause now under consideration. The correct decision of the cause requires that the facts and circumstances which give it its peculiar character shall be closely regarded, and the intention and purposes of the bank and of the city kept constantly in view.

§ 162. *The general relation of banker and customer is that of debtor and creditor.*

The general relation of the bank to the city was the usual relation of a banker to his customer, viz., the relation of debtor and creditor. That was the undoubted relation as to the account in the general pass-book "H." On the face of the special pass-books "E" and "G," the same relation also exists, for the bank credits the city and charges itself with the amount received or transferred from the general account, and when it subsequently receives the coupons and surrenders them to the city, and not before, it charges the city on these books (and on its books, of which these are copies) with the amount of coupons

surrendered, and with exchange on the sum remitted to New York, and also the commissions for services charged by the Bank of the Republic. It did not charge the city on the special books with the amount remitted to New York at the date of remittance, but, as just stated, only debited the city when the coupons were received here and surrendered to the city. As between the bank here and the Bank of the Republic, the money was that of the Bank of Missouri, and not that of the city. It was intended to be so as between all three of the parties. Originally the city had a purpose in not having it appear that the money in New York to pay its obligations was its own — a purpose based upon a commendable precaution to protect its credit against unfounded pretenses, and in no wise fraudulent,— and that mode of transacting the business naturally continued after the reasons for it had probably ceased. If we leave out of view the effect of the account shown in the special pass-books "E" and "G," the right of the city as against the bank would seem to be sufficiently clear. The case would then be this: The bank was the general debtor of the city, having funds subject to its check or draft. Let us take the transaction of April 25th, for it represents all the others. The city comptroller directs the city treasurer "to remit" to the Bank of the Republic \$51,000 to pay the bonds and coupons of the city falling due at that bank on the following month. On the same day the city treasurer draws in favor of the bank his check for the amount and incloses it to the president of the bank, with directions, *inter alia*, "to remit" to the Bank of the Republic, in New York, \$51,000, "to pay bonds and coupons of the city falling due (at that bank) in May next." The bank at once charges the amount of that check to the city, which has the effect to reduce the city's balance with the bank and to stop interest to that extent. If the money had been passed over the counter to the city treasurer, and he had delivered it to another bank, with instructions to remit to a particular bank for a specified and definite purpose, such bank would have been the agent of the city to remit or transmit the money of the city; it would remain the money of the city, notwithstanding it may have been credited on account to the agent, and not to the principal, and this with the consent of the two. If such bank had transmitted the money by express, the money would be the city's; if by draft, it would be the agent of the city for that purpose; but when its instructions were obeyed and the money duly received by the appointed depository, all liability would be at an end. If the appointed depository failed, the loss could not be thrown upon the agent.

But the money was not paid over the counter to the city, and the city did not select some other agent or bank to remit or transmit it to the Bank of the Republic, but selected its general depository to make the remittance, and accepted a credit in another account for the same sum. The bank remitted the sum, as directed by the city, to the Bank of the Republic, with specific directions to credit the amount to it, and to use the same "to pay the bonds and coupons of the city maturing at your bank next month," and charge the amount to the account of the bank here, and forward to this bank the bonds and coupons canceled. The letter of the treasurer to the president of the bank made the bank here the agent of the city to remit, and if the bank here did remit accordingly, and placed the sum with the designated bank, *i. e.*, the Bank of the Republic, it did its duty, and would not be liable to the city if the Bank of the Republic had failed with this fund on hand. Though the amount stood on the books of the Bank of the Republic to the credit of the bank here, yet that was by the city's consent and for its convenience. It imposed, as between the

bank here and the city, no additional liability on the bank, and it deprived the city of none of its rights; such would be the effect of the letter of the treasurer to the president of the bank, if there is nothing to qualify or change it in the other circumstances of the case. The main circumstance relied on is that the city, at the time it gave directions to remit, accepted on another account and pass-book a credit from the bank for the same sum — the bank, by such credit, acknowledging itself to be the debtor of the city for the amount it had undertaken to remit. If this is the controlling element in the case, then the relation of debtor and creditor between the city and bank never ceased, as respects the sum directed to be remitted, and remained the same as before, and continued so to remain after the sum was placed, as directed, with the Bank of the Republic.

§ 163. — *but under special circumstances the bank acts merely as agent of the depositor.*

But, in my judgment, this is not the controlling element in the cause. The special pass-books are to be regarded as in the nature of memoranda, and adopted for the sake of convenience, and have the same effect as if the bank had given to the city a receipt for the money received, and promised therein to remit the same to the Bank of the Republic for the purpose of paying the coupons of the city. The bank charged the city with exchange on the amount it thus received, the same as it would have charged if the draft had been for any other customer. It became the agent of the city to transmit the money. The money, when placed in the Bank of the Republic, was, as between the Missouri bank and the city, the money of the latter. When the agent presented coupons canceled, this showed that the agent had discharged the duty it had undertaken. It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic were, as between the former bank and the city, *trust moneys*, and in equity they belong to the *cestui que trust*, and the latter has the right to pursue and claim them as against all persons who do not stand free of the trust. This view is not regarded as at all in conflict with the cases cited and relied on by the defendant's counsel. *Marine Bank v. Fulton Bank*, 2 Wall., 252; *Savings Bank Case (MSS.)*, per Mr. Justice Miller. A decree will be entered adjudging the money in controversy to belong to the city.

Decree accordingly.

§ 164. **Overdraft.**—A custom of a bank to allow its depositors to overdraw is illegal, and cannot be supported by any act or vote of the board of directors. If the cashier allow an overdraft he does so at his peril. *Minor v. Mechanics' Bank*, 1 Pet., 46. See the case, §§ 6-19.

§ 165. **Bank must pay in specie.**—If the charter of a bank require its bills to be paid in gold and silver, it must repay a general deposit of bills received by it at their nominal value, although the same were at the time of demand of much less value. *Bank of Kentucky v. Wister*, 2 Pet., 318. See the case, §§ 265-269.

§ 166. **Presumption of funds.**—The payment of a draft or check is *prima facie* evidence of funds; and especially when the draft or check is surrendered to the drawer. *The Bank v. Wilson*,* 3 Cr. C. C. 218; *The Bank v. McCrea*,* 3 Cr. C. C., 649; *The Bank v. Washington*,* 3 Cr. C. C., 295.

§ 167. **Deposit, how drawn.**—Money deposited in bank by a firm cannot be drawn out on the check of a member of the firm; and the bank can justify itself only by showing that the money was applied to the use of the firm. *Coote v. The Bank*,* 3 Cr. C. C., 50.

§ 168. It is no defense that the member drawing the check informed the bank that it was for the use of the firm. *Ibid.*

§ 169. Right to set off note against deposit.—It seems that a bank which is the holder of an indorsed note may set off the same against a general deposit of the maker. *Blair v. Allen*, 8 Dill., 109.

§ 170. Pass-book.—The pass-book of the depositor in a savings bank performs the same office as certificates of deposit or drafts and checks. *Oulton v. Savings Institution*, 17 Wall., 118.

§ 171. Contract between bank and depositor.—It seems that the contract of a bank with a depositor is to pay his checks when presented for payment, if at the time of the presentment of the check he has funds on deposit sufficient to pay it. *Morse v. Massachusetts National Bank*, 1 Holmes, 210.

§ 172. Statute of frauds.—A verbal agreement by a bank with the holder of a check drawn on it by one who had not sufficient funds on hand to meet it, that if the holder would deposit the check in some other bank, so that it should be received through the clearing-house, it would then pay it, is an agreement within the statute of frauds, and consequently not binding. *Ibid.*

§ 173. Note payable at bank.—Where an instrument payable at a bank is lodged with the bank for collection, the bank becomes the agent of the payee to receive payment. But if such instrument is not lodged at the bank at its maturity, but money is left with the bank to be applied thereon, the bank holds the money as the agent of the depositor and not of the payee, and any depreciation of the money so deposited must be adjusted between the bank and the depositor. *Ward v. Smith*, 7 Wall., 451.

§ 174. Where a note is taken by a bank as collateral security for a loan to a depositor, the right of the bank to proceed against the maker of the note is not affected by the fact that the borrower had on deposit at various times sums sufficient to repay the loan. Neither is the right of the bank thus to sue affected by the fact that the note was illegal in its inception, and that as the bank took it as an innocent indorsee, it could thus enforce the otherwise void and illegal note in favor of the borrower. *Third National Bank v. Harrison*, 10 Fed. R., 253.

§ 175. Effect of bankruptcy of depositor.—In case of the bankruptcy of a depositor, a bank cannot apply the deposit on a debt due to it from the depositor, but the amount on deposit must go in as assets, and the debt must be proved as other debts, and the banker must take his dividend with the other creditors. *In re Warner*,* 5 N. B. R., 420.

§ 176. A bank holding a customer's note, payable on demand, has a right to apply thereon the proceeds of drafts handed it by such customer before his bankruptcy, though such drafts were not collected till after such bankruptcy. *In re Farnsworth*, 5 Biss., 224.

§ 177. Deposit of Confederate notes.—Though it is true, as a general rule, that when money is deposited in a bank, or is collected by it as an agent, it becomes the property of the bank, and the bank assumes the position of a debtor, yet where Confederate notes are deposited or received the bank becomes liable to return an equal amount of Confederate notes, and not the value of such notes in government currency. *Planters' Bank v. Union Bank*, 16 Wall., 501. See § 194 *et seq.*

§ 178. When a deposit is special; when general.—A special deposit in a bank only exists when the money or thing deposited is received by the bank to be kept by itself and returned *in corpore* on demand. So where a bank, after suspension, announced that on a certain day it would open and receive special separate deposits, which would be applied on the payment of checks against them, and not used to pay the bank's existing liabilities, it was held that such agreement was *ultra vires* and void, and did not bind the bank; that the deposits were not special deposits, and that such depositors on a second failure of the bank were entitled only to a *pro rata* distribution of the assets with the other and former creditors. *In re Mutual Building Fund Society*, 2 Hughes, 376.

§ 179. Special deposit.—If a bank delivers a special deposit to the wrong person, or it is lost or mislaid by default or mistake, or by the carelessness or misconduct of any of the officers or clerks of the bank, the bank is not responsible therefor, if such accident, mistake or carelessness did not happen in the regular course of the business of such officers or clerks, and proper care had been used in the selection of honest and faithful clerks and officers. *White v. Bank*,* 4 Brewster, 245.

§ 180. In case of a special deposit in a bank, the burden of proof is on the bank to show what has become of it. *Ibid.*

§ 181. Clearing-house; relation of banks.—The C. S. bank agreed to act as the agent of the I. S. bank for clearing house purposes, and to pay all checks of the I. S. bank which came through the clearing-house. The I. M. bank agreed to keep on deposit in the C. S. bank funds to meet such checks, and such funds were mixed with the other funds of the C. S. bank, and a regular debtor and creditor account was kept by it with the I. M. bank. After

banking hours, the C. S. bank, after paying checks for the day, had a sum belonging to the I. M. bank, which it requested it to remove, as it was on the eve of failure. The money was removed by the I. M. bank accordingly. *Held*, that the relation between the two banks was that of ordinary debtor and creditor; that the I. M. bank was a mere depositor in the C. S. bank; that its funds were not trust funds, but were merely a part of the assets of the bank; that the transaction of the removal of the funds was an attempt to give a preference, and that the assignee in bankruptcy could recover such sum of the I. M. bank. *Phelan v. Iron Mountain Bank*, 4 Dill., 89. See § 193.

VI. CHECKS.

[See the title **BILLS AND NOTES**.]

SUMMARY — *When holder of check can sue bank*, § 182.

§ 182. The holder of a check cannot sue the bank on which it was drawn, for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer. But in equity, and as between the drawer and the payee, the check is an equitable assignment of the fund on which it is drawn to the amount called for by the check. *German Savings Institution v. Adae*, §§ 183-185.

[NOTES.— See §§ 186-190.]

GERMAN SAVINGS INSTITUTION *v.* ADAE.

(Circuit Court for Missouri: 1 McCrary, 501-505. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.— This case is submitted upon an agreed statement of facts, from which it appears:

First. That on the 16th day of December, 1878, the firm of C. F. Adae & Co., bankers, Cincinnati, Ohio, being indebted to their correspondents, H. L. Newman & Co., at East St. Louis, Illinois, made and forwarded their certain bill of exchange (or check) of that date, on the German Savings Institution, a bank in St. Louis, for \$1,072, to the order of said H. L. Newman & Co., the same being proceeds of a collection theretofore made by said Adae & Co. in the ordinary course of business between them and the said H. L. Newman & Co.

Second. The said bill of exchange, received by said Newman & Co. on the 19th day of December, 1878, and about noon of that day, was presented at the banking house of said German Savings Institution for payment, which was refused.

Third. On the 18th day of December, 1878, C. F. Adae & Co. became insolvent, and on that day, in Cincinnati, Ohio, made an assignment in writing of all their property to Augustus Bennett and Phillip Henry Hartman, in trust, for the benefit of their creditors, which assignment and trust was on the same day accepted by said assignees.

Fourth. Upon making said bill of exchange, December 16th aforesaid, Adae & Co. charged themselves with the amount thereof on their general account with the German Savings Institution.

Fifth. On December 16th the amount on deposit with said German Savings Institution to the credit of Adae & Co. was more than the sum of said bill of exchange, and on December 18th, at the time of said assignment to Bennett & Hartman, the balance on deposit as owing from it to, and the property of, said Adae & Co. on said general account was \$4,637.25.

Sixth. Notice of the assignment to Bennett & Hartman was received by the German Savings Institution on the 19th day of December, before the presentation for payment of said bill, and by reason thereof payment was refused.

The German Savings Institution, by bill of interpleader, asks the direction of this court as to the proper disposition of said fund. Bennett & Hartman, as assignees, claim the entire fund under the assignment from Adae & Co. to them. Newman & Co. claim a portion thereof under the bill of exchange executed to them by said Adae & Co., on the 16th day of December, for \$1,072. The controversy is thus seen to involve the question whether the execution and delivery of the bill of exchange for \$1,072 was in equity, in view of the facts above recited, an assignment *pro tanto* of the fund in question.

§ 183. *When the holder of a check cannot sue the bank on which it is drawn.*

It has been frequently decided that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it, in the absence of proof that it was accepted by the bank or charged against the drawer. *Bank of Republic v. Millard*, 10 Wall., 152; *Marine Bank v. Fulton Bank*, 2 Wall., 252; *Thompson v. Riggs*, 5 Wall., 663; *Rosenthal v. Mastin Bank et al.*, 21 Alb. L. J., 28, and cases cited.

§ 184. — *but the rule does not apply where the bank holds a fund which it is willing to pay to the true owner.*

If, therefore, this were an action by the check holder against the bank upon the check, there could be no recovery. But such is not the case. This is a bill of interpleader in equity, by which the plaintiff, a bank, holding the fund in question, declares its readiness and willingness to pay as the court may order, and the controversy is as to the equities of the other parties, who are adversary claimants of the fund. The rule which protects a bank from being harassed by suits brought by check holders has no application to a case of this character. We are at liberty, therefore, to inquire which of the claimants here has the better right in equity to the fund in question. There are, undoubtedly, numerous respectable authorities which sustain the doctrine that the execution of a check in the ordinary form, not describing any particular fund, does not operate as an assignment equitable or otherwise of funds of the drawer in the hands of the drawee. *Attorney General v. Insurance Co.*, 71 N. Y., 325, and cases there cited; *Randolph & Co. v. Canby, Assignee*, 2 N. B. R., 296.

But, on the contrary, it was held by this court in *Walker, Assignee, v. Siegel*, 2 Cent. L. J., 508, that the rule thus broadly stated seems to apply only to cases at law, and that "such an order, as soon as notice is given to the drawee, works an assignment in equity," and this view is well sustained by authority. *Roberts v. Austin, Corbin & Co.*, 26 Ia., 315; *Forgarties v. State Bank*, 12 Rich. L. R. (S. C.), 518; *Munn v. Burch*, 25 Ill., 35; *Daniels on Neg. Inst.*, vol. 1, p. 20, sec. 23; *Willard's Eq. Juris.*, Potter's edition, p. 464.

§ 185. *In case of insolvency, in questions between the assignee and check holders, the better equity is with the latter, these checks operating from their date as an assignment pro tanto of the fund.*

There is certainly no good ground for holding that a check or draft drawn upon a fund in bank is not an equitable assignment as between the drawer and payee, and in case where there is no controversy as to the rights of the bank or drawee. It does not lie in the mouth of the drawer or of his assignee to say that such an instrument is not an equitable assignment. If it were conceded that, as a general rule, a check drawn upon a part of a fund in bank will not of itself operate as an assignment *pro tanto*, it is very clear to my mind that this is a case which a court of equity might well regard as an exception to any such general rule. As already suggested, the holder of the fund has come voluntarily into a court of equity, bringing the fund with him, and, disclaiming all in-

terest in it, asks the court to dispose of it, as between the check holder and the assignee, according to equity. It is a case, too, in which it appears that, in equity the fund was the property of Newman & Co. before the check was executed, being the proceeds of a collection made for them by Adae & Co. As between the parties who are now claiming this fund, a court of equity would have decreed the payment of it to Newman & Co., on the ground that Adae & Co. held it for them as the proceeds of a collection made as their agents, and therefore proceeds of their property. *Superintendent, etc., v. Heath*, 2 McCartie (N. J.), 22; *Overseers of the Poor v. Bank of Virginia*, 2 Gratt., 544. It is well settled that the principal may follow his property into the hands of his agent or factor and recover it or its proceeds from him. *Veil & Petray v. The Adm'r of Mitchell*, 4 Wash., 105; *Bank v. King*, 57 Pa. St., 202; *Beech v. Forsyth*, 14 Bush, 399; *Cook v. Tullis*, 18 Wall., 332. An assignee for general creditors can assert no claim that was not good in the hands of the assignor. *Roberts v. Austin, Corbin & Co.*, 26 Ia., 315; *Haggerty v. Palmer*, 6 Johns. Ch., 437; *Clark v. Flint*, 22 Pick., 231; *Burrill on Assignments*, 483, 484, and authorities cited. If there had been no assignment, and this were a controversy between Adae & Co. and Newman & Co., it would, I apprehend, hardly be contended that the right of the latter to a decree for the money could be questioned. Such a decree would only give them their own — the proceeds of their property, to wit, certain choses in action left with their agent, Adae & Co., for collection. As the assignees can assert no claim as purchasers, and have no equities which did not belong to the assignors, I am clearly of the opinion that the defendants, Newman & Co., are entitled to a decree for the amount of the face of their bill of exchange, to wit, \$1,072. The balance of the fund, after payment of costs, should go to the assignees. Decree accordingly.

§ 186. *Difference between bills and checks.*—The distinction between bills of exchange and bank checks is pointed out in *Espy v. Bank of Cincinnati*, 18 Wall., 604 (§§ 254-258); *Merchants' Bank v. State Bank*, 10 Wall., 604. See the case, §§ 101-113.

§ 187. *What indorser warrants.*—An indorser of a negotiable instrument warrants that the instrument itself and the antecedent signatures thereon are genuine. *Matthews v. Massachusetts National Bank*, 1 Holmes, 396. See the case, §§ 121-125.

§ 188. *Effect of certification.*—The certification of a bank that a check is good is equivalent to an acceptance. *Merchants' Bank v. State Bank*, 10 Wall., 604. See the case, §§ 101-118. See § 142.

§ 189. *Effect of marking a check "good."*—As to the effect of the act of a teller of a bank in marking a check as "good," and appending his signature thereto, see *Espy v. Bank of Cincinnati*, 18 Wall., 604. See §§ 254-258.

§ 190. *Checks need not be signed by president.*—The provision in the charter of a bank which provides that all bills, bonds, notes, and every contract or engagement on behalf of the corporation, shall be signed by the president and countersigned by the cashier, does not apply to contracts which the law will imply. So where a check is drawn on a bank by the cashier of another bank, who is acting in behalf of the bank, the latter bank is liable for the amount of the check. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat., 335. See §§ 5, 34, 321. As to checks and drafts, see *BILLS AND NOTES*.

VII. BANKER'S LIEN.

SUMMARY—*Lien on papers*, § 191.

§ 191. Where there is no agreement to the contrary, a banker has a lien upon all papers and securities in his hands for any debt due him from the owner of the same. *Kelly v. Phelan*, § 192. See §§ 81, 203, 229.

[NOTES.—See § 193.]

KELLY v. PHELAN.

(Circuit Court for Missouri: 5 Dillon, 228-235. 1879.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—This is a contest which involves the right of the respective parties to a fund of about \$16,000 arising from the sale of certain securities. The bankrupt is the Central Savings Bank, of this city; Mr. Phelan is the assignee. The petitioners for this fund are the firm of Kelly & Co., in New York city, bankers. Kelly & Co. had for years been the correspondents in that city of the Central Savings Bank of this city, and the transactions between them had been very large. It appears from the proofs here, that at times the bankrupt bank had on deposit to their credit with Kelly & Co. as high as \$300,000; the deposits running down at times to a very small amount. On one occasion, in addition to the time immediately preceding the bankruptcy, there was a slight overdraft.

In 1873 the bankrupt bank was the owner of bonds of the state of South Carolina, subject to a debt to certain persons in New York city, and they directed the petitioners, Kelly & Co., to take up these bonds and hold them. The petitioners did that by paying the amount that was owing upon them out of moneys which stood to the credit of the bankrupt bank—they redeemed these bonds for the Central Savings Bank out of money which stood to the credit of the Central Savings Bank. Sometime afterwards, in 1875, the bankrupt being the owner of two thousand shares of the capital stock of the Kansas Pacific Railway, and two hundred shares of the common stock of the St. Louis, Kansas City & Northern Railway Company, transmitted the stocks to the petitioners, Kelly & Co., *without any specific directions*. The letter in which that transmission was made is not in the record, but it is stated in the testimony it was done with a view that the stocks might be more conveniently sold if the Central Savings Bank desired to do so. It is enough to say, on this point, that there was no specific pledge, on the one hand, of these bonds to Kelly & Co., nor any express agreement that they should hold them as security for any overdrafts which might be made upon them. There was no express agreement of this kind; nor, on the other hand, was there any express agreement that they should not thus hold them, or that they were specially pledged for any collateral or definite purpose. They were sent there under those circumstances; so that in 1876, when the bankruptcy of the Central Savings Bank occurred, the condition of affairs between these two parties was, in substance, this: The one was the correspondent of the other. Kelly & Co. had the possession (obtained in the manner which I have briefly stated) of these South Carolina bonds, the Kansas Pacific and the St. Louis, Kansas City & Northern Railway stocks. On the 5th day of July, 1876, the Central Savings Bank awoke to a very alarming state of affairs. The day preceding had been the 4th of July—a legal holiday. There were two days' drafts to be provided for, and the clearing-house showed there was a debit against them of \$50,000, and they had not the means wherewith to pay. What took place in this crisis, as bearing on this transaction, is very well stated in Mr. Conroy's brief. Mr. Conroy represents the assignee, and he has stated the case as strongly for the assignee as the facts warrant, though I think he has stated it fairly. He says: "The money was not on hand to meet this \$50,000 at the clearing-house. The president of the bank was at once consulted, and the following telegram was the result:

" 'ST. LOUIS, July 5, 1876.

" 'To Eugene Kelly & Co., New York:

" 'Can we overdraw to \$50,000?

(Signed)

" 'CENTRAL SAVINGS BANK.'

"After sending that dispatch, and before receiving Kelly & Co.'s answer, the Central Savings Bank drew drafts on Kelly & Co. for about \$30,000, and remitted to them \$6,000.

"Kelly & Co.'s answer to the telegram was as follows:

" 'NEW YORK, July 5, 1876.

" 'To Central Savings Bank, St. Louis:

" 'Not to exceed \$20,000, present overdrafts included;' which was about \$10,000.

"The officers of the Central Savings Bank took it for granted that Kelly & Co. would comply with their request, and finding that they did not, they sent the dispatch to them next copied on the day the bank failed. The bank, after doing business all day, closed on the night of July 6th, and never reopened.

" 'ST. LOUIS, July 6, 1876.

" 'To Eugene Kelly & Co., New York:

" 'Dispatch received after banking hours; drew \$24,000 more currency. Protect drafts. We will remit or forward securities to cover.

(Signed)

" 'CENTRAL SAVINGS BANK.'

"The promise was that they would 'remit or forward securities.' What they did in redemption of that promise was this: On the same day, July 6th, the bank officers sent two deeds for property mentioned in the record, conveying real estate, part in this city, and part beyond it, inclosed in the following letter:

" 'ST. LOUIS, July 6, 1876.

" 'Messrs. Eugene Kelly & Co., New York:

" 'GENTLEMEN — We inclose deeds for property in this city and at Cheltenham, to secure the payment of the drafts we drew yesterday. We send this as promised, and feel certain that it and what you already have on hand will cover your advances.

" 'Respectfully yours,

" 'HENRY J. SPAUNHORST, President.'"

Those deeds went forward. I will not say, definitely, just what the entire overdrafts amounted to—it was between thirty and forty thousand dollars. The deeds of trust were received and accepted, and the property afterwards sold, leaving a large deficit. And Kelly & Co. held possession of the South Carolina bonds and the Kansas Pacific and the St. Louis, Kansas City & Northern Railway stocks. They first proved up their claim in respect to this matter as unsecured, and finding afterwards that the real estate did not cover their indebtedness, and there was a large balance due them, they asked to withdraw that as an unsecured claim, and to be allowed to prove it as a secured claim—alleging the security to be a banker's lien upon the bonds and stocks for the amount due them, after exhausting their other securities.

I have omitted a material circumstance which ought to be stated—one transaction at this end of the line, and one at the other—namely: When the officers of this bank were called upon, on the 5th day of July, to face this large deficit—to face bankruptcy or do something to prevent it,—they began to canvass as to their condition, and their reliance was upon Kelly & Co. They ascertained how much they had overdrawn. They made a calculation as to

what their general credit ought to be, and they made an estimate as to the value of the bonds and stocks in the hands of Kelly & Co., and estimated it at about \$25,000. Now, when the telegram of the Central Savings Bank reached New York, asking to overdraw for \$50,000, the officers of that bank canvassed the credit and situation of the Central Savings Bank, and they took out these securities and made, in the language of the president of the bank, Mr. Kelly, a rough estimate—not going into particular details—of the value of the stocks and bonds belonging to the Central Savings Bank in their hands, and they estimated it roughly at \$20,000. After having made this estimate they sent the dispatch which I read before: “No; you cannot draw for \$50,000, but you may draw for \$20,000, including the \$9,000 or \$10,000 that you already owe us.” These are undisputed facts. Since this is a contest between the assignee in bankruptcy of the Central Savings Bank, representing the general creditors of the bankrupt bank, and Kelly & Co., who claim a special lien upon the proceeds of these bonds and stocks, and since this is a question which turns entirely upon the fact as to whether Kelly & Co. have a lien upon these bonds and stocks for the general balance due them, it is only necessary to determine whether, under the circumstances of this case, Kelly & Co. have what is known in the law as a banker’s lien on the South Carolina bonds and on the railroad stocks in their hands at the time of the failure.

§ 192. *When there is no agreement to the contrary, a banker has a lien upon all papers and securities in his hands for any debt due him from the owner of the same.*

Whether a banker has a lien for any general balance due him depends upon the circumstances of the particular case. The law will not force a lien on a banker, any more than upon any one else, against the actual or presumed intention of the parties. If there is a lien, it is because there is, at all events, nothing in the transaction which repels the presumption of giving a credit on the strength of the securities. Therefore, in the case to which Mr. Conroy calls attention—a leading case on this subject—that of *Lucas v. Dorrien*, 7 Taunt., 278, a party went to a banker and said: “I want to raise on the security of a lease a certain sum of money.” The bankers considered the proposition and rejected it. But the lease, in the language of the report, was “casually left” in the possession of the bankers, and the bankruptcy of the owners of the lease having afterwards happened, the bankers claimed they were entitled to hold this lease by virtue of a banker’s lien upon it. But the court said, “No”—and very properly. “This was left here by mistake—left here casually. The party brought it here to get a specific loan upon it. You refused it, and he neglected to take it away. You cannot hold that lease as a pledge—you cannot make that available as a basis of any lien in the nature of a banker’s lien.” The supreme court of the United States, which, so far as this court is concerned, must be considered to be the source of the highest authority on this subject, has had this question before them in three cases—quite famous cases—which have been referred to by the counsel: *Bank of Metropolis v. The New England Bank*, 1 How., 234, which went before the court again in 6 How., 212, and an illustrative case of *Wilson v. Smith*, 3 How., 763. (See §§ 203, 204, *infra*.) The bank cases were very strong ones, and, perhaps, carry the doctrine of bankers’ liens as far as it has ever been carried. In substance, the case was this: Two banks were, as here, correspondents of each other. Each bank was in the habit of transmitting paper for collection to the other. In this particular case certain paper was transmitted by its correspondent, indorsed to it, and

apparently belonging to the sender, to a bank to collect. The bank did collect it, and the bank which had transmitted it proved to be insolvent and owing the bank which made the collection. The bank insisted on holding the proceeds of this collection, although, in fact, the paper collected belonged to a third bank. The real owner of the paper that had been collected by the bank brought suit against it to recover the proceeds. The supreme court of the United States held that, inasmuch as these two banks were the correspondents of each other, and inasmuch as this paper did not show on its face that it belonged to any other than the correspondent bank, the defendant bank which collected it had all the right that it would have if it had really belonged to the correspondent, and, therefore, it had a right—and they recognized the right—to hold the proceeds of that collection to secure any balance due to it, in the absence of knowledge or notice of facts to put it on inquiry that it belonged to the other bank. It is a very strong application of the doctrine of a banker's lien.

I think Mr. Conroy is entirely mistaken in arguing, under the circumstances, that, in the case at bar, there were any facts which tended to show that Kelly & Co. did not rely upon these securities. Presumptively they would rely on them, but we are not remitted or relegated to any presumption in this case, because, as I said before, it is in evidence—it is in undisputed evidence—that both parties so understood it; for, when it was proposed on the part of the Central Savings Bank to make this large overdraft, they made an estimate of the value of the securities in the hands of Kelly & Co. On the other hand, Kelly & Co., before they would allow even an overdraft of \$20,000, made an estimate of the value of these securities, showing that they relied on them. It is not a case where these securities had been pledged for some specific collateral purpose. Not at all. Kelly & Co. acted in the utmost good faith—something which, on this record, however it may be in fact, cannot, I think, be entirely predicated of the action of the Central Savings Bank; for here they drew without any express authority—overdrew. They sent a letter, "We will remit or forward securities to cover our overdraft," advising them that they had overdrawn \$21,000. What would a banker understand by that? He wouldn't understand by "securities" that they were forwarding them deeds to real estate to cover advances in money.

Then, again, the understanding of the parties as to the nature of the possession of these securities appears in this letter of July 6th: "We send these deeds as promised, and feel certain that it, *with what you already have on hand*, will cover your advances." They had nothing on hand but a large overdraft on themselves except these bonds and stocks. True, this letter was not acted upon, because, before it reached Kelly & Co. and any drafts had been paid on the strength thereof, Kelly & Co. became aware of the failure of the bank here; still, it is evidence of an understanding on the part of the bank officers here that these bonds and stocks were there as a basis of credit. Now, on this record, I have not a particle of doubt, on the acknowledged law, the settled law in relation to the right of the banker to a lien on papers and securities in his hands, where there is no agreement that negatives it, and where such a lien is consistent with the whole transaction, that Kelly & Co. have a lien on these stocks and bonds in their possession as against the general creditors of the Central Savings Bank. That having been the judgment below, it is affirmed.

§ 193. No lien on money specially deposited. — A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, and he has therefore no right to apply the same to the payment of such debt without the consent of the depositor. Where the general course of business has been to deduct the amount of notes falling due from the amount then on deposit, it seems that the consent of the depositor may be inferred. But such a transaction is only valid between the depositor and the banker, and if it constitutes an unlawful preference under the bankrupt law it is void. *In re Warner*,* 5 N. B. R., 420. See § 188.

VIII. COLLECTIONS.

SUMMARY — *Presumption as to ownership of paper sent for collection*, §§ 194, 195. — *Relations between two collecting banks*, § 196. — *Not liable for negligence of notary*, § 197. — *Remedy of owner as against sub-agents*, §§ 198, 199. — *Lex loci*, § 200. — *Holds money in trust*, § 201. — *Negligence in giving notice of non-payment; usage*, § 202.

§ 194. Commercial paper transmitted from one bank to another for collection is presumed, in the absence of notice to the contrary, to be the property of the forwarding bank, and cash may be advanced or credit given upon the paper as such. *Bank of Metropolis v. New England Bank*, § 203.

§ 195. Where one bank sends bills to another for collection, and the receiving bank has notice that the sending bank has no interest in the same, except as agent for such purpose, the former cannot retain the proceeds against the latter for the general balance of account. But if the receiving bank has, without such notice, upon the faith of such remittances, given credit to the sending bank, it can retain such proceeds, even as against the real owner. *Bank of Metropolis v. New England Bank*, § 204.

§ 196. A collecting bank is the agent of the transmitting bank when the funds are kept distinct; but where placed to the credit of the latter, the former becomes a debtor and not an agent; and a depreciation of bank bills then falls upon the collecting bank. *Marine Bank v. Fulton Bank*, §§ 205, 206.

§ 197. A banker having placed notes which he holds for collection in the hands of a reputable notary for presentation, and, if necessary, for protest and notice to indorsers, is not liable for the default of such notary, nor responsible to the owner of the notes. *Britton v. Niccolls*, §§ 207, 208.

§ 198. The owner of paper sent to a bank for collection has no remedy against the agents selected by the bank to make the collection; the bank to which he sends the paper is alone answerable to him. *Hyde v. First National Bank*, §§ 209, 210. See §§ 234, 236.

§ 199. Where a bank receives paper for collection, and sends it to its agent at a distant place for collection, the bank is directly liable to the owner of the paper for the default or failure of its sub-agent. (Conflicting authorities cited.) *Kent v. The Dawson Bank*, §§ 211-218. See §§ 234, 236.

§ 200. Where the paper is sent from one state to another, the rights of the parties are governed by the law of the state to which the paper is sent. *Ibid.*

§ 201. A bank received a draft for collection. It presented the draft to the drawees, and accepted their check, which was presented and certified. The bank then closed its doors, and afterwards collected the check, and the money went into the hands of the receiver of the bank. *Held*, that the money was held in trust for the plaintiffs, and that the receiver could not hold it for distribution among the general creditors. *Levi v. National Bank of Missouri*, §§ 214-217. See § 232.

§ 202. Where a bank receives a draft for collection, and fails to notify the drawer within a reasonable time of a delay in payment, and in the meantime the drawee fails, the collecting bank is liable for the amount of the draft. It seems that an alleged custom to wait for the usual monthly statement from which to learn the fate of the draft is not valid. *Trinidad National Bank v. Denver National Bank*, §§ 218-220.

[NOTES. — See §§ 221-245.]

BANK OF METROPOLIS v. NEW ENGLAND BANK.

(1 Howard, 234-241. 1843.)

ERROR to the Circuit Court for the District of Columbia.

STATEMENT OF FACTS. — Negotiable paper was indorsed by the New England Bank, and sent to the Commonwealth Bank for collection. Both banks were

located at Boston. The latter bank sent the paper to the Bank of the Metropolis. The New England Bank sued the Bank of the Metropolis to recover the proceeds of the paper, and recovered judgment. The defendant asked the court to instruct the jury as follows: That, if they shall believe, from the said evidence, that the Commonwealth Bank did, for a series of years, transact business with defendants, and did from time to time transmit notes and other commercial paper to defendants for collection, which were all treated by both parties as if the same were the property of the said Bank of the Commonwealth, who were credited in their account current with the proceeds, and charged with the costs and expenses, which accounts were from time to time adjusted upon these principles; that the notes and paper mentioned in said letter of 13th January, 1838, were indorsed and transmitted in the ordinary course of business, without any notification that any other party or person had any interest in said paper, were thus received by defendants, and held by them, and while thus held by them the said Commonwealth Bank became insolvent or embarrassed in its circumstances; and after such embarrassment the letters aforesaid of the 13th January, 1838, were written, and at the time of their receipt by defendants said embarrassed state of said Commonwealth Bank was known to defendants, and there was at that period a large balance on general account due defendants from said Commonwealth Bank, and the said paper was all regularly indorsed by the cashier of said Commonwealth Bank to defendants, the said defendants had a right to receive said paper and the proceeds, when recovered, until such balance was paid, and plaintiffs are not entitled to recover. The instruction was refused.

Opinion by TANEX, C. J.

If this were a question between the two Boston banks, and the case depended upon their respective rights, the plaintiff in the court below would, undoubtedly, have been entitled to recover; for it is admitted that, although the notes and bills were indorsed to the Commonwealth Bank by the cashier of the New England Bank, yet no consideration was given for them, nor any advances of money made upon them, and they were placed in the hands of the first-mentioned bank, as the agent of the other, merely for the purpose of collection. The question, however, is a different one between the parties to this suit, and its solution must depend, not upon the nature of the transactions between these two banks, but upon the dealings between the Commonwealth Bank and the Bank of the Metropolis. It appears from the evidence offered by the plaintiff in error, that, for several years prior to the insolvency of the Commonwealth Bank (which happened in January, 1838), there had been mutual and extensive dealings between the two last-mentioned banks, and an account current between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protest, postage, etc. Accounts were regularly transmitted from the one to the other, and settled upon these principles; and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them on its own account. The balances in the account current fluctuated according to the amount of paper they respectively transmitted, and these balances, it would seem, were generally suffered to remain until they were reduced by the proceeds of the notes and bills deposited with each other in the usual course of business. Thus, in November, 1837, the Bank of the Metropolis was debtor upon the account in the sum of \$2,200, but in January, 1838, when notice of the failure of the Commonwealth Bank was received,

that balance had been extinguished and the last-mentioned bank was debtor in the sum of \$2,900. It is not suggested that any information of the interest of the New England Bank in the paper in question was ever communicated to the Bank of the Metropolis until after the insolvency of the Commonwealth Bank. And the question is whether the plaintiff in error has a right to retain the proceeds of the notes then in its hands to cover the balance of account due upon these transactions.

§ 203. *Paper sent by one bank to another for collection is presumed to be the property of the forwarding bank.*

If the notes remitted had been the property of the Commonwealth Bank, there would be no doubt of the right to retain, because it has been long settled that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. The paper in question was, however, the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent, in the ordinary course of business, it being usual, and, indeed, necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank, and, without notice to the contrary, the plaintiff in error had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and, if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed. We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case, as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties. There does not, indeed, appear to have been any express agreement that those balances should not be immediately drawn for, but it may be implied from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement, and such mutual indulgence on these balances would be a valid consideration, and, like the actual advance of money, give the plaintiff in error a right to retain the amount due on closing the account.

It is evident that a loss must be sustained either by the plaintiff or defendant in error, by the failure of the Commonwealth Bank. We see no ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give to the corporation which has proved insolvent credit with the plaintiff in error by the notes and bills which it placed in its hands to be sent to Washington for collection, indorsed in such a form as to make them *prima facie* the property of the Commonwealth Bank, and enable it to deal with them as if it were the real owner. The Bank of the Metropolis, on the contrary, is in no degree responsible for the confidence which the defendant in error reposed in its agent. And when this misplaced confidence has occasioned the loss in question, it would be unjust to throw it upon the bank which has been guilty of no fault or want of caution, and which was induced to give the credit by the manner in which the defendant in error placed its property in the hands of an agent unworthy of the trust. If, therefore, the jury

find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be, and treated each other as, the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of the dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account.

The question whether the balances were usually suffered to lie for a time on account of negotiable paper actually deposited or expected to be received, and which formed the consideration on which the defense rested, is not perhaps as distinctly stated as it might have been in the hypothetical instruction requested by the plaintiff in error. But we think it is fairly to be inferred from the language used in the prayer, by which the defense is put upon the ground that the paper transmitted was treated by the parties as the property of each other; and as the prayer was rejected without any explanation or qualification, we have no reason for supposing that a different construction was put upon it in the circuit court. The judgment must, therefore, be reversed.

BANK OF METROPOLIS v. NEW ENGLAND BANK.

(6 Howard, 212-227. 1847.)

ERROR to the Circuit Court for the District of Columbia.

For a statement of the facts in this case see the preceding opinion.

Opinion by TANEY, C. J.

This case was before the court at January term, 1843, and is reported in 1 How., 234. (See § 203, *supra*.) The judgment of the circuit court was then reversed, and the case remanded, with directions to award a *venire facias de novo*. Upon the second trial some additional testimony appears to have been offered, and two instructions given by the court to the jury, one upon the prayer of the defendant, the other upon the prayer of the plaintiff, to the last of which the defendant, who is now plaintiff in error, excepted; and the judgment of the circuit court being against him, he has again brought the case here by writ of error. The opinion expressed by this court, in reversing the former judgment and remanding the case, is summed up in the following paragraph, in 1 How., 240:

"If, therefore," say the court, "the jury find that the course of dealing between the Commonwealth Bank and the Bank of the Metropolis was such as is stated in the testimony; that they always appeared to be, and treated each other as, the true owners of the paper mutually remitted, and had no notice to the contrary; and that balances were from time to time suffered to remain in the hands of each other, to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of dealing between them, then the plaintiff in error is entitled to retain for the amount due on the settlement of the account."

The only question now open upon this second writ of error is, whether the circuit court in their instructions to the jury have conformed to this opinion. We have examined them with a good deal of care, and regret to find them so complicated and involved that we have some difficulty in ascertaining the meaning of the circuit court. It would seem to be almost impossible for a

jury acting under such instructions to comprehend distinctly the issues of fact upon which they were to find their verdict. Indeed, as we understand these two instructions, the last paragraph in the second seems to this court to be inconsistent with the direction contained in the first. And if the last instruction stood by itself, without any reference to the first, it might perhaps be construed to be substantially the same with the directions given by the circuit court at the former trial, which were reversed upon the former writ of error. It is not usual, in remanding a case, to state in the opinion of this court the particular manner in which the instructions to the jury should have been framed, but to state in the opinion the principles of law which govern the case as it appears in the record, and leave it to the circuit court to apply them to the case as it may appear in evidence upon the second trial, in such manner and form as it may think advisable. From the manner, however, in which the directions of the circuit court appear in the record before us, upon the trial under the mandate, we may perhaps prevent future difficulty by stating the form in which instructions to the jury might have been given so as to carry into effect the opinion of this court, and enable the jury to understand more clearly the points in issue before them. Of course, we do not mean to prescribe this form to the circuit court when the case again comes before it, because the testimony then offered may differ materially from that now contained in the record. But if, instead of the complex instructions under which the case was decided at the last trial, the following directions had been given, it would have conformed to the opinion of this court when the case was formerly before it, and at the same time have enabled the jury to understand more distinctly the matters of fact in dispute between the parties, and submitted to them for decision.

§ 204. *Relations of banks to each other in collections sent by one to the other, and their relations to the owners of the bills sent for collection.*

1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New England Bank for the general balance of the account with the Commonwealth Bank. 2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks. 3. But if the jury found that in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank.

We restate the former opinion of this court in this form because we presume it must have been misunderstood by the circuit court. And as it was

not followed in the proceedings under the mandate, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

MARINE BANK v. FULTON BANK.

(2 Wallace, 252-253. 1864.)

STATEMENT OF FACTS.—The Fulton Bank was located at New York, the Marine Bank at Chicago. In 1861 the Fulton Bank sent two notes to the Marine Bank for collection. The notes were collected in Illinois currency, at that time depreciated from five to ten per cent. The Marine Bank advised its correspondent of the condition of the Illinois currency, and the Fulton Bank directed it to hold the avails of the notes subject to order. About a year after the collection the Fulton Bank demanded payment, which the Marine Bank refused, unless the former would accept Illinois currency, at that time fifty per cent. below par. The Fulton Bank brought suit, and the court charged that it was entitled to recover the value of the Illinois currency at the time the collection was made, and refused to charge that it was entitled to recover, in coin, the value of Illinois currency at the time of demand.

§ 205. *A collecting bank is the agent of the transmitting bank, when.*

Opinion by MR. JUSTICE MILLER.

The Chicago bank was unquestionably the agent of the Fulton County Bank up to and including the receipt of the money from the makers of the notes. If no change was made in their relation subsequent to that time, then the former bank, having obeyed instructions, should not be held liable to the latter for the depreciation of its money. The agent, however, in this case was a bank engaged in the usual banking business of discounting notes, buying and selling exchange, and receiving deposits from its customers, and some confusion may grow out of the peculiar character of the agent. If any person not a banker had received this sum of money for an eastern correspondent, with instructions to hold it subject to order, he would probably have locked it up in his own safe, or that of some one else, until called for; and when demanded, he would have delivered the identical money which he had received, thus discharging his whole duty as agent. If, however, instead of this prudent and safe course, he had the same day that he received it bought with it a bill on New York at thirty days, which, when matured, was worth in Chicago one-half per cent. premium, it will hardly be contended that when the principal demanded his money the agent could pay him by buying in the market other bills of Illinois banks fifty per cent. below par. This, however, is substantially what the Chicago bank did, and what it claims the right to do. It is true that it is not in evidence what precise use was made by it of the money received for these collections. But it is proved that it was placed with other money of defendant, and used in its daily business as its own. That business was to buy such drafts, to pay its own debts to its depositors, to discount notes and bills. If it was defendant's money it was all right, because he could do as he pleased with his own. But if it was plaintiff's money, held by defendant as its agent, then this use of it by defendant would seem to be a conversion.

But here we are reminded of the banking character of the agent, who insists that it was impossible to keep plaintiff's money separate from its own, and that plaintiff knew this fact; and, secondly, that from the course of business it was understood that, when the money was collected and placed to the credit of plaintiff's account, the defendant would use it. As to the first proposition, it

cannot be admitted that there was any impossibility in keeping plaintiff's money separate from defendant's. It is every day business for bankers, who have vaults and safes, to receive on special deposit small packages of valuables, and even money, until the owners call for them. There is not only no impossibility in this, but there is no serious difficulty in it. It is simply an inconvenience, and but a slight one, as a small slip of paper around the bills, labeled with the owner's name, would have marked their identity and their separation, without occupying any additional space. Even this inconvenience the defendant could have avoided at any time by refusing longer to hold the deposit. But the truth undoubtedly is, as stated in the second branch of the proposition, that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in its business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation.

All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter. The parties seem to have taken this view of it, as is shown by the reply made by the Chicago bank, May 1st and 6th, to the New York bank, when inquiring how the account stood. The counsel have argued as to the effect of mixing the money of plaintiff with that of defendant. In the view we take of the matter, there was no such admixture. It being understood between the parties that, when the money was received, it was to be held as an ordinary bank deposit, it became by virtue of that understanding the money of the defendant the moment it was received. But let us look for a moment at the equity of defendant's position. It receives this money when it is worth ninety cents on the dollar. It places it with its other money, and perhaps in the course of a week all the specific bank bills it then had on hand are paid out by it. It uses it in paying the checks of its depositors, in other words, its debts at par. It buys with it bills on New York, which it converts into exchange worth a premium. But it continues to receive of other parties this class of paper, though constantly depreciating. There is no legal necessity that it should do this. It only does so with a view to its own advantage. When, however, it proves to be a loss instead of a profit, the bank says to the man whose money it had used profitably months before: "I claim to impose this loss on you. I insist on the right to pay the debt I owe you, not in the specific bank bills I received from you, nor in those of the same value which I received from you, but in bills of that general class, although, while I have been using the money, they have depreciated forty per cent."

If we are correct in these views, it would seem that the relation of principal and agent was changed the moment the money received was placed in the general fund of the bank, and the plaintiff credited on its book with the amount.

Does the notice of the Marine Bank to its customers, taken in connection with the other facts of the case, change the relative rights of the parties as thus stated? The obvious intent of the circular is to convey to correspondents the fact of the great depreciation in value of the Illinois currency, and to request them, if they are not willing to have their notes paid in such currency, to withdraw their collections. This was just and fair between the parties, and was what the collecting bank had a right to require. We think that it justified that bank in receiving the Illinois currency, in all cases where the notice had reached their correspondents and no contrary orders had been received. If the Marine Bank had thus received depreciated money, and kept it without using it until called for, or had sent it by express to plaintiff, it would have been relieved from further liability. In other words, as long as the defendant retained strictly the character of agent, and acted within the principle laid down in the circular, it was protected. But, as we have already shown, the defendant changed that relation by using the money as its own, and became the debtor of the plaintiff for the sum collected.

§ 206. *Where plaintiff mistakes his form of action, objection must be taken in the court below.*

The counsel for plaintiff in error raises the point that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defense to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. On the contrary, the only instruction prayed by defendant's counsel recognizes the right to recover something with interest, and only raises the question of the measure of damages. On that subject we think the instruction asked was erroneous, and properly refused. It is too late now to object for the first time to the particular form of the action.

Judgment affirmed with costs.

BRITTON v. NICCOLLS.

(14 Otto, 757-766. 1881.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The defendant in the court below is the surviving partner of the firm of Britton & Koontz, which was engaged in the banking business at Natchez, in the state of Mississippi, in 1874 and 1875. The plaintiff in the court below, Niccolls, was at that time a citizen of Illinois, and the present suit is brought by him to recover damages from the surviving partner of the firm for its neglect to present for payment to the maker at their maturity, two promissory notes sent to it for collection, by reason of which the liability of a responsible indorser was released.

The facts in the case are briefly these: In April, 1874, the plaintiff was the holder of a promissory note of one John I. Lambert for \$3,666.66, dated at Natchez, April 24, 1872, and payable to his order two years after date, with interest at the rate of eight per cent. per annum. The note was indorsed by

three parties besides the payee,—J. M. Reynolds, John Flemming and J. S. Everet. Flemming's indorsement was without recourse to him; the other indorsements were without any such restriction upon the liability of the parties. In April, 1874, the plaintiff caused this note to be sent, through a banking house in Bloomington, Illinois, to the firm at Natchez for collection. The only instructions accompanying it were that it was to be collected if paid, and if not paid on presentment it was to be protested and notice of non-payment sent to the indorsers. In April, 1875, the plaintiff was the holder of another note of the same maker, identical in amount, date and terms with the first, except that it was payable in three years after date; and it was indorsed in like manner by the same indorsers. This note matured on the 27th of that month. Some days previously the plaintiff sent it to the firm at Natchez, with instructions to collect it if paid, and if not paid to have it delivered to a protesting officer for protest, and to give notice to the indorsers. No information as to the residence of the maker was given to the firm with the notes; nor does it appear that either member of it had, then or subsequently, any knowledge on the subject. The plaintiff himself was ignorant of it. He resided, in fact, on his plantation, twelve or fifteen miles from Natchez; he had no domicile or place of business in that city. The notes not being paid at their respective maturities,—the first one on the 27th of April, 1874, and the second one on the 27th of April, 1875,—before the close of banking hours on those days, were handed by the firm to a notary public of the county, with instructions to demand payment of them, and if they were not paid to protest them and send notice of non-payment to the indorsers. No other directions were given. The notary knew that the maker resided on his plantation, and had no place of business in the city; but he inquired for him at the postoffice, the city hall and the court house,—three of the most public places there,—and, not finding him, protested the notes for non-payment, and gave notice thereof to the indorsers. The plaintiff soon afterwards brought suit against the maker, and also against the indorser, Everet, which proceeded to judgment and execution; but nothing was obtained from the parties. Suit was also brought against Reynolds, the first indorser, in which judgment passed for the defendant, on the ground that due presentment of the notes to the maker and demand of payment had not been made at their maturity, by reason of which the indorser was released from liability. It is admitted that if judgment had been rendered against Reynolds, the money due upon the notes might have been collected upon execution. The plaintiff thereupon brought the present action.

The notary testified that, in his endeavors to make presentment of the notes for payment, he had acted upon his own opinion as to his duty, without instructions from the firm; and because he considered that the notes, being dated at Natchez, and no place of payment being stated, the place of presentment was, in law, at Natchez, and not at the maker's domicile outside of the city. The surviving partner, Britton, testified that it was always the custom of the firm, when it had notes for collection, whether its own or those belonging to others, to send through the postoffice a notice of their amount and of the date of their maturity to the proper parties, a reasonable time before the notes became payable, and if payment was not made at their maturity, to place them in the hands of a notary for presentment and protest; that this course was pursued with respect to the notes in question; that Koontz, the deceased partner, who, it would seem, took special charge of the business of protesting paper left with the firm for collection, when that was necessary, had inquired of sev-

eral persons coming into the banking house as to the residence of the maker of the notes, and on one occasion left the house for the express purpose of trying to ascertain it, and returned stating that he had not succeeded; and that "the notary would have to comply with the law in such cases, and present at several of the most public places." He also testified that he was "certain that Koontz made diligent efforts to ascertain Lambert's (the maker's) place of residence, and that they were unsuccessful."

Upon the facts and testimony as stated, the defendant, among other things, requested the court to instruct the jury, in substance: That if the bankers had no knowledge of the residence or place of business of the maker, and were unable, after diligent inquiry in the city of Natchez, to ascertain the same, and thereupon, at the maturity of the notes, handed them to a notary public for the purpose of having presentment made thereof to the maker for payment, and of having them protested in case of non-payment, and notice thereof given to the indorsers, then the bankers were not liable for negligence in performing the duties intrusted to them, nor for failure of the notary to discharge the duties required of him with respect to the demand of payment. We do not give the precise language of the instruction asked, but only its substance and purport. The court refused it, and instructed the jury, in substance: That if it was the duty of the bankers to perform such acts as the law required to charge the indorsers upon the notes, which were to present them to the maker for payment on their last days of grace respectively, and upon non-payment to give notice thereof to the indorsers; and that the bankers were not exonerated from this duty by the delivery of the notes to the notary for their performance, unless it was within a reasonable time for him to present the notes to the maker, and to demand payment, on the days they respectively became due, at his residence or place of business. To the refusal of the instruction asked, and to those given, an exception was taken. The plaintiff recovered judgment for the amount due on the notes, and the case is brought here for review.

The notes being dated at Natchez, the presumption of law, in the absence of other evidence on the subject, is that that was the place of residence of the maker and that he contemplated making payment there. The duty of the bankers as collecting agents was, therefore, to make inquiry for his place of business or residence in that city, and if he had either to make there the presentment of the notes, but if he had neither to use reasonable diligence to find him for that purpose; or if the employment of a notary public for that object was sanctioned by the usage of bankers, or by the law as declared by the courts of the state, instead of making the presentment and demand personally, they could have placed the notes in his hands for the performance of that duty. As it turned out that the maker had neither domicile nor place of business in the city and was absent at the time from it, no demand upon him there was possible, nor was that essential to charge the indorsers.

§ 207. *A banker having placed notes in the hands of a reputable notary is not liable for his default.*

The law on this subject we consider to be well settled, as will be seen by an examination of the numerous adjudged cases as to what constitutes due presentment and demand of payment of commercial paper and what will excuse both. The only point upon which we find any marked difference of opinion in them respects the liability of the collecting bankers for the manner in which the notary, to whom the notes are delivered for presentment and protest, dis-

charges his duty. In the state of New York the doctrine obtains that bankers, to whom notes are intrusted for collection, are responsible for the failure of agents employed by them in the presentation of the notes to the maker and in protesting them when not paid, though the agents are notaries exercising a public office and especially charged with the performance of such duties. In the case of *Allen v. Merchants' Bank of New York*, it was decided by the court of errors of that state that the liability of the bank extended to any neglect of duty by which any of the parties to a bill are released, whether arising from default of its own officers or servants or its correspondents at a distance, or agents employed by them. Previously a more limited liability was supposed to rest upon a collecting bank. In that case the bill was drawn in New York upon parties in Philadelphia, and placed in the defendant's bank of the former city for collection, and by it forwarded to a bank in Philadelphia. The latter bank handed it to a notary to present for acceptance. He presented it, but omitted to give notice of its non-acceptance, by which a responsible indorser was released. The action was against the collecting bank to recover the amount of the bill, and was brought in the superior court of the city of New York, where the jury was charged that the defendant was, upon general principles of law, independently of any custom or usage or of any agreement, express or implied, only bound to transmit the bill to Philadelphia in due time to some competent agent; and that it was not liable for his negligence or omission in giving notice of its non-acceptance. Judgment having passed for the defendant, the case was taken to the supreme court of the state and was there affirmed. That court, speaking through Mr. Justice Nelson, said that "a note or bill of exchange left at a bank and received for the purpose of being sent to some distant place for collection would seem to imply, upon a reasonable construction, no other agreement than that it should be forwarded with due diligence to some competent agent to do what should be necessary in the premises. The language and acts of the parties fairly import so much, but nothing beyond it. The person leaving the note is aware that the bank cannot personally attend to the collection, and that it must therefore be sent to some distant or foreign agent," and that there seemed to be nothing in the nature of the transaction which could reasonably imply an assumption for the fidelity of the agent abroad. 15 Wend. (N. Y.), 482. The case being carried to the court of errors, the decision of the supreme court was reversed, and the doctrine declared that the bank was responsible for all subsequent agents employed in the collection of the paper. 22 id., 215. The reversal was by a vote of fourteen senators against ten; Chancellor Walworth, who composed a part of the court of errors in cases appealed from the supreme court, voting with the minority and giving an opinion for affirmation of the judgment. Senator Verplanck delivered the prevailing opinion. The decision has since been followed in New York, and its doctrine, we believe, has been adopted in Ohio. But in the courts of other states it has been generally rejected and the views expressed by the supreme court approved.

In *Dorchester and Milton Bank v. New England Bank*, it was held by the supreme court of Massachusetts that when notes or bills, payable at a distant place, are received by a bank for collection without specific instructions, it is bound to transmit them to a suitable agent at the place of payment, for that purpose; and that when a suitable sub-agent is thus employed in good faith, the collecting bank is not liable for his neglect or default. In giving its judgment the court referred to the ruling in *Allen v. The Merchants' Bank*, and

observed that it was opposed to a number of decisions of great authority, and, in its opinion, was not well founded in principle; that if the bank in that case acted in good faith in selecting a suitable sub-agent where the bill was payable, there was no principle of justice or public policy by which the bank should be made liable for his neglect or misfeasance. 1 Cush. (Mass.), 177.

In the supreme courts of Connecticut, Maryland, Illinois, Wisconsin and Mississippi, the doctrine of the supreme court of New York in the case reversed, and of the supreme court of Massachusetts in the case cited, has been approved and followed. In the New York case, in the court of errors, it was conceded that the general liability of the collecting bank might be varied and limited by express agreement of the parties, or by implication arising from general usage; and in some of the cases in other states proof of such general usage of bankers in the employment of notaries was permitted, and a release thereby asserted from liability of the bank for any neglect by them. Thus in *Warren Bank v. Suffolk Bank*, 10 id., 582, a note left with the latter bank for collection had been placed at the close of banking hours with a notary public for presentment and protest, and by his negligence in presenting the paper to the maker the liability of an indorser was released. The bank was thereupon sued. On the trial proof was offered to show that in Boston, where the case arose, it was the invariable usage of banks, when notes were sent for collection by other banks, to keep them for payment until the close of banking hours on the day they became payable, and if not then paid, to put them into the hands of a notary public for demand on the maker and protest; and that the defendant had pursued that course. The court below decided that, if there were negligence on the part of the notary, the evidence was immaterial, and that the usage did not constitute a defense. The supreme court reversed this decision, and held that the evidence was admissible. "It would, we think," said the court, "have authorized the jury to find an implied agreement or assent to the employment of a sub-agent or notary public for the purposes of making a demand on the maker, requiring only in the collecting bank due diligence and care in selecting the notary, or a general usage binding certainly those who were conversant of it. It is no sufficient answer to this to say that it was not absolutely necessary to employ a notary in a case like the present to certify to the demand and protest. If this was the well-established course of business, and known to the plaintiffs when they sent to the defendants this note for collection, they must be bound by it." The court also said, that when the nature of the business in which an agent is engaged requires for its proper and reasonable execution the employment of a sub-agent, the principal agent is not responsible for the default of the sub-agent, provided a proper one be selected; and it was of opinion that, if the usage of the banks authorized the employment of a sub-agent holding an official character, it then became a case of sub-agency, with its incidents.

§ 208. *Liability of collecting agents for the acts of notaries under the law of Mississippi.*

In the case at bar there was no proof of any general usage of bankers at Natchez as to the employment of notaries public in the presentment and protest of notes left with them for collection. But we have before us the decisions of the supreme court of Mississippi, and they are of equal potency to limit the liability of the bankers for the negligence of the notary. We can look into those decisions to ascertain what the law is in that state, and how far it has modified what would otherwise be deemed the general law on any particular

subject. By them we are informed that it is the settled law of the state, that "a bank receiving commercial paper as an agent for collection, properly discharges its duties, in case of non-payment, by placing the paper in the hands of a notary public to be proceeded with in such manner as to charge the parties to it, and secure the rights of the real owner; and that the bank is not liable in such cases for the failure of the notary to perform his duty." This is the language used by that court in *Bowling v. Arthur*, 34 Miss., 41; and in support of it *Tiernan v. Commercial Bank of Natchez*, 7 How. (Miss.), 648, and of *Agricultural Bank v. Commercial Bank of Manchester*, 7 S. & M., 592, are cited. And the court adds that these cases decide that the notary is the sub-agent of the holder, through the bank, and, as such, is liable to him; and it is satisfied that the rule declared in them is correct. By a statute of Mississippi notaries are authorized to protest promissory notes as well as bills of exchange, and they are required to keep a record of their notarial acts in such cases; and the record is admissible in evidence in the courts of the state just as though the notary were present and interrogated respecting the matters recorded. And it was decided in the case of *Bowling v. Arthur*, that, under the statute, it is a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it. Judged by the law of Mississippi, the bankers, Britton and Koontz, discharged their duty to the plaintiff when they delivered the notes, received by them for collection, to the notary public. There is no question as to his habits or qualifications. He was not connected in business with the bankers, nor employed by them except in his official character. What more could they have done, as intelligent and honest collecting agents, desirous of performing all that was required of them by the law, ignorant, as they were, of the residence or place of business of the maker of the notes, and having unsuccessfully made diligent inquiry for them? Had they known that the maker resided on his plantation, without the city limits, in time to make the demand upon him, it might, perhaps, have been incumbent upon them to forward the notes there for presentment. It is not necessary to express any opinion on this head, for the only question is whether, on the knowledge they possessed, they discharged their whole duty. For the reasons stated, we are of opinion that they did all that the law required of them.

The notary, it is urged, was aware of the residence of the maker; but we do not perceive how this could affect the liability of the bankers. We are not prepared to say that even with this knowledge he was bound, receiving the paper at the close of banking hours, to go out of the limits of the city to present it to the maker. He took the paper to inquire for the maker in the city, not outside of it, and to make presentment if he were found. If his knowledge of the residence of the maker could have required him to leave the city, so it would have done had the maker resided one hundred miles distant instead of twelve or fifteen. But on this head we are not called upon to express an opinion. It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them. The fact that in the action against the

indorser, Reynolds, judgment passed in his favor, on the ground that due presentment and demand of payment had not been made of the maker, can have no weight in this case. The bankers were not parties to that action, had no control over its management, and are not bound by the judgment rendered. If the plaintiff was not satisfied with that judgment, he should have appealed from it. The rulings of the court in that case are not authority in this. It follows from these views that the instruction refused should have been given, and that the instructions given should have been refused. The judgment must, therefore, be reversed, and the cause remanded for a new trial; and it is so ordered.

HYDE v. FIRST NATIONAL BANK.

(Circuit Court for Illinois: 7 Bissell, 158-160. 1876.)

Opinion by HOPKINS, J.

STATEMENT OF FACTS.—The evidence showed that John Hutchins, of Lacon, in this state, gave his note to the plaintiffs, residents of New York city, for \$407.63, on the 15th day of September, 1874, payable in four months, at the First National Bank of Lacon, the defendant. The plaintiffs indorsed the note to the order of A. Hest, Esq., cashier, for collection for their own account. Hest then indorsed it to the defendant for collection for Cook County National Bank. Mr. Hest was the cashier of the Cook County National Bank, and sent the note in a letter to the defendant, on the 11th day of January, 1875, with instructions "to collect and credit." The defendants kept an account with the Cook County Bank, and then had a considerable sum in that bank. The note was paid to defendant on the 13th of January, 1875, and credited to the Cook County Bank, as other collections in the usual course of business. The defendant remitted, on that day, to the Cook County Bank more money than this collection amounted to, and had at that time a large balance due it from that bank. The Cook County Bank failed on the 19th of January, but the defendants had no knowledge of its failure or embarrassment until about noon on the 19th. The testimony also showed that the custom between that bank and defendant, and also between the other Chicago banks and their country correspondents, was to make collections of notes sent there for that purpose, and credit the proceeds to the bank transmitting them; that no account was kept with any other person of such paper sent for collection; that this custom prevailed as well when the paper was indorsed to the bank sending for collection on account of their own, as when indorsed generally; and that accounts of all such transactions, in all cases, were kept in the same way.

§ 209. *A bank receiving paper for collection, and not other banks to whom it sends the paper, is liable to the owner.*

These are the substantial facts, and the law applicable as now settled by the supreme court of the United States may be stated as follows: that when an owner of commercial paper sends it to, and it is accepted by, a bank for collection, whether payable at the place where such bank is located, or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank, arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note, but on the contrary "its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents and not the agents of the

owner of the note;" that its duty is not discharged when it selects responsible agents to perform the duty intrusted to it; that the owner of the paper is not to look to the responsibility of the agents intrusted by the bank with his collections; that the bank to which he commits the paper is alone answerable to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected (*Ayrault v. Pacific Bank*, 47 N. Y., 570), and that the liability to pay over attaches as soon as the money is paid, either to it, or to a sub-agent selected by said bank to collect for it.

§ 210. *No privity of contract exists between the owner of the paper and the agent of the party to whom he intrusted the collection of the paper.*

This being so, it follows that the owner is to look to his immediate contractor, and has no remedy against the under-contractor or agent employed by the bank; that such agents or contractors have no privity of contract with the owner and are not liable to him, but are only liable to the party immediately employing them; in short, that the sub-agent employed by the bank owes no duty to the party who deposited the paper for collection with his principal, and hence is not responsible to him for any damages. This I understand to be the effect and meaning of the late decision of the supreme court of the United States in the case of *Hoover v. Wise*, 8 Ch. Leg. N., 193 (1 Otto, 308); although prior to that decision I had considered that the weight of authority was in favor of the owner's having a right of action against the party who actually collected the money upon the note, although a secondary agent, unless he had paid it before notice of the owner's claim, or had made advancement upon the paper to the party from whom he received it in such a way as to enable him to hold the proceeds on the ground that he was a *bona fide* holder of the paper for value. But this decision, by declaring that a secondary agent is not liable at all to the owner, completely overthrows the theory upon which such supposed liability was based, and excludes the consideration of the question of the rights of such agent, as against his immediate principal, and renders immaterial the question as to whether he knew the bank employing him was the owner of the paper or not; for, not being answerable to the owner in any case, without some arrangement changing the implied contract arising from the said employment to collect, it is unimportant to the owner to inquire what right such agent may have against his employers. In the case of *McBride v. The Farmers' Bank*, 26 N. Y., 450, a recovery was had against the secondary agent, which, at first, seems to be in conflict with the early New York cases cited, and followed in the opinion of the United States supreme court above mentioned. But on examining that case carefully, it appears that the bank gave an order to the owner of the paper. or its agent, for the notes, before the payment of the notes, and that he demanded them of the agent before payment, and that the failure of the bank was before payment, which distinguishes it from the case cited, and from this also; for here the money was collected by the defendant before the Cook County Bank failed, and was by this defendant passed to the credit of that bank, the day before the failure, so that the Cook County Bank's liability to the plaintiff for the money attached before its failure, which brings the case, in my judgment, clearly within the doctrine of *Hoover v. Wise*, *supra*. It is difficult to reconcile this decision with that of *Dickerson v. Wason*, 47 N. Y., 439, and *Sweeny v. Easter*, 1 Wall., 166. But it is not for me to reconcile these cases; the case of *Hoover v. Wise* being the latest expression on that subject, it must be regarded as the law, by this court. The defendant is, therefore, entitled to a judgment.

KENT v. THE DAWSON BANK.

(Circuit Court for New York: 18 Blatchford, 237-242. 1876.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiff, as assignee of the Corn Exchange National Bank, of Chicago, Illinois, brings this action to recover of the defendant the amount of a draft sent to the defendant for collection. A draft drawn upon one Wiswall, of Washington, North Carolina, and owned by the Corn Exchange National Bank, was transmitted by mail by the latter to the defendant, at Wilmington, North Carolina, with directions to collect and remit the returns. The residence of the drawee was distant from the defendant's place of business one hundred and seventy miles. Upon receipt of the letter from the Corn Exchange National Bank, the defendant replied, stating, in substance, that the draft had been credited to the Corn Exchange National Bank and entered for collection; and thereupon the defendant transmitted the draft to Burbank & Gallagher, bankers at Washington, N. C., who were the correspondents and collecting agents of the defendant at that place. Burbank & Gallagher collected the draft, but failed before remitting the amount to the defendant, and the proceeds passed to their assignees in bankruptcy. They were in good credit at the time the draft was forwarded to them by the defendant.

§ 211. *Where a note is transmitted from one state to another to be collected, the law of the latter state is the law of the contract.*

Two questions arise upon these facts: *first*, are the rights of the parties to be determined by the law of Illinois or by that of North Carolina? *second*, is the defendant liable for the default of Burbank & Gallagher, on the theory that they were its agents and it was responsible for their miscarriage, or, is it exonerated, on the theory that its duty towards the Corn Exchange National Bank was discharged upon transmitting the draft, with proper directions, to competent and responsible agents at the drawee's place of residence?

If the rights of the parties are to be governed by the law of Illinois, the plaintiff cannot recover, as the adjudications of the highest court of that state settle the question involved in favor of the defendant. *Fay v. Strawn*, 32 Ill., 295; *Ætna Ins. Co. v. Alton City Bank*, 25 id., 243. It is urged, for the defendant, that the contract between the parties originated by the letter inclosing the draft mailed at Chicago, and was not complete until the Corn Exchange National Bank received the letter of the defendant in reply, acknowledging the receipt of the draft and assuming to undertake its collection, and was, therefore, wholly made in the state of Illinois. The sufficient answer to this position is, that the proposition of the Corn Exchange National Bank to the defendant, expressed by the letter of the latter, was assented to at the place where the defendant mailed its letter in reply, and then became obligatory upon the parties. Irrespective of this test, the contract was one which was to be wholly executed in the state of North Carolina. The place of performance of a contract is generally a controlling consideration by which to determine the *lex loci contractus*, and where, as here, the contract was both made in North Carolina and was to be performed there, it is clear that the case must be controlled by the law of that state. It is not claimed that any statute exists in the state of North Carolina which affects the rights of the parties, or that the courts of that state have passed upon the direct question here, but the testimony of experts, lawyers of that state, has been produced, by which it appears that the question is yet an open one, to be determined by the general principles of com-

mercial law, as recognized by that state in common with the other states of the Union. The question, then, is, whether, upon the facts, the bank receiving the paper becomes the agent of the owner to make collection, and is liable for any miscarriage on the part of the agent to whom it delegates that duty, or whether it becomes the agent of the owner to transmit the paper, with proper instructions, to another, to collect it as an agent for the owner, and is liable only for negligence in the selection of the agent; and this is to be determined by this court according to its own convictions, in the light of precedent and principle.

§ 212. *Authorities cited as to the liability of an agent for the default of a sub-agent.*

In the decisions of questions of commercial law, the federal courts do not feel bound to adhere to the course of adjudications in the courts of the state in which the action is tried. It is to be regretted that a uniform rule should not have been adopted by the courts upon a question of such importance, and one that so frequently arises; but it will be seen that it is involved in a hopeless conflict of authorities. In New York and Ohio, and in England, the adjudications are, that the receiving bank is the agent of the owner to make collection, and liable for the default of the sub-agent to which it transmits the paper (*Allen v. Merchants' Bank*, 22 Wend., 215; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 463; *Reeves v. State Bank*, 8 Ohio St., 465; *Van Wart v. Woolley*, 3 Barn. & Cress., 439; *Mackersy v. Ramsays*, 9 Clarke & Fin., 818); while in Connecticut, Massachusetts, Pennsylvania, and Illinois, the contrary doctrine is asserted. *East Haddam Bank v. Scovil*, 12 Conn., 303; *Fabens v. Mercantile Bank*, 23 Pick., 330; *Dorchester & Milton Bank v. New England Bank*, 1 Cush., 177; *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill., 243; *Fay v. Strawn*, 32 id., 295. No decision upon the question, of which I am aware, has been made by the courts of the United States, though the case of *The Bank of Washington v. Triplett*, 1 Pet., 25, is referred to in several of the decisions as one in point; but that case differs essentially from this, because there it was conceded that the draft was sent to the receiving bank to be by it transmitted to a sub-agent for collection, and the action was brought by the owner of the draft against the sub-agent. In many of the cases referred to the liability of the receiving bank was predicated upon the theory that the sub-agent was its agent, and not the agent of the owner of the paper, while, in others, liability was denied upon the theory that the sub-agent was the agent of the owner. Accordingly, the same conflict of adjudication exists where the question has arisen whether the owner of the paper can maintain an action against the sub-agent for the latter's default in making collection, or whether his only remedy is against the receiving bank by whom the paper is transmitted to the sub-agent (*Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 463; *Commercial Bank of Penn. v. Union Bank*, 11 N. Y., 203); while, in some of the cases, the conclusion is reached that the owner has his election to proceed against either. *Wilson v. Smith*, 3 How., 763. In this confusion of precedent, and in the absence of any decision which should be held controlling upon this court, it only remains for me to adopt such a conclusion as to my judgment seems best to accord with principle; and, in view of the very elaborate discussion of the question involved, to be found in several of the cases cited, I do not deem it necessary to do more than indicate some of the reasons which lead me to dissent from the doctrine that the receiving bank is exonerated from liability if it transmits the paper with proper instructions to a suitable agent. The cases which exonerate the bank from liability, under such

circumstances, rest their conclusions upon the supposed intention of the parties to the transaction, and insist that, when the paper is to be collected at a place distant from the bank to which it is sent, the fair presumption is, that the parties do not intend that the receiving bank shall collect by its own officers or employees, but shall transmit to another agent to perform that duty. The first objection to this position is, that it is inconclusive, because it fails to determine the vital question, whether it is to be presumed the parties intend that the ultimate agent shall be the agent of the receiving bank or the agent of the owner of the paper; and the doubt thus presented has found expression not only in the cases cited, but in others, where the question was whether the bank is liable for the default of a notary to whom it delivers paper to protest. *Ayrault v. Pacific Bank*, 47 N. Y., 570; *Citizens' Bank v. Howell*, 8 Md., 530; *Bowling v. Arthur*, 34 Mississippi, 41; *Agricultural Bank v. Commercial Bank*, 15 id., 592.

§ 213. *A bank undertaking to collect a note and employing a sub-agent to do so is responsible for the default of that sub-agent.*

The second objection is, that this presumption cannot be indulged without violence to the terms by which the parties have defined the character of the act to be performed. The owner sends the paper with instructions to collect it and the receiving bank assumes to act upon these instructions. The undertaking, then, would seem to be one to collect, in the sense in which that term is used when applied to a bank or financial agent, rather than an undertaking to select a suitable agent for the owner. Some effect must be given to the language of the instructions. If it is intended that the receiving bank shall select an agent for the owner, it would seem that the instructions would naturally direct the bank to forward the paper for collection. The implication contended for requires the interpolation of other language into the instructions than that used. That which seems to me the reasonable one is in harmony with the language of the parties, while it is no more repugnant to the presumptions raised by the situation of the parties and the instrumentalities the undertaking may require. If the facts imply an undertaking on the part of the receiving bank to collect the paper, rather than one to transmit it to another to collect it as an agent for the owner, I can see no reason why the receiving bank should not be liable to the same extent as it would be if one of its immediate employees received and appropriated the money. The difficulty is in fixing the character of the undertaking. I know of no exception to the rule, that, when one, as principal, contracts to fulfil a duty towards another, he is liable for any default, whether on his own part or that of those to whom he delegates the duty. The cases where a bailee is not liable for the miscarriage of his agents or servants are not exceptions to the general rule, for there the implied contract is only to exercise ordinary care, and if, in selecting the agents, this duty has been fulfilled, the implied contract is satisfied. For these reasons, I am of opinion that judgment should be rendered for the plaintiff, and it is ordered accordingly.

LEVI v. NATIONAL BANK OF MISSOURI.

(Circuit Court for Missouri: 5 Dillon, 104-111. 1878.)

STATEMENT OF FACTS.—The plaintiffs sent to the defendant bank, “for collection and credit,” a draft drawn by August Taussig on Taussig Brothers & Co. The draft was received and credited, and presented for payment, the defendant bank taking the drawee's check on the Franklin Savings Bank of St. Louis. The check was presented and certified, and on the same day the de-

defendant bank closed its doors. The amount of the check was collected by the defendant bank after suspension, and the money went into the hands of its receiver. The suit is brought to recover the money from the receiver, two questions being argued: (1) Whether the receiver holds the money as trustee for plaintiffs, or whether the plaintiffs are simple contract creditors. (2) Whether the knowledge on the part of the directors of the insolvency of the bank did not render the collection of the check a fraud as against the plaintiffs.

Opinion by DILLON, J.

It is only necessary to decide the first of the above questions, although counsel have discussed both of them with great fulness and referred to numerous cases. While these cases have been considered, I do not feel called on to examine them at length in this opinion, for, in my judgment, on the facts here presented, the principles of law decisive of the case are clear and well settled. In respect to the Taussig draft, out of which the controversy arises, the defendant bank was the collecting agent of plaintiffs. This is manifest from the relations of the two banks to each other, from the letter transmitting this draft "for collection and credit," and from the plaintiffs' special indorsement thereon to the cashier of the defendant bank "for collection on account of" the plaintiffs. This relation was not only known to the two banks, but knowledge of it—that is to say, that the defendant bank was merely the agent to collect this draft for the plaintiffs, and not the holder of it in its own right—was imparted to the drawees of the draft, the Messrs. Taussig Brothers & Co., by the above mentioned special indorsement of the plaintiffs on the draft itself, and which was surrendered to the drawees when their check for the amount thereof on the Franklin Bank was received. What, then, was the duty of the defendant bank, and the rights and obligations of the drawees, the Messrs. Taussig Brothers & Co.?

§ 214. *A collecting agent can receive nothing but money in payment.*

It was the duty of the defendant bank, as the collecting agent of the plaintiffs, to present the draft for payment; and as there is no proof of any special authority to the defendant, or agreement or usage varying the legal rights of the parties, the defendant bank could receive in absolute payment thereof nothing but money, "that which the law declares to be a legal tender, or which, by common consent, is considered and treated as money." *Ward v. Smith*, 7 Wall., 452. This settled principle of law has not been drawn in question by the defendant's counsel. As the defendant bank was not authorized to receive payment, except in the manner above stated, and as the Messrs. Taussig Brothers & Co. knew that the defendant bank did not hold the draft as their own, but as agents to collect, they are charged with knowledge that they could only make a valid payment binding upon the plaintiffs by making such payment in money. Their check for the amount of the draft would, at most, be but conditional payment—that is, payment when the money was actually received thereon by the agents of the plaintiffs. Even if the defendant bank had undertaken, by a special agreement, to receive the check in absolute payment (of which there is no pretense), such an agreement would have been void for want of authority from the plaintiffs to make it. When the check was received in exchange for the draft, the drawers of the check must be taken to have constituted the defendant bank their agents to collect the check, in order that its proceeds might be paid to the plaintiffs. Without special authority to the defendant bank to take a check in absolute payment, or without ratification of its act in receiving a check instead of money, this act of the defendant would

not bind the plaintiffs *ex proprio vigore*. The latter could affirm or disaffirm it, as they might elect. If the money had been received on the check by the defendant bank before its suspension, this would have presented a very different question from the one which actually arises. The check was presented, but instead of payment being demanded and received, a certification of it was accepted. That was an act which did not bind the plaintiffs — for it was alike without their knowledge or authority. If this was done by the defendant bank without authority from the Messrs. Taussig Brothers & Co., it might, as between them and the bank, discharge them as drawers of the check, but it could not operate to pay the bill of exchange for which the check was given, or in any manner vary the rights of the plaintiffs. Their debt subsisted until payment was made by Messrs. Taussig Brothers & Co., and no payment was made until the check was actually paid, which was the day after the failure of the defendant bank and its resolution to cease business and wind up its affairs. It is, therefore, a mistake to suppose that the act of the defendant bank in originally receiving the check of the Messrs. Taussig Brothers & Co., or in subsequently procuring it to be certified, discharged Taussig Brothers & Co. from their liability to the plaintiffs. I am, therefore, of opinion that the defendant bank remained the agent of the plaintiffs to collect the bill of exchange on Taussig Brothers & Co. until the money was actually received. When the money was received, and not before, the agency of the defendant bank to *collect* terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor would then arise, provided it was still a going concern; but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. It would hold the amount as the agent of the plaintiffs, or in trust for it, subject to any balance due it from the plaintiffs.

§ 215. *Meaning of the words "for collection and credit."*

Against this view the defendant urges two objections. The first is thus stated in the defendant's printed argument: "The letter transmitting the draft was simply asking for '*credit*' — the depositing of the Taussig draft by the plaintiffs in the defendant bank. The words '*for collection and credit*' mean '*credit*.' While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiffs being '*credit*,' if they receive the credit, it matters not to them whether the defendant bank received the money or not; and as soon as the defendant bank was satisfied to give the credit, as requested, the plaintiffs' demand was complied with, whether the collection was ever made or not." The argument is fallacious. The words "*for collection and credit*" do not mean that the credit shall be given until the money is collected. And it does make a difference whether the defendant bank ever received the money or not. On this point the language of Byles, J., in *Sweeting v. Pearce*, 7 C. B. (N. S.), 485, is applicable. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to the principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything but cash." This language is approved in the case

of *Pearson v. Scott*, decided in the chancery division of the high court of justice, May 4, 1878 (18 Alb. L. J., 193).

§ 216. *Liability of a collecting agent in receiving a certified check.*

The second objection of the defendant's counsel to the view above stated is, "that even if the defendant bank was the agent of the plaintiffs for the collection of the Taussig draft, and had no right to receive payment thereof in anything but money, the acceptance of the Taussig check, and having it certified, by defendant bank, was a simple breach of their duty as such agents, for which they became instantly liable, on the 19th day of June, as a simple contract debtor." I answer that it has been shown above that the act of the defendant bank in having the check certified wrought no change in the plaintiffs' rights, and that their debt still remained. This unauthorized act, if it resulted in any injury to the plaintiffs, would undoubtedly give them a right to recover any damages suffered thereby, but it did not dissolve or terminate the relationship of principal and agent between the plaintiffs and the defendant bank, nor preclude the plaintiffs from the right to elect to ratify the act of receiving the check, and to claim the money afterwards collected thereon. The force of the argument of the defendant's counsel, that the defendant bank, on the very day of its failure, and when it was *in articulo mortis*, had the right, by a credit in advance of collection, or by its unauthorized act in receiving the check and in procuring its certification, to terminate, without the plaintiffs' consent, the agency, and to constitute itself the actual debtor for the amount, against the plaintiffs' will and against their interest, I must confess I have been unable to perceive. It is not unusual for bankers to credit their correspondents or customers with the amount of paper of a certain character at the time of its receipt for collection, but such credits are provisional only, being made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored. *Trinidad National Bank v. Denver National Bank*, 4 Dill., 290; 7 Cent. L. J., 170. Such was the nature of the credit made in this instance, and the circumstance is immaterial, as it does not vary the ultimate rights of the parties.

§ 217. *Money collected by a collecting bank after suspension is held in trust for the owner.*

The conclusion, therefore, is that the defendant bank was the agent of the plaintiffs to collect the draft on Taussig Brothers & Co.; that the agency remained until the money was received on the check, and as this was after the defendant bank had ceased to do business, and had resolved to wind up its affairs, it was received in trust for plaintiffs (less the plaintiffs' indebtedness to the defendant bank); and hence the receiver has no right to hold it, to be distributed ratably among the general creditors of the bank. Let a decree be entered for the plaintiffs for \$8,168.58, with interest from the date of the commencement of this suit at the rate of six per cent. per annum.

Decree accordingly.

TRINIDAD NATIONAL BANK v. DENVER NATIONAL BANK.

(Circuit Court for Colorado: 4 Dillon, 290-295. 1878.)

STATEMENT OF FACTS.—The plaintiff bank, on the 9th day of January, drew a draft on the First National Bank of Kansas City, Mo., payable to the order of the cashier of the defendant bank. The draft was received by the defendant bank on January 10th, and at once transmitted. The plaintiff, when the

draft was drawn, had on deposit in the Kansas City Bank a sum exceeding the amount of the draft. The draft should have reached the Kansas City Bank on January 13th or 14th. It was never received. The Kansas City Bank closed its doors on January 29th. The defendant gave the plaintiff no notice until after February 9th, after it had received the monthly account current, and learned that the draft had not been received. Plaintiff charges negligence, but defendant defends its conduct in waiting for the monthly statement by setting up an alleged custom or usage among Colorado banks. The replication denies the existence of such a usage, or any knowledge thereof.

§ 218. *A bank receiving a draft for collection must use due diligence in notifying its correspondent of a delay in payment.*

Opinion by DILLON, J.

The plaintiff treats the defendant as its agent to collect the draft in question, and the ground of action is the alleged negligent omission of duty on the part of the defendant, resulting in loss to the plaintiff. I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers or for other banks. They clearly show that the defendant bank ought to have ascertained, within a reasonable time, whether the draft transmitted had been received by its correspondent, and, if not, to have advised the plaintiff thereof. The practice of banks to send such checks or drafts *directly to the drawee* (as in this case) is attended with some obvious additional peril, and does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The defendant bank allowed an unreasonable time to elapse before it made inquiry concerning the draft, and more than a reasonable time had elapsed before the failure of the Kansas City Bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee, on the 29th day of January. Here, then, was an unexcused delay, for fifteen or sixteen days, to make any inquiry, or to give any notice. Aside from the custom or usage pleaded in defense, to be noticed presently, the decisions in England and in this country are uniform that such delay to make inquiry and omission to notify the party interested, as occurred in this case, impose a liability, if loss is thereby occasioned.

§ 219. *Usage; not proved in this case.*

The alleged custom or usage, in derogation of the otherwise legal rights of the plaintiff, is one which scarcely seems consistent with reasonable vigilance or the well known practice of business men and banks to acknowledge promptly the receipt of money remittances. The evidence in this case showed that it was the uniform practice to make such acknowledgments. The defendant claimed that all the banks in Denver and Colorado relied on the monthly statements, and that it was not customary or usual to inquire after remittances in the *interim* between monthly statements. The evidence failed to show any such custom or usage common to all, or even to the majority, of the banks in Denver. In fact, it failed to show that there was any such uniform usage in the defendant bank, whose business seems to be well regulated. The cashier of the defendant frankly testifies that, if his attention had been called to the fact that no letter of advice had been received in due course from the drawee, he would have made inquiries. At all events, the usage of the defendant was, at most, its private usage or mode of doing business. It was not known to the plaintiff, and if it was invariably adhered to by the defendant it was of such a nature that the

plaintiff was not bound to take notice of it. It was shown in evidence that the defendant bank did a very extensive business, and it was claimed by the cashier, on the witness stand, that it was impracticable to look after all the paper sent forward to correspondents for credit in the interval between the transmission of such paper and the receipt of the monthly statement. But the evidence did not sustain this claim. On the contrary, it showed that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, and that it was the usual practice to make such inquiries unless upon the eve of the time when the monthly statement was due. The fact that the defendant transacts a large business cannot relieve it from the duty of giving due attention to every piece of paper it undertakes to collect. The measure of diligence cannot fluctuate with the amount of business which a given bank may do. And the defendant would not, perhaps, like to be discharged from liability on the ground, judicially declared, that it was not bound to the same degree of care as smaller banks in transacting the business of its correspondents. I consider the liability of the defendant beyond any reasonable doubt.

§ 220. *The measure of damages for negligently failing to collect a draft is its amount.*

Under the circumstances, I regard the rule of damages as equally clear. The plaintiff had more than the amount actually on deposit, subject to draft, in the Kansas City Bank. The draft would have been paid if it had been presented in time; if plaintiff had been notified within a reasonable time that the draft had miscarried, it could have protected itself against loss. The Kansas City Bank has failed. There was no evidence what dividend, if any, its creditors will receive. The draft in question was drawn in favor of the defendant, and it had, and has, the legal title thereto. The plaintiff, when it drew the draft, credited it to the drawee and charged it to the defendant, and received in turn credit from the defendant therefor. The defendant, having the legal title to the draft, will be entitled to prove it as a lost instrument against the Kansas City Bank, and to receive all dividends which may be declared. Under these circumstances, the defendant is liable for the full amount of the draft, and will be entitled to hold the draft as its own, or to have a duplicate if it desires. There is no other practicable rule of damages in the posture in which the case stands, and this rule cannot fail to measure the exact loss which may eventually ensue.

Judgment for plaintiff.

§ 221. *Bank is liable for negligence.*—Where a bank receives a draft for collection it becomes the agent of the holder, and if it is a time draft, it must present it promptly for acceptance, so that in case of non-acceptance the drawer may be resorted to; and if it fails to perform this duty it is liable for any damages resulting therefrom. *Woolen v. New York & Erie Bank*, 12 Blatch., 361.

§ 222. If a bill sent to a bank for collection is lost in consequence of the bank's not taking care of letters received by it, the presumption is that the bank was negligent, and the burden of proof is upon it. The bank is liable to the holder of the note where it appears that by such negligence the holder lost his remedy against the indorser. *Chicopee Bank v. Philadelphia Bank*, 8 Wall., 649.

§ 223. Where a check is sent to a bank for collection, it is its duty to present the same and demand payment within the time prescribed by law, and if not paid, to notify the proper parties of its dishonor. But if, instead, it procures the check to be certified, it becomes liable for the amount itself. *Essex County Nat'l Bank v. Bank of Montreal*,* 15 Am. L. Reg., 419; S. C., 7 Biss., 197.

§ 224. Where a bank receives drafts for collection, accompanied with bills of lading, with instructions to deliver the cargo on payment of the drafts, it is bound to use due care and

diligence in executing the instructions, and if it delivers the cargo on payment of only a part of the drafts, it is guilty of negligence. *National Bank v. City Bank*, 13 Otto, 668.

§ 225. The drawers of a sight draft on "A., treasurer of the M. S. Co.," delivered it to a bank in Michigan for collection, which at once transmitted it for collection to a bank in Connecticut, of which A. was known by the Michigan bank to be president, with instructions to return at once if not paid. The draft was presented, and A. said he would look up his account and inform the bank. At the time of sending the draft the drawers also wrote A. that they had sent the draft, and in due time received answer from him that he had paid the draft. This letter was shown the Michigan bank, and it not having received the draft back, and hearing nothing of it, paid the amount to the drawers. The draft was never paid, in fact, and a few days later was returned to the Michigan bank. If it had been returned according to instructions, the payment to the drawers would have been prevented. Repayment by the drawers was refused. In an action by the Michigan bank against the Connecticut bank the latter was held liable for the amount of the draft on the ground that it acted as the agent of the plaintiff, and had been guilty of negligence in not at once returning the draft. *Merchants' & Manufacturers' Bank v. Stafford Bank*, *44 Conn., 567.

§ 226. Money received on a collection belongs to the bank.—Where a banker undertakes to collect a note for his customer, the note is regarded as deposited, and the money received belongs to the banker. *In re Bank of Madison*, 5 Biss., 515. See the case, §§ 157-161.

§ 227. When the bank is agent to forward only, effect of.—Where a bank acts merely as the agent of the holder of a bill in transmitting it to another bank for collection, the bank which receives the bill becomes the agent of the holder, and not of the bank transmitting the bill, and is liable to the holder for any losses arising through its negligence. *Bank of Washington v. Triplett*, 1 Pet., 30.

§ 228. Where the holder of a bill transmits it to a distant bank for collection, he is bound by the usage at such bank in the matter of the time of making presentment of bills for payment. *Ibid.*

§ 229. Proceeds of note sent for collection must be returned.—H. & Co. were in the habit of sending negotiable paper to S. & Co., bankers, for collection, sometimes on their own account, and sometimes merely as the agents of the owners. H. & Co. having failed, owing S. & Co. a large sum on general account, it was held, in an action against S. & Co. by the owner of paper sent to them through H. & Co. for collection, that they had no right to retain the proceeds of such note if they knew that it was sent to them for collection merely. Neither could they retain without such knowledge, unless they had credited H. & Co., or had suffered a balance to remain in the hands of H. & Co., which they expected to set off against such proceeds. As against H. & Co., they would be entitled to hold the proceeds if they had no notice that the paper did not belong to them, and had suffered a balance to remain in the hands of H. & Co. on the faith of such paper. *Sweeny v. Easter*, 1 Wall., 174.

§ 230. Demand.—A note payable at a bank was deposited in such bank for collection. When it became due, the teller, who was the clerk of a notary, holding the note in his hands at the time, inquired of the book-keeper if funds had been deposited to meet it. The book-keeper, after an examination of the books, replied in the negative. *Held*, that this was a sufficient demand. *Browning v. Andrews*, 3 McL., 577.

§ 231. It is sufficient evidence of the demand of payment of a note payable at a bank, to show that it was discounted at the bank, and was its property, and was not paid at maturity. *Fullerton v. Bank of the United States*, 1 Pet., 617.

§ 232. Bank is liable if it take a certified check.—Where the holder of a check transmits it to a bank for collection, and, instead of insisting upon receiving the cash, the bank accepts a certification thereof, it thereby assumes the risk of its payment and is liable to the owner of the check for the amount thereof, and for interest from the date of the certification, as by such certification the drawers were discharged. *Essex County Nat'l Bank v. Bank of Montreal*, 7 Biss., 195. See § 201.

§ 233. Bank must charge indorsers if note be not paid.—A note was deposited by its owner in a branch bank for collection, and was by it transmitted to the parent bank. Not being paid at maturity, it was protested and notices of protest mailed to the branch bank for the indorsers, which were never served. *Held*, that the sending of the notices to the branch bank was notice to it that the indorsers had not been served; that as the agent of the holder of the note it was the duty of the branch bank to do whatever was necessary to insure the liability of the indorsers if it was not paid; that as it did not even give notice of non-payment to its principal, it was chargeable with the loss resulting from its negligence. *Held*, also, that the parent bank is liable for the negligence of the branch, as it is all one concern so far as its liability is concerned. *Bird v. Louisiana State Bank*, 3 Otto, 98; *Bank of Alexandria v. Young*, 2 Cr. C. C., 58.

§ 234. Bank liable for negligence of its agents.—It seems that where a bank receives a note for the purpose of collection, its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note. *Hoover v. Wise*, 1 Otto, 313. See §§ 198, 199.

§ 235. Bank may follow custom.—Where a bank receives a note to be collected according to its known and established mode of transacting business, if the last day of grace falls on Sunday, it is not liable in damages for delaying demand until Monday, such being its known and established mode of transacting business. *Patriotic Bank v. Farmers' Bank*,* 2 Cr. C. C., 560.

§ 236. The collecting bank alone liable.—If the payee of a draft indorses it and delivers it to a bank to be transmitted to another bank for collection, the latter bank becomes the agent of the payee, and is liable to him alone for any breach of its duty in relation to the draft. *Farmers' Bank of Virginia v. Owen*, 5 Cr. C. C., 505. See §§ 198, 199.

§ 237. Fund arising from discount cannot be diverted.—In order to pay a particular note then in its possession, a bank discounted a new note for \$2,500, and then diverted the fund to the extinguishment of other claims against the makers. *Held*, that the bank could not do this, but must apply the same to the payment of the note as the makers intended. *Bank of Alexandria v. Saunders*,* 2 Cr. C. C., 183.

§ 238. Discounting legal interest at the highest rate from the face of the note for the time the note has to run is not usurious. *Fleckner v. Bank*, 8 Wheat., 333. See the case, §§ 20-27.

§ 239. Bank taking collaterals upon discount.—A director of a bank offered for discount his note at the bank, but was not present when his application was passed upon. As collateral securities he deposited certain notes of which he was payee, which he indorsed to the bank. *Held*, that the bank had no notice of any illegality in the inception of any note thus deposited as collateral. *Third National Bank v. Harrison*, 10 Fed. R., 252.

§ 240. Discount of accommodation note.—If a bank discounts an indorsed note for the drawer on his own account, it is presumed that such indorsement is an accommodation indorsement; and if indorsed in a firm name, the bank must ascertain at its peril whether such indorsement was made by the authority of the other partners. *Lemoine v. Bank of North America*, 3 Dill., 48.

§ 241. Disposal of former note taken up by discount of another.—Where a note is discounted in renewal of a former note, it is proper for the bank to charge the former note to the last indorser, and credit him with the proceeds of the note. *Fullerton v. Bank of the United States*, 1 Pet., 618.

§ 242. On a discount, bank is not bound by statements of cashier.—In case of a note discounted at the Bank of the United States, it was held that as all discounts were made under the authority of the directors, the representations of the president and cashier that security had been given for the payment of the note, and that the indorser incurred no liability, do not bind the bank or affect the liability of the indorser. *Bank of the United States v. Dunn*, 6 Pet., 59.

§ 243. Officers of a bank to which a note is indorsed have no power to bind the bank by their representations that the indorser incurs no liability by his indorsement. *Ibid.*; *Bank of Metropolis v. Jones*, 8 Pet., 15.

§ 244. Rights of bank in discounted paper.—Where a note is in terms made payable at a bank, and is discounted by that bank for the payee, the maker cannot set up an offset against the payee in a suit on the note by the bank. *Mandeville v. Union Bank of Georgetown*, 9 Cr., 11.

§ 245. Third parties not bound by want of authority to discount.—The question whether paper has been authorized by the discounting committee to be discounted at a bank does not in any way affect an outside party who is a *bona fide* indorsee of the paper before maturity. Such committee being only a part of the private machinery of the bank, devised for its own safety and advantage, the outside public is not in any way affected by its action in relation to commercial paper. The action or want of action by such committee does not in any way affect the validity of the paper when put in circulation. *Blair v. First Nat'l Bank of Mansfield*, 2 Flip., 117. See §§ 173, 174.

IX. FORGED PAPER.

SUMMARY—If bank takes its own forged paper it is bound, §§ 246, 247.—Money paid on forged paper can be recovered, § 248.

§ 246. As a general rule payment in forged paper or base coin is not good. But when a bank receives forged notes purporting to be its own, it must bear the loss whether it be regarded as a credit or as a payment. The question of a lack of consideration does not change the rule. *United States Bank v. Bank of Georgia*, §§ 249-253.

§ 247. The acceptor of a bill of exchange, of which the drawee's name is forged, is bound by his acceptance, which has given credit to the bill. He is presumed to know the handwriting of the drawee and is responsible accordingly. *Ibid.* See §§ 124, 125.

§ 248. Money paid on altered or raised checks can be recovered back. When a check is presented to the bank on which it is drawn for information, the presumption is that the inquiry relates only to the genuineness of the signatures and the state of the drawer's account. It is no more incumbent on the bank than on the holder to ascertain from the maker of the check its general validity. *Espy v. Bank of Cincinnati*, §§ 254-253.

[NOTES.—See § 259.]

UNITED STATES *v.* BANK OF GEORGIA.

(10 Wheaton, 838-858. 1825.)

ERROR to U. S. Circuit Court, District of Georgia.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a case of great importance in a practical view, and has been very fully argued upon its merits. The Bank of Georgia having originally issued the bank notes in question, they were in the course of circulation fraudulently altered, and, having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is not disputed that the Bank of the United States were holders, *bona fide*, for a valuable consideration. Under these circumstances the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover in this action the amount of this deposit.

§ 249. *As a general rule payment in forged notes or base coin is not good—Form of action.*

Some observations have been made as to the form of the action, the declaration embracing counts for the balance of an account stated, as well as for money had and received, etc. But if the plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It is clearly not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account, and deposited as such; so that according to the course of business and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia, and became the property of the bank. The action has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form. We may lay out of the case at once all consideration of the point how far the defendants would have been liable if these notes had been the notes of any other bank, deposited by the plaintiff in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert that a payment received in forged paper, or in any base coin, is not good; and that, if

there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly *Markle v. Hatfield*, 2 Johns., 455; *Young v. Adams*, 6 Mass., 182; and *Jones v. Ryde*, 5 Taunt., 438. But without entering upon any examination of this doctrine, it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner and with the same general intent as if they had been genuine notes or coin.

§ 250. *Where a bank receives forged notes purporting to be its own, it must bear the loss.*

Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes purporting to be its own, and those where it receives the notes of other banks in payment or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known that every bank is in the habit of using secret marks and peculiar characters for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discretion as to its discounts and circulation, and to enable it to detect frauds. Its own security, not less than that of the public, requires such precautions. Under such circumstances, the receipt by a bank of forged notes purporting to be its own must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine be applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine that the notice and return must be within a reasonable time, and any neglect will absolve the payer from responsibility. If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts that all the genuine notes of that bank of the denomination of \$100, in circulation at this time, were marked with the letter A; whereas twenty-three of the forged notes of \$100 bore the marks of the letter

B, C and D. These facts were known to the defendants, but unknown to the plaintiffs; so that, by ordinary circumspection, the fraud might have been detected.

§ 251. *The question of lack of consideration does not change the rule.*

The argument against this view of the subject, derived from the fact that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law where the party has received no legal consideration, and yet in which, if he has paid the money, he cannot recover it back; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point whether in good faith and conscience the money can be justly retained; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

Passing from these general considerations, it is material to inquire how, in analogous cases, the law has dealt with this matter. The present case does not, indeed, appear to have been in terms decided in any court; but if principles have been already established which ought to govern it, then it is the duty of the court to follow out those principles on this occasion. The case has been argued in two respects; first, as a case of payment, and, secondly, as a case of acceptance of the notes. In respect to the first, upon the fullest examination of the facts, we are of opinion that it is a case of actual payment. We treat it, in this respect, exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes or as a special deposit; but the transaction is precisely the same as if the money had been first paid to the plaintiffs, and instantaneously the same money had been deposited by them. It can make no difference that the same agent is employed by both parties, the one to receive and the other to pay and credit. Upon what principle is it, then, that the court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent to be a different act for the purpose of making it available in law; to do that, *cy pres*, which would be defective in its direct form. Here the parties were at liberty to treat it as they pleased, either as a payment of money or as a credit of the notes. In either way it was a legal proceeding, effectual and perfect; and as no reason exists for a different construction, we think that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money and then deposited; since that is the only way in which it could legally become or be treated as cash. Nor is there any novelty in this view of the transaction.

§ 252. *Bank notes are generally considered as money.*

Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless especially objected to; and, as Lord Mansfield observed in *Miller v. Race*, 1 Burr., 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true in respect to bank notes in general, it applies, *a fortiori*, to the notes of the bank which receives them; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view

was taken of this point in the case of *Levy v. Bank of United States*, 4 Dall., 234; S. C., 1 Binn., 27, where a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud the bank refused to pay the amount. The court there said: "It is our opinion that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken. In the latter case, the bank would have appeared as plaintiffs; and every mistake which could have been corrected in an action by them may be corrected in this action, and none other." The case of *Bolton v. Richard*, 6 D. & E., 139, is not in all its circumstances directly in point; but there the court manifestly considered the carrying of a check to the credit of a party was equivalent to the transfer of so much money in the hands of the banker to his account. Considering, then, the credit in this case as a payment of the notes, the question arises whether, after a payment, the defendants would be permitted to recover the money back; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit.

In *Price v. Neale*, 3 Burr., 1355, there were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, "here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the defendant to inquire into it. There was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts, after which the defendant, innocently and *bona fide*, discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant." The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Neal v. Price* has never since been departed from; and, in all the subsequent

decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority. The case of *Smith v. Mercer*, 6 Taunt., 76, was a stronger application of the principle. There the acceptance was a forgery, and it purported to be payable at the plaintiff's, who was a banker, and paid it at maturity, to the agent of the defendant, who paid it in account with the defendant. A week afterwards the forgery was discovered, and due notice given to the defendant. But the court (Mr. Justice Chambre dissenting) decided that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground that the banker was bound to know the handwriting of his customers; and that there was a want of caution and negligence on the part of the plaintiff. The chief justice, without dissenting from this ground, put it upon the narrower ground that during the whole week the bill must be considered as paid, and if the defendant were now compelled to pay the money back he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff. The very case occurred in the *Gloucester Bank v. The Salem Bank*, 17 Mass., 33, where forged notes of the latter had been paid to the former, and, upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed, both by the counsel and the court, and the conclusion to which the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground that, by receiving and paying the notes, the plaintiffs adopted them as their own; that they were bound to examine them when offered for payment, and if they neglected to do it within a reasonable time, they could not afterwards recover from the defendant a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes until fifteen days after the receipt, and no actual averments of forgery until about fifty days. The notes were in a bundle when received, which had not been examined by the cashier until after a considerable time had elapsed. Much of the language of the court as to negligence is to be referred to this circumstance. The court said: "The true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Against the pressure of these authorities there is not a single opposing case; and we must, therefore, conclude that, both in England and America, the question has been supposed to be at rest. The case of *Jones v. Ryde*, 5 Taunt., 488, is clearly distinguishable, as it ranged itself within the class of cases where forged securities of third persons had been received in payment. *Bruce v. Bruce*, 5 Taunt., 495, is very shortly and obscurely reported; but from what is there mentioned, as well as from the notice taken of it by Lord Chief Justice Gibbs, in *Smith v. Mercer*, 6 Taunt., 77, it must have turned on the same distinction as *Jones v. Ryde*, and was not governed by *Price v. Neal*.

But if the present case is to be considered, as the defendant's counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In

that point of view, the notes must be deemed to have been accepted by the defendants as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants, for nineteen days; and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs, in *Smith v. Mercer*, 6 Taunt., 76, the prior holders would be discharged; and the case of the Gloucester Bank v. The Salem Bank, 17 Mass., 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants; but, waiving this narrower view, we think the case may be justly placed upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, *a fortiori*, the maker must be presumed and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

§ 253. *The acceptor of a bill of which the drawer's name is forged is bound by his acceptance.*

The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson v. Lutwidge*, 1 Str., 648, the lord chief justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys v. Fawler*, 2 Str., 946, the lord chief justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe it the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defense, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price v. Neale*, 3 Burr., 1355, already commented on, in which it was thought that the acceptor ought to be conclusively bound by his acceptance. The correctness of this doctrine was recognized by Mr. Justice Buller, in *Smith v. Chester*, 1 D. & E., 655, by Lord Kenyon, in *Barber v. Gingell*, 3 Esp., 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in *Bass v. Clive*, 4 Maule & Selw., 15, and it was acted upon by necessary implication by the court, in *Smith v. Mercer*, 6 Taunt., 76. In *Levy v. The Bank of the United States*, 1 Binn., 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. "Some of the cases," said the court, "decide that the acceptor is bound, because the acceptance gives a credit to the bill, etc. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself." After some research, we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken, or

even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own. Considering, then, as we do, that the doctrine is well established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their act of adoption, and cannot be permitted to set up the defense of forgery against the plaintiffs.

It is not thought necessary to go into a consideration of other cases cited at the bar to establish that the acceptor may show that the accepted bill was void in its origin, as made in violation of the stamp act, etc.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature, of public policy, and a violation of the laws of the land. Nor are the cases applicable in which bills have been altered after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare that we place our judgment, in the present case, upon the ground that the defendants were bound to know their own notes, and, having received them without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature.

The remaining consideration is whether there has been a legal waiver of the rights of the plaintiffs derived under the cash deposit, or, in other words, whether they have consented to treat it as a nullity. There is nothing on which to rest such a defense, unless it is to be inferred from the letter of Mr. Early, the cashier of the Bank of the United States, under date of the 17th of March, 1819, addressed to the cashier of the Bank of Huntsville. That letter contains information of the forgery of the notes, and then proceeds, "by the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money." Now, there is no evidence that this letter was ever shown to the Bank of Georgia, or its contents ever brought to the cognizance of its officers. It states no agreement to take back the notes, or to transmit them, on account of the Bank of the United States, to Huntsville. For aught that appears, the intention may have been to transmit them on account of the Bank of Georgia, under the expectation that the latter might desire it. But what is almost conclusive on this point is, that on the same day the Bank of Georgia had made a tender of the notes to the plaintiffs, which had been refused. This is wholly inconsistent with the notion that they had agreed to take them back, or to treat the previous credit as a nullity. Assuming, therefore, that the cashier had a general or special authority for the purpose of extinguishing the rights of the plaintiffs, growing out of the prior transactions (which is not established in proof), it is sufficient to say that it is not shown that he exercised such an authority. And the case of *Levy v. Bank of the United States*, 4 D., 234; S. C., 1 Binn., 27, affords a very strong argument that a waiver, without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon further reflection, he

refuses to acquiesce in it. The subsequent letter of the 25th of March demonstrates that the intention of waiving the rights of the bank, if ever entertained, had been at that time entirely abandoned. The letter from the Huntsville Bank, of the 4th of May, cannot vary the legal result. What might be the rights of the plaintiffs against that bank, in case of an unsuccessful issue of the present cause, it is unnecessary to determine. The contract, whatever it may be, is *res inter alios acta*, from which the defendants cannot, and ought not, to derive any advantage. It only remains to add that, if the plaintiffs are entitled to recover the principal, they are entitled to interest from the time of instituting the suit. Upon the whole, it is the opinion of the court that the circuit court erred in refusing the first and third instructions prayed for by the plaintiffs; and for these errors the judgment must be reversed, with directions to award a *venire facias de novo*. On the second instruction asked by the plaintiffs, it is unnecessary to express any opinion.

Judgment reversed, accordingly.

ESPY v. BANK OF CINCINNATI.

(18 Wallace, 604-622. 1878.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—Stall & Meyer, customers and depositors with the First National Bank of Cincinnati, made their check on that bank for the sum of \$26.50, payable to the order of Mrs. E. Hart, and delivered it to a stranger to all the parties to the transaction, out of which this controversy arose. This man erased the name of the payee and the amount for which it was given and inserted the name of Espy, Heidelberg & Co., bankers and brokers, and also the sum of \$3,920, and passed it to Espy, Heidelberg & Co. in payment of bonds and gold, which he purchased from them. The check was paid by the bank through the clearing-house, and the next day the fraud was discovered, and the bank made a demand on Espy, Heidelberg & Co. for the amount, as paid through a mistake.

§ 254. *Money paid on altered or raised checks can be recovered back by the payer.*

If this were all the case there could be no doubt of their right to recover. The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled, and in the case of raised or altered checks so paid by banks on which they were drawn, there are numerous well considered cases where the right to recover has been established when neither the party receiving nor the party paying has been in any fault or blame in the matter. Of course, if there is fault on the part of the party receiving pay for such a check, it strengthens the right of recovery. But, in the case before us, the rights of the parties are to be determined by what took place between themselves before the check was paid. It appears by the bill of exceptions that the man who perpetrated the fraud, having ascertained from Espy, Heidelberg & Co. the price of the bonds and gold which he proposed to buy of them, told them that he had dealings with Stall & Meyer, and would get their check for the amount, and, after an absence of two or three hours, returned with the check in question. Not wishing to take it from this stranger without further information, they sent Mr. Snarenberger, one of their clerks, to the bank with instructions to ascertain if the check was good, and to say that it was presented

by a stranger. Snarenberger presented it to Mr. Sanford, the proper officer of the bank, who, after examining the check and the state of Stall & Meyer's account, said: "It is good," or "it is all right; send it through the clearing-house." There is a slight disagreement between Snarenberger and Sanford as to the precise words used, but we do not deem the difference of any importance. But there is difference in another point between these two, which, with the jury, might have had some weight. Snarenberger testifies that he told Sanford that the check was offered to his house by a stranger, which Sanford denies; and Sanford says that he told Snarenberger that if the check was offered by a stranger he would advise them to have nothing to do with him; that he would be careful and not pay so large a check to a stranger, no matter how good-looking he was. On the return of Snarenberger, Espy, Heidelberg & Co. delivered the bonds and gold to the stranger and received the check in payment, and, in the language of the record, the stranger went his way and was heard of no more. Espy, Heidelberg & Co. indorsed the check, and it was paid, as stated already, through the clearing-house. In a suit brought by the bank to recover the money it had a judgment, to reverse which this suit is brought.

The defendants excepted to the admission of certain testimony given by the plaintiffs on the trial for the purpose of proving that the words "all right," "it is good," when used in reference to a check presented at the bank on which it is drawn, had, by the custom and usages of the bankers of Cincinnati, acquired a limited and well-understood meaning, namely, that it had reference exclusively to the genuineness of the drawer's signature and to the state of his account at the bank. The objections made to this evidence were that in its nature it was inadmissible; that the person testifying showed his want of knowledge on the subject, and that the expressions "all right" and "it is good" were not the precise expressions used. But we need not inquire whether the court was right in admitting this testimony, because, in the subsequent progress of the trial, it became immaterial. The court refused to charge the jury, as requested by the plaintiffs in their fifth and sixth prayers, that, if there was such an understanding among bankers as to the use of the terms mentioned, it limited the responsibility of the bank to these two matters; and in the charge of the court, of its own motion, it placed the case beyond the influence of such testimony by instructing the jury that, as matter of law, such was the effect of the words supposed, when used under the circumstances suggested by the interrogations of plaintiff's counsel in regard to the understanding of them among bankers.

We are relieved also, by an attentive consideration of the instructions given by the court, from another very grave question much discussed by counsel in this court, that is, whether a verbal statement by the proper officer to certify checks that the one presented is good, is, or is not, the equivalent of a written certification of the check in the usual manner. For the fourth instruction asked by the defendants and granted by the court is precisely what is claimed by counsel here as to the effect of such verbal statement, as will be seen at once by its inspection. It is as follows: "A verbal certification of a check is equally valid with a written certification, and constitutes a contract obligatory on the party giving the certification, the consideration of which is the property parted with by the party receiving the certification on the faith of the certification." The plaintiff in error, against whom the jury rendered their verdict, notwithstanding the instruction thus given, must be held to have had the benefit of the principle thus asserted with the jury, whether the court was right in giving it or not.

The plaintiffs on the trial below prayed ten distinct instructions to the jury, all of which were granted except the fifth and sixth, which we have considered. The defendants prayed eight instructions, all of which were refused or modified except the fourth, to which attention has just been called. Upon all these rulings of the court, as well as upon the charge of the court of its own motion, errors are assigned. But we are of opinion that the whole case turns upon the latter charge of the court. This consisted of four distinct propositions:

1. That if defendants below sent the check to the bank for the purpose of having the latter pass upon the genuineness of the signature and the state of the account of the drawer, the statement that it was good, or all right, would estop them from denying that the signature was genuine, and there were funds to meet it.

2. If defendants sent the check for the purpose of testing the genuineness of the signature of the drawers, the state of their account, and to test its genuineness in all other respects, and plaintiff, knowing the full extent of the object for which it was sent, replied "It is good," or "It is all right," plaintiff is estopped to set up that the check was raised.

3. That if the defendants had no suspicion that the check was raised, and sent it to plaintiffs for examination without specifying the particulars to which they wished the examination directed, the plaintiffs had a right to presume that it was desired in relation to such points as the law presumed them to have knowledge, namely, the genuineness of the drawer's signature and the state of his account; and if they answered in good faith and had no means other than those of defendants of knowing that the check was raised, they were not estopped from setting up that fact.

4. That if the parties were mutually ignorant and unsuspicious concerning the check being raised, the law did not impose upon plaintiffs, more than the defendants, the duty of calling on the drawers for information on that subject.

The plaintiffs in error, defendants below, can have no cause to complain of the first and second proposition laid down by the court below.

§ 255. *When a check is presented to a bank upon which it is drawn for information, the presumption is that inquiry relates only to the genuineness of the signature and the state of the drawer's account.*

If the bank officers had their attention turned to the matter of the raising of the check, or even had notice that in applying to them for information the parties presenting it did so for the purpose of getting information which would include that subject, they could have limited their general statement that it was good so as to exclude its application to that point, or might have declined answering altogether. If, with this notice, says the court, they gave a general statement that the check was good, or all right, these words must be held to have reference to all the matters on which they knew that the other party asked or desired their opinion. Unless we are prepared to hold to the fullest extent the principle asserted by the plaintiffs in error, that the general statement that the check is good binds the party making it as to everything connected with its validity, this charge of the court is as favorable to them as it should have been, and is only doubtful as it militates against the bank.

§ 256. *It is no more incumbent on the bank than on the holder to ascertain from the maker of the check its general validity.*

We think it is equally clear on principle that there was no error in the fourth proposition of the court. Undoubtedly, where there exists a suspicion that the check has been altered in the amount or in the name of the payee, the proper

party to be inquired of is the maker of the check. He, and he alone, has the means of settling that question conclusively. The bank, as a general rule, can know this no better than the party to whom it is presented for negotiation. It is the latter who first parts with his money or property on the faith of the check, and he is as much bound to diligent inquiry on that question as the bank. The latter is held by the law to know the drawer's signature and the state of his account. He is no more bound to know or to answer beyond these two matters than the party who presents it for information. So, if there be no suspicion of the fraud in raising the check, the parties are equally innocent, and no question of the relative degree of diligence in making inquiry on that subject arises between them. This is certainly true unless the bank, if it consents to give any information at all about the validity of the check, is bound to answer as to everything which may affect its validity. As this contention is the turning-point of the case, and is the one which is responded to in the third of the propositions laid down by the court, we turn now to consider that.

§ 257. *Quære, as to the effect of a teller marking a raised check "good" in writing and appending his signature.*

This assumes that neither party had any suspicion that the check was raised, and that no special reference was made to that point in the inquiry of the defendants below. It is also to be considered that the bank was not asked to certify it in the usual way by indorsing it as good, and that the party who asked information was the one whose name was in the check as payee. We do not propose to decide here what would have been the legal effect in the present case if the bank officer had, under precisely these circumstances, been requested to indorse the check as good, and had done so, affixing his name or his initials in the ordinary way. The strong argument of the plaintiff in error is that such an indorsement would bind the bank for the entire validity of the check, and that what was said verbally by Sanford was the legal equivalent of such an indorsement. If this latter point were conceded, no case precisely in point has been produced where this would be held to bind the bank under the circumstances of the present case. The authorities relied on are mainly acceptances of drafts or bills of exchange; and it is the same class of cases that are relied on to show that a verbal acceptance or promise to accept is equivalent to a written acceptance. The highest courts in this country and England have regretted the decisions which gave original sanction to this latter proposition. *Boyce v. Edwards*, 4 Pet., 122; *Johnson v. Collings*, 1 East, 103.

§ 258. *Distinction between bills of exchange and bank checks. Liability of a certifying bank on checks certified.*

Bank checks are not bills of exchange, and though the rules applicable to each are in many respects the same, they differ in important particulars. *Merchants' Bank v. State Bank*, 10 Wall., 647. Among these particulars is that a check is drawn against funds on deposit with the banker, and the indorsement that it is good implies that when the indorsement is made there were funds there to pay it. A bill of exchange is not drawn on such deposits necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. It is a new promise by the acceptor to pay, funds or no funds. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after indorsing it as good or accepted, dispute the signature. But as one of the main elements of utility in a bill of exchange is that it shall circulate freely, and it may thus pass through many hands on the faith of the acceptor's signature, it may possibly be that he should be responsible for the promise contained in it,

as it came from his hands, for it was drawn on no special fund, and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable, as if he were the maker of a promissory note. How far these reasons should be applied to a certification that a check was good seems extremely doubtful, both on principle and authority. Where the object is to use the indorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of an acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation. But such a verbal statement as was made in the present case cannot come within that principle. There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it into circulation. Nothing was said or done by the bank officer which could be transferred with the check as part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would.

We are of opinion that the court was entirely right in treating the case as one in which information was sought and obtained by Espy, Heidelbach & Co. for their own use, and to govern their own action. For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable. It is not liable as for accepting or indorsing a draft or check with intent that it might go upon the market for general use and negotiation with the credit of its name attached to the paper, just as it was placed on the market. Under these circumstances we are of opinion that the circuit court was right in holding that in the absence of anything tending to direct his attention to other matters, the bank officer had a right to suppose that information was desired of him only in regard to the signature of the drawers and the state of their account. These were material facts to be known, which both common sense and commercial law presumed to be within his knowledge. The answer he gave, that the check was good or was all right, must be supposed to be responsive only to these two points. The genuineness of the payee's name and of the sum filled in the body of the check were as well known and as easily ascertainable by the payees themselves as by the bank officer, and unless the inquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them. So the response of "good" should not on sound principle be held to extend to them. He was under no moral or legal obligation to give an opinion on these points. He had no reason to suppose that he was asked for such an opinion, and because he did give an opinion that the check was good in the only points of which he knew anything, it would be illogical to hold the bank liable on the ground that the response meant good absolutely and for all purposes.

The court told the jury very clearly that if the bank officer had any reason to believe that the defendants were seeking information in regard to the general validity of the check, or if they had been asked any question which related

to the genuineness of the check as to amount or the names of the payees, his statement that it was all right would bind the bank. This was as far as the court ought to have gone in that direction, for they were not bound to answer such a question, nor, as we have already said, does the law or the nature of the business imply that they had any superior information on these points to that which the defendants had. The case was certainly very fairly put before the jury, so far as the rights of the plaintiffs in error are concerned, if the views here advanced are sound, and the judgment must be affirmed.

§ 259. D. deposited a sum of money in a bank at Keokuk, Iowa, and took a certificate of deposit, payable on the return of the certificate. D. could not write, but left his mark on the signature book, and the officers took his description. He lost the certificate, and it was afterwards presented at a bank in St. Louis by a man who said he was D., and could not write. The cashier took the certificate for collection, writing an indorsement to himself as cashier, the stranger signing by a mark. The mark was witnessed by one Brooks, a man who did odd jobs about the bank. Neither the cashier nor Brooks knew the man presenting the certificate. The cashier indorsed the certificate to Bower, Barclay & Co. for collection, and the amount was paid to them by the Keokuk bank. Afterwards D. appeared at the Keokuk bank, claimed that the indorsement was a forgery, and the bank paid him the money and brought suit against the St. Louis bank. The St. Louis bank and Bower, Barclay & Co. had no information of the description of D. The court (TREAT, D. J., KREKEL, J., concurring) charged the jury as follows:

"The case you are trying turns mainly on the question of negligence. The fact that defendant is a corporation is in proof. You have then the plaintiff a corporation and the defendant a corporation. The rule of law usually is, that where a certificate of deposit is issued by a bank, and it comes back to the bank issuing it with the indorsement of the depositor through the hands of *bona fide* innocent parties, the indorsement being forged, the bank paying the deposit certificate must lose it; for they are presumed to know the signatures of their customers, and the bank issuing the certificate has the means of verifying the signature. This is a different case. Here was a person who could not write. The bank gave him the certificate and took his description. The ordinary mode, where a person signs by his mark, is to have him identified, so that a piece of paper coming back to the Keokuk bank through respectable institutions, with the depositor's mark on the back of it witnessed by another party, the bank issuing the certificate would have the right to suppose that the bank sending the certificate had so identified the man making his mark. The witness' signature is proven. Mr. Brooks himself says he signed it. The simple fact, then, that the paper comes back to the bank at Keokuk with a mark witnessed by Mr. Brooks, which means that he knew Mr. Dunivan to be the person who made that mark, is sufficient to justify the Keokuk bank in paying the draft." There was a verdict and judgment for the plaintiff. *State National Bank v. Freedmen's Savings Co.*, 2 Dill., 11.

X. CERTIFICATE OF DEPOSIT.

SUMMARY — *Certificate of deposit*, § 260.

§ 260. A certificate of deposit bearing interest and payable three months from the time it was given is a promissory note. *Austen v. Miller*, §§ 261, 262.

[NOTES.— See § 263.]

AUSTEN v. MILLER.

(Circuit Court for Ohio: 5 McLean, 153-158. 1850.)

Opinion of the COURT.

STATEMENT OF FACTS.— On the 1st of February, 1840, the Mississippi Union Bank issued the following certificate:

"I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st of May, 1839, with five per cent. interest till due, \$1,500, for

the use of Henry Miller, and payable only to his order, upon the return of this certificate. (Signed) WILLIAM P. GRAYSON, Cashier."

On which the following indorsements were made:

Pay to George Lockwood, or order.

HENRY MILLER,
Cincinnati, Ohio.

Pay Austen, Wilmerding & Co., or order, without recourse.

GEORGE LOCKWOOD.

On the 4th of May, 1840, L. V. Dickson, justice of the peace, and *ex officio* notary public, presented the paper declared on at the counter of the Mississippi Union Bank, at Jackson, and demanded of the teller payment in specie, or its equivalent, which that officer, after consultation with the other officers of the bank, refused, but offered to pay in the notes of the bank, which the notary would not accept. The defendant Miller was duly notified as indorser, by a written and printed notice, directed to him at Cincinnati, and deposited in time for the first mail of the next day.

In July, 1847, the plaintiffs brought this action against Miller, as indorser. The declaration contained three counts. 1st. Alleging it to be a promissory note of the Union Bank, payable to the order of Henry Miller, and by him indorsed to George Lockwood, who indorsed it to the plaintiffs. 2d. Alleging it to be a draft drawn by Henry Miller on the Mississippi Union Bank, at Jackson, requesting the bank to pay to George Lockwood, and by him indorsed to the plaintiffs, and charging a due presentment for payment, and notice of non-payment. 3d. On a common count for money lent and advanced, paid, laid out and expended, money had and received, and on an account stated.

The plea was *non-assumpsit*. In the defense it was contended that the instrument declared on was not a promissory note in a mercantile sense, so as to pass by indorsement, under the statute of Ohio. It provides "that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon; but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn to any person or persons alone, and not drawn payable to order, or bearer, or assigns." A check and certificate of deposit are not mentioned in the statute as being negotiable. And it is alleged that the supreme court of Ohio has decided that this identical paper is not a promissory note, negotiable under the laws of Ohio, as appears from the fourth vol., page 527, of the Western Law Journal.

Suit was brought by these plaintiffs against Miller on the same certificate, and was decided at the May term, 1847, against the plaintiffs. This is claimed as conclusive of the case, as it was made in this state under the statute of the state, which construction is claimed as a rule of decision by the courts of the United States, according to the cases in 6 Cranch, 225; 10 Wheat., 50; 13 Pet., 739; 11 Wheat., 367, and 6 Pet., 297. But independently of that decision, it is urged that the instrument is not a promissory note, and that it is not negotiable under the well settled rules of law. To constitute a promissory note, it is said there must be an express promise to pay a certain amount, as an implied promise will not answer. That where there is no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply, it is not a promissory note. *Patterson v. Poindexter*, 6 Watts & Serg., 231. In that case this question was fully examined by the supreme court of Pennsylvania, on a certificate of deposit exactly like the one before the court, and which was

held not to be a promissory note, after two arguments. That court referred to *Horn v. Redford* as conclusive on the subject. In *Fisher v. Leslie*, 1 Esp., 426, it was held that a slip of paper, I O U eight guineas, is not a promissory note, but merely the acknowledgment of a debt. An instrument acknowledging the receipt of two hundred pounds in drafts for the payment of money, and promising to pay the money specified in the drafts, is not a promissory note. *Williamson v. Bennett*, 2 Camp., 417.

It was also objected that it was not a promissory note, because it was payable upon a contingency, and not at all events. It was payable only upon the order of Henry Miller, and upon the return of the certificate. A promissory note, it was said, must not depend upon a contingency. Story on Promissory Notes, 22; *Williamson v. Bennett*, 2 Camp., 417; *Roberts v. Peake*, 1 Burr., 323. This point was decided in the case above cited from 6 Watts & Serg. That case is said to have been well considered, and in which the above points were ruled. It is asked whether the consideration of a promissory note in the hands of an assignee can be inquired into. If it can, it seems to be a negotiable promissory note. And it is claimed that the consideration of the certificate may be inquired into. In a suit against the Mississippi Bank, it might show, it is urged, that instead of money worthless bank notes were deposited, and that an offer was made to return them. If this be a promissory note, it is asked, to whom is it payable? The words, for the use of Henry Miller, only indicate the equitable rights of the parties, and do not in any way affect the legal character of the paper, etc. In reply it was said that in *McCoy v. Gilmore*, 7 Ohio, pt. 1, 268, it was held that no special form of words is necessary to constitute a promissory note. It is enough if the intent appear, and the sum can be made certain by calculation, etc. And the court said the certificate had all the essential requisites of a promissory note. The cashier being the active agent of the bank, acknowledged the deposit of \$1,500, payable thirteen months from the 1st of May, 1839, with five per cent. interest, for the use of Henry Miller, and payable only to his order on the return of this certificate. Signed by the cashier. There is no want of certainty on the face of this paper. It was payable on presentation, as notes are often made, which is not a contingency that affects the character of the paper. There is a promise to pay to the order of the person for whose benefit the deposit was made. This is sufficient.

§ 261. *Decisions of state courts on questions of mercantile law are not binding on the federal courts.*

This is not a case in which the rule established by the state court is followed by the courts of the United States. It is not a question as to the construction of a state statute, but rather a principle of the common or mercantile law which governs the case; and in this view the federal courts rather than the courts of the state should fix the rule of decision.

§ 262. *A certificate of deposit is a promissory note.*

We can entertain no doubt on the subject. By a proper construction of the certificate it is in principle a promissory note, and the jury being so instructed, found a verdict for the plaintiff. Under the statute of Mississippi, a justice of the peace officiates as a notary public in making a demand and giving notice.

§ 263. *Certificate of deposit is negotiable.*—Under the law of Ohio, and under the decision of state courts generally, a certificate of deposit which is for a sum certain and is payable to order is negotiable by indorsement, and the indorser is liable to his indorsee thereon, the same as in case of a promissory note. *Miller v. Austen*, 13 How., 228.

XI. SUITS.

SUMMARY—*When bank may be sued in federal court, § 264.*

§ 264. A bank of which a state is sole proprietor may be sued in the federal courts. *Bank of Kentucky v. Wister*, §§ 265-269. See §§ 290, 296.

[NOTES.—See §§ 270-310.]

BANK OF KENTUCKY v. WISTER.

(2 Peters, 318-326. 1829.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The defendants here were plaintiffs in the court below, in an action for money had and received, instituted to recover the amount of a deposit made in the Bank of the Commonwealth of Kentucky. The defendants pleaded to the jurisdiction on the ground that the state of Kentucky was sole proprietor of the stock of the bank, for which reason it was insisted that the suit was virtually against a sovereign state. To this plea the plaintiffs demurred, and the circuit court of Kentucky having decided in favor of its jurisdiction, that decision is made the first ground of error in the present suit.

§ 265. *A bank of which a state is sole proprietor may be sued in the federal courts.*

But this court is of opinion that the question is no longer open here. The case of the *United States Bank v. The Planters' Bank of Georgia*, 9 Wheat., 904, was a much stronger case for the defendants than the present; for there the state of Georgia was not only a proprietor but a corporator. Here the state is not a corporator, since, by the terms of the act incorporating this bank (*Kentucky Acts of 1820*, p. 55, s. 2), "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit. Hence, by the laws of the state itself, it is excluded from the character of a party in the sense of the law when speaking of a body corporate. On the subject of ~~an~~ interest in the stock of a bank, the language of this court, in the case cited, is this: "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of the Union which have an interest in banks are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank, and waives all privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act." To which it may be added that if a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit, which violation of the constitution, no doubt, the state here intended to avoid.

§ 266. *Assumpsit lies in Kentucky, though a corporation can only assume under seal.*

The next question in the cause is on the sufficiency of the declaration; and on this point it is insisted that in Kentucky a corporation can only assume under seal, whereas the *assumpsit* here laid is general and without seal. On this subject the counsel admitted that every other court in the United States had decided otherwise, but that it had been so ruled in the courts of Kentucky and was there held as an established law. It cannot be denied that the case of the Frankfort Bank v. Anderson, 3 A. K. Marshall R., 1, fully sustains him in his position; but this court declares it unnecessary at this time to enter into the inquiry how far its decisions and those of other states upon a question of a general, not a local, case or character are to be controlled by those of any particular state, since they are of opinion that the act by which the Bank of the Commonwealth of Kentucky is incorporated contains a provision which is conclusive upon this question. We mean the eighth section, by which it is enacted that the bank shall receive money on deposit without requiring them to give an obligation under seal to repay it. This enactment must be construed with regard to the practice of banking and the general understanding of mankind, and must create a liability to the depositor by the simple act of depositing; that is an *assumpsit* in law, implied from an act *in pais*.

§ 267. *Where a bank receives its own bills on deposit, the deposit must be repaid by the nominal amount of the bills.*

The two remaining questions arose upon a bill of exceptions, the material facts on which were these: The deposit was proved by an instrument of writing in these words: "J. T. Drake this day deposited to the credit of J. Wister, J. M. Price and C. J. Wister, the plaintiffs, \$7,730.81, which is subject to their order on presentation of the certificate. Signed, O. G. Waggoner, cashier." It was admitted that the deposit was made in bills of the Commonwealth Bank; that bills of that bank were then, and at the time of demand, passing current at half their nominal value, and that, on presentation of the certificate, the cashier offered bills of the bank to that amount, but the agent of the defendants refused to receive payment in anything but gold or silver. In behalf of the bank it was moved that the court instruct the jury that the plaintiffs below had not made out a good cause of action, and were not entitled to the nominal amount deposited, but only to the value of the notes. The court overruled the motion, and instructed the jury that the plaintiffs below were entitled to receive the full sum as expressed in the certificate, with interest from the date of the demand, in lawful money of the United States. In this instruction it is now insisted that the court below erred. 1. Because nothing but a receipt of money can prove the basis of a recovery for money had and received. 2. Because, if entitled to recover at all, the plaintiffs below could recover no more than the value of the thing deposited. On both these points we are of opinion that the form of the certificate and the act of incorporation furnish a conclusive answer. The language of the certificate is expressive of a general, not a special deposit; and the act of incorporation, section 17, is express, that the bills of the bank "shall be payable and redeemable in gold or silver." The transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, nothing would have been easier than to refuse to take the money as a formal deposit, and the holder of their bills would then have been put to his action upon the bills themselves, in

which case he would certainly have received the gold or silver to the amount upon the face of the bills.

§ 268. *What is a sufficient demand.*

There are two other points which the cause has been supposed to present, and which the court notices to avoid the imputation of letting them escape their attention. The first is, that the refusal of the bank to pay on the presentation of the cashier's certificate may be imputed to the failure to accompany it with a check from the principals. But on this subject the majority of the court are of opinion that the bank put its own construction on the sufficiency of the demand and the meaning of their cashier's certificate, when they tendered, upon its presentation, all that they admitted to be due upon it.

§ 269. *A note payable to bearer is not affected by the disabilities of the nominal payee to sue in the federal courts.*

The other point has relation to the form of the bills, which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which therefore may have been payable, in the first instance, to parties not competent to sue in the courts of the United States. But this also is a question which has been considered and disposed of in our previous decisions. This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee. The judgment is affirmed, with costs.

§ 270. *Assets remaining after payment of debts belong to the stockholders.*—Where, in proceedings in the nature of *quo warranto*, a bank charter is declared forfeited, and a trustee is appointed to collect its assets and pay its debts, all sums remaining in his hands after the debts are paid belong to the stockholders; and a debtor of the bank cannot set up the forfeiture to defeat the collection of his debt by the trustee or his representative. *Lum v. Robertson*, 6 Wall., 279.

§ 271. *Assignee may maintain suit in his own name.*—Where a general assignment in trust to liquidate the affairs of a bank has been made, the assignees may maintain a suit in equity against the other parties to a note without any special assignment on the note. *Lenox v. Roberts*, 2 Wheat., 370.

§ 272. *The assignee may sue the directors.*—An assignee in bankruptcy of a bank may bring suit against the directors of the bank for losses incurred in consequence of their gross negligence. *Trustees v. Boeseiux*, 3 Fed. R., 823.

§ 273. *Right of action remains after charter expires.*—Where the charter of a bank provided that it should continue to the 1st day of January, 1859, but that it should do no banking business after January 1, 1837, but should have all the "necessary and incidental powers to collect and close up its business," it was held that a writ of error sued out in 1861 in an action commenced in 1849 would not be dismissed and the action abated, and that a writ of error was still maintainable against the bank. *Pomeroy v. Bank of Indiana*, 1 Wall., 25. See § 299.

§ 274. *The charter of the United States Bank expired March 3, 1836.* Smith, as agent of the bank, brought suit upon a note given him as such agent on May 17, 1836, in renewal of paper of an earlier date. It was held that the bank, through its agent, could collect debts due to it, although its charter had expired. *Smith v. Frye*, *5 Cr. C. C., 515.

§ 275. *Location of bank.*—A note was discounted at the branch bank of the United States at Richmond, and on maturity was duly protested. An action was brought against the indorser more than five years after such protest. *Held*, that as the branch bank was located at Richmond, and the officers and directors lived there, the place of the corporation was there, and not at Philadelphia, where the parent bank was located, and that consequently the statute of limitations barred the collection of the debt. *Bank of United States v. M'Kenzie*, 2 Marsh., 397.

§ 276. *When payment of bank bills may be enforced.*—It seems that if a private banking or other corporation issue bills contrary to law, the holder may maintain an action thereon for money had and received, unless the law prohibits the taking of such bills, in which case the holder, being *in pari delicto*, cannot recover. *Thomas v. City of Richmond*, 12 Wall., 356. See § 295.

§ 277. "Superior force" releases bank.— During the war of the rebellion a bank in Louisiana was put in liquidation by orders of the commander of the Union forces, against the protest of the officers of the bank. Collateral securities held by the bank were turned over under compulsion to a commission appointed by the officer to close up the affairs of the bank, and were sold by them for less than their value. In an action against the bank to recover such collaterals it was held that the proceeding for the liquidation of the bank was by "superior force," and that the bank was not liable for the loss. *McLemore v. Louisiana State Bank*, 1 Otto, 28.

§ 278. Summary process in charter constitutional.— The provision of the charter of the Bank of Columbia, giving it summary process for the collection of its debts on paper expressly made negotiable at the bank, is constitutional. *Bank of Columbia v. Okely*, 4 Wheat., 241.

§ 279. It seems that the clause in the charter of the Bank of Columbia, that executions in its favor shall not be stayed, cannot apply against strangers to the transaction, whose property has been seized on such an execution. *Smith v. Bank of Columbia*, 4 Cr. C. C., 149.

§ 280. — Statute of limitations applies to such process.— The act of incorporation of the Bank of Columbia provided that it should have summary process to collect its debts. *Held*, that the statute of limitations could still be set up as a defense by a debtor, and for that purpose the issuing of the execution would be considered as the commencement of a suit. *Bank of Columbia v. Sweeney*, 2 Pet., 673.

§ 281. Statute of limitations runs against the Bank of the United States.— The fact that the United States was a stockholder of the Bank of the United States was held not to prevent the statute of limitations from running against it, on the principle that *nullum tempus occurrit regi*. The sovereign, by becoming a member of a trading corporation, lays aside its sovereignty for such purpose. *Bank of United States v. M'Kenzie*, 2 Marsh., 400.

§ 282. Although a state is a stockholder, the bank may be sued in the federal courts.— The fact that a state is a stockholder in a bank does not prevent it from being sued in the courts of the United States. *Bank of the United States v. Planters' Bank*, 9 Wheat., 906. See § 290.

§ 283. State sole stockholder, effect of.— Where a state becomes a stockholder in a bank, it imparts none of its attributes of sovereignty to the bank; and this is true even if it is the sole stockholder. *Briscoe v. Bank of Kentucky*, 11 Pet., 825; *Bank of the United States v. Planters' Bank*, 9 Wheat., 906.

§ 284. Bank estopped to say that notes payable to bearer were wrongfully issued.— In an action upon the notes of a bank against its directors, the plea that the notes were fraudulently put into circulation and that the bank received no benefit therefor is no defense. The notes being payable to bearer, title passed with delivery. It is a matter of no importance, as regards the rights of the plaintiff, how the notes were put into circulation, if they came into his possession without notice of fraud or unfairness. *White v. How*, 3 McL., 292.

§ 285. Plea by directors that bank is in liquidation is bad.— Where a state law makes the directors of a bank personally liable in a certain case, in an action against them to enforce such liability a plea that proceedings have been taken by the bank commissioners to close up the business of the bank, and that the notes sued on are in the hands of the receiver of the bank, but which does not set up that there are assets, is insufficient on demurrer. *Ibid*.

§ 286. When cashier may bring action.— Where a draft is made payable to the cashier of a bank, and a bill of lading is indorsed to him as collateral security, he can maintain a libel in admiralty for the property, though only a trustee for the bank. *The Steamship Thames*, 3 Ben., 289; affirmed, S. C., 7 Blatch., 229.

§ 287. Decree exempting stockholders from liability, when bad.— Under the charter of a bank its stockholders were liable for its debts after its assets were exhausted. An action was begun by holders of its bills to close up the affairs of the bank, but the stockholders were not made parties in any manner, and did not appear in the action. *Held*, that a decree exempting them from liability was erroneous, where it appeared that the creditors had not been paid in full. *Terry v. Commercial Bank of Alabama*, 2 Otto, 456.

§ 288. Creditor cannot sue an individual stockholder.— Where the charter of a bank makes all stockholders liable for its debts in proportion to the amount of stock held by each, one of several creditors cannot bring an action at law for himself alone against a stockholder to obtain full satisfaction of his debt. The proportion of the stockholder's indebtedness could not be determined in such an action, a suit in equity being essential for such purpose. And this is especially true where the charter in its terms obviously contemplates the equitable adjustment of such matters. *Pollard v. Bailey*, 20 Wall., 524.

§ 289. A corporation is estopped by its acts.— The bank account of a corporation was overdrawn by a check signed by the president and secretary, but without special authority. The directors, on learning of the overdraft, gave the bank a note for an amount greater than

the overdraft, to include it and future anticipated drafts. In an action by the bank to recover the amount of the overdraft it was held that though the overdraft may have been outside the authority of the president and secretary, yet the corporation had ratified it by directing the giving of the note, and consequently was bound. *Anglo Californian Bank v. Mahouey Mining Co.*, 5 Saw., 257.

§ 290. Suit in federal court on note payable to bearer.—A note payable to bearer is payable to any one and is not affected by the disabilities of the payee to sue in the United States court. *Bank of Kentucky v. Wister*, 2 Pet., 318. See §§ 235-269, 292.

§ 291. The holder of a bank bill payable to bearer is not the assignee of a *chose in action* within the eleventh section of the judiciary act of 1789, limiting the jurisdiction of the federal courts. *Wood v. Dummer*, 3 Mason, 313.

§ 292. Allegations in declaration.—It is never necessary for a bank to allege, when suing upon a note, that it was taken in the ordinary course of business. *New York Dry Dock v. Hicks*, 5 McL., 115; *Bank of Metropolis v. Guttschlick*, 14 Pet., 27.

§ 293. For money misapplied the suit is against the bank.—Where money is paid to the cashier of a bank for the use of the bank, and the money is misapplied, the remedy of the person paying the money is against the bank, and not against the cashier personally. *Wilson v. Rogers*,* 1 Wyom. T'y, 56.

§ 294. The bank is the proper defendant, when.—*Assumpsit* will lie against a bank upon a contract entered into in its behalf by its president and cashier, which is signed by them and sealed with their seals. *Bank of Metropolis v. Guttschlick*, 14 Pet., 29.

§ 295. Unless damaged, the holder of bank bills cannot set up that they are invalid.—Where bills of a bank pass current, and they have not proved worthless in the hands of the party taking them, and he has not been obliged to take them back from the party to whom he paid them, he cannot set up as a defense to a suit to foreclose a mortgage which was given in part for such bills, that the bank issuing them was chartered for illegal and fraudulent purposes, and that the bills were in fact worthless. *Orchard v. Hughes*, 1 Wall., 75. See § 276.

§ 296. Right of Bank of the United States to sue in the federal courts.—The act of incorporation of the Bank of the United States is a law of congress within the provisions conferring jurisdiction upon the federal courts, and the clause of the bank's charter giving it power to sue and be sued in any circuit court of the United States is constitutional. *Osborn v. Bank of the United States*, 9 Wheat., 317.

§ 297. The Bank of the United States had not, by virtue of the clause in its charter allowing it "to sue and be sued, plead and be impleaded, etc., in courts of record, or in any place whatsoever," any power to sue in the courts of the United States. *Bank of United States v. Deveau*, 5 Cr., 84.

§ 298. The charter of the Bank of the United States provides that it shall have the power to sue and be sued in the circuit courts of the United States, and its capacity so to sue and be sued is therefore independent of the judiciary act, and the provisions of the eleventh section do not apply to cases in which it is a party. *Bank of the United States v. Planters' Bank*, 9 Wheat., 908.

§ 299. Effect of expiration of charter.—The expiration of the charter of the Bank of the United States on the 4th day of March, 1811, abated all suits pending at that time in the name of the president, directors and company of such bank, though the bank had made a general assignment in trust to settle up its affairs, and the clerk had entered the suit for the use of the trustees before the expiration of the charter. *Bank of United States v. McLaughlin*, 2 Cr. C. C., 20. See § 273.

§ 300. Special privileges as to suit.—Suits brought by the Bank of Alexandria on promissory notes made negotiable at that bank are entitled to trial at the return term of the writ. *Young v. Bank of Alexandria*,* 5 Cr., 49.

§ 301. Under the act of incorporation of the Bank of Alexandria the accommodation indorser of a promissory note made negotiable at that bank might be sued before the maker, although the latter was solvent. (Dissenting opinion by Johnson, J.) *Yeaton v. Bank of Alexandria*,* 5 Cr., 49.

§ 302. Notwithstanding the law of Virginia, embodied in the charter of the Bank of Alexandria, that there should be no writ of error issued to review judgments in its favor, a writ of error lies to the supreme court of the District of Columbia from the supreme court of the United States. The act of incorporation merely gave the bank corporate existence, but could confer upon it no peculiar privileges in the courts of the United States not belonging to the corporation. Such privileges could only exist when conferred by act of congress. *Young v. Bank of Alexandria*, 4 Cr., 396.

§ 303. Congress has power to create a bank.—A bank, being a useful and convenient agent for the carrying on of the fiscal operations of the government, may be created by act of

congress, and branches of the parent bank may also be established in pursuance of the same end. *M'Culloch v. State of Maryland*, 4 Wheat., 422.

§ 304. Succeeding bank is not liable for debts of its predecessor.—Where a new bank is incorporated with the same name as a bank whose charter was expiring, the new corporation is not responsible for the debts of the old, though the stockholders may be mostly the same, and though for a time the new corporation may have paid the bills of the old. *Bellows v. Hallowell & Augusta Bank*, 2 Mason, 43.

§ 305. The charter of the Bank of the United States expired on the 3d day of March, 1836, but the bank was continued two years for the purpose of settling up its affairs. In anticipation of the dissolution, the legislature of Pennsylvania incorporated a bank of the same name with substantially the same stockholders and gave to it substantially the same powers. A contract was made after the 3d of March for the purchase of a branch bank. *Held*, that it was made with the new corporation. *Bank of United States v. Lyman*, 1 Blatch., 300.

§ 306. Payment in depreciated notes is not trading.—The Bank of the United States gave in exchange for a private note payable to it, notes of the Bank of Kentucky, which were depreciated, and a check on the same bank, which, though it had suspended, was solvent, and against which debts could be still collected on compulsion. *Held*, that this transaction was not dealing or trading within the prohibition of its charter. *Bank of the United States v. Waggener*, 9 Pet., 398.

§ 307. Power of the state over lands of foreign banks.—It is competent for a state to provide a mode by which the lands of a foreign banking corporation owning land and owing debts within the state can be subjected to the payment of such debts. *McGoon v. Scales*, 9 Wall., 31.

§ 308. Bank, act creating.—The act of a territorial legislature in chartering a bank is an act under territorial authority, and not under the authority of the general government. *Miners' Bank v. State of Iowa*, 12 How., 8.

§ 309. When the bank is not bound by the fraudulent acts of the cashier.—Where the cashier and one of the directors of a bank, conspiring to aid a defaulting officer in the treasury department, and acting entirely without the knowledge or assent of any other officer or director of the bank, deposit securities of the bank in the government treasury to cover the defalcation of such officer, such act does not bind the bank, and the government is liable for the value of the securities. *Newton Bank v. United States*,* 16 Ct. Cl., 73.

§ 310. —nor is one who lends money to the bank bound.—The president of a bank who owned more than five hundred and fifty shares of its stock, most of which had been transferred to other parties as security, and which was still outstanding, gave, as security for a loan to himself, a certificate in due form, signed by himself and the cashier, who had full knowledge of the irregularity, stating that he had five hundred and fifty shares standing to his credit on the books of the bank. This certificate was a duplication of the stock of the president, and was issued in anticipation that the outstanding certificates would be given up and canceled, but they were not. The money received on this transaction, with the knowledge of the cashier, was placed with the funds of the bank without consideration passing from it to the president. The bank having failed and the lender discovering the fraud, offered to return the certificate and demanded his money. *Held*, that the act of the president was a fraud, and the money was received by the bank for the use of the lender, and that he was entitled to share its assets *pro rata*. *Manhattan Life Ins. Co. v. Farmers', etc., National Bank*, 10 Blatch., 344.

XII. MISCELLANEOUS.

§ 311. Bank not a trustee, when.—Where a bank made a contract for the purchase and delivery of gold certificates, but it was not agreed that the identical certificates should be delivered, the bank cannot be regarded as holding the certificates in pledge. *Merchants' Bank v. State Bank*, 10 Wall., 604. See the case, §§ 101-118.

§ 312. Custom.—The indorser of a note discounted at a bank is bound by a custom of the bank which is known to him, as to the time of demand and protest of notes. *Bank of Columbia v. McKenny*, 3 Cr. C. C., 361.

§ 313. A party to a note discounted at a bank is not bound by a special usage of such bank without his express or implied assent. *Bank of Alexandria v. Deneal*, 2 Cr. C. C., 490.

§ 314. Bank fails, when.—A bank fails when it ceases to redeem its paper and pay its debts at maturity; and this though an act of the state legislature relieves it from paying specie. Such act can only relieve the bank from a forfeiture of its charter, but cannot relieve it from the obligation to pay its debts in specie. *Godfrey v. Terry*, 7 Otto, 179.

§ 315. Putting draft in bank to transfer money is not a deposit.—The law of congress of 1846 prohibited the deposit of public funds in local banks. While this law was in force the secretary of the treasury, wishing to transfer a sum of money to New Orleans, deposited a draft in bank in New York, and the bank agreed to make the transfer. *Held*, that this was a proper transaction, and that on failure to make the transfer the United States could recover the amount of the draft. *United States v. City Bank*, 6 McL., 139.

§ 316. Bank notes cut in halves for transmission may be recovered, although one part be lost.—Where bank notes are cut in halves for safer transmission through the mails, and one-half is lost or stolen, the lawful holder may recover of the bank on showing that he is lawfully in possession thereof, and explaining the mutilation; for it seems that the taker of the lost or stolen parts would take subject to all the existing defenses on the part of the bank. *Bullet v. Bank of Pennsylvania*, 2 Wash., 173; *Martin v. Bank of United States*, 4 Wash., 255. And this is true though the bank has previously given notice that in such case it will pay only when both halves are produced. *Martin v. Bank of the United States*, 4 Wash., 255.

§ 317. If a bank note is cut in halves for safer transmission through the mails, and one-half is lost, the holder may recover the whole sum of the bank on proving such loss and offering to indemnify the bank against its liability on the other half. *Armat v. Union Bank*, 2 Cr. C. C., 181.

§ 318. Equitable interest in stock.—An assignment of United States stock as collateral security gives to the assignee an equitable interest, notwithstanding the act of congress of 1790, ch. 61, prescribing the mode of transferring such stock, was not complied with. *United States v. Cutts*,* 1 Sumn., 133.

§ 319. Capital stock, what may be.—Road stock paid in as part of the capital stock of a bank, whose charter required its capital stock to consist of money only, belongs to the corporation. *Holbrook v. The Union Bank of Alexandria*,* 7 Wheat., 553.

§ 320. Pledgee of stock is bound, as is pledgor.—The articles of association of a bank declared that no stockholder could transfer his stock while the bank held his unpaid note. This rule was held binding as against one who had loaned and transferred the stock to the debtor to give him credit with the bank. *Burford v. Crandell*,* 2 Cr., 86.

§ 321. Teller's bond.—It is not a breach of a teller's bond to receive as cash a check upon another bank made by one in good credit, where it was shown that such was the custom of the bank. *Union Bank v. Mackall*,* 2 Cr. C. C., 695. See §§ 96, 143.

§ 322. The condition of the bond of a bank teller "faithfully to perform all the duties assigned to him in said bank, and to make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care," embraces damages arising from carelessness as well as from unfaithfulness; and the sureties are bound to indemnify for all losses arising from such carelessness, if by any degree of care they could have been prevented. *Union Bank of Georgetown v. Forrest*, 3 Cr. C. C., 218.

§ 323. The bond of a bank teller, given under the original charter, was held in this case to cover defalcations arising under an extended charter of the bank, and after the time when such charter would have expired but for the extension. *Ibid*.

§ 324. The bond of the teller of a bank provided that he was to be elected from year to year, and that it was to continue as long as the teller should continue in that position. *Held*, that it was not necessary that the teller should be appointed yearly, and from year to year, and that though an interval of three days elapsed between the expiration of his term and the time of his election, yet, if he continued to perform his duties, his bond continued good and his sureties were liable for his defalcations after that date. *Ibid*.

§ 325. A bank teller is not liable for losses occurring during his absence from the bank. *Bank of United States v. Johnson*, 3 Cr. C. C., 229.

§ 326. A bank teller, though he gives bonds for the faithful performance of his duties, is liable, in an action for money had and received, for all moneys in his hands unaccounted for, and a judgment against the bank in an action on the teller's bond is no bar to such an action against the teller. *Ibid*.

§ 327. The bond of a teller of a bank, conditioned that he "well and faithfully execute the office, and in all things relating to the same well and faithfully behave," is substantially a compliance with the requirement that a bond be given that the officer "faithfully perform the trust reposed," etc. *Bank of United States v. Brent*, 2 Cr. C. C., 699.

§ 328. Real estate.—Though neither a bank, after the expiration of its charter, nor the trustees appointed to wind up its affairs could take title to real estate, yet either may make an arrangement through the medium of a trustee which will enable the bank to secure a debt for which it has a lien on real estate, and may have such real estate sold to pay the debt. *Zantzingers v. Gunton*, 19 Wall., 36.

§ 329. State debts payable in bank notes.—The charter of the Bank of Arkansas provided that its notes should be taken at their face for debts due to the state. Certain lands were

granted to the state for the use of a seminary and were sold. Bonds were given in payment to the governor, which were payable and negotiable at the Bank of Arkansas "in specie or its equivalent." *Held*, that a tender of the notes of the bank of the amount of the bond was insufficient. *Paup v. Drew*, 10 How., 221.

§ 330. The charter of the State Bank of Tennessee provided that its notes should be received for taxes and all other moneys due the state. *Held*, that as long as this statute remained in force it was a contract between the state and every bill holder. Such guaranty was in no sense a personal one, but attached to the note as a part of it, as much as if it had been written on the back of each note; that a law which was a withdrawal of this guaranty was, as far as outstanding notes were concerned, a law impairing the obligation of a contract and consequently void. *Furman v. Nichol*, 8 Wall., 59.

§ 331. The original charter of the Bank of the State of South Carolina provided that its notes, payable on demand in specie, should be receivable for taxes and for all debts due the state. This charter was re-enacted in 1832 and in 1852, and in each case this provision was retained. Other banks were in existence at these times, whose notes were receivable for taxes, only when they were redeemed in specie on demand. In 1848 it was enacted that all taxes should be paid in specie, or in the notes of specie-paying banks. In 1865 the issue of currency of the bank was suspended, and in 1868 all acts relating to the bank were repealed. In 1870 notes issued in 1860 were tendered for taxes and refused. *Held*, that the law of 1848 did not repeal the clause of the charter making the notes of the bank receivable for taxes, even as to notes issued thereafter, and that in order to effect a repeal of such provision, the intention would have to be clear; and that even if the law of 1848 did repeal it, it was again passed by the re-enactment of the charter in 1852; and that the tender in question was good. *State v. Stoll*, 17 Wall., 481.

§ 332. **Taxation.**—A savings bank having no capital stock, and forbidden to make discounts or to have any circulation, and which only receives deposits and invests the same for the benefit of the depositors, is engaged in the business of banking within the meaning of the revenue laws of the United States, and on the repeal of the proviso in the original act, exempting savings banks from its operation, it becomes liable to taxation by the United States, and its deposits become liable to taxation as soon as the money is received from the depositors. *Bank for Savings v. The Collector*, 8 Wall., 508. See § 82.

§ 333. Where the charter of a bank contains no provision regarding taxation, a law passed subsequently which imposes a tax on the bank is not unconstitutional as violating the obligation of a contract. *Providence Bank v. Billings*, 4 Pet., 560. See REVENUE.

§ 334. **Debtor cannot set up usury.**—Although the taking of usury may be a violation of the charter of the bank, the debtor cannot set up that fact to defeat a recovery. The taking of the highest rate of interest by way of discount is not usury. *Fleckner v. Bank*, 8 Wheat., 338. See the case, §§ 20-27.

§ 335. **Discount not usury.**—The purchase of notes at a discount is not usury. *La Fayette Bank v. State Bank*,* 4 McL., 209. See § 21.

§ 336. **Rule as to usury.**—A bank is within the law forbidding usury the same as a private person. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 555.

§ 337. **Usurious note not void.**—The charter of a bank prohibited it from taking more than a certain rate of interest, but was silent as to any penalty for the violation of this provision. It seems, in such a case, that, if an illegal rate be contracted for in a note, the note is not consequently void, but only void as to the excess of interest reserved beyond the allowed rate. It seems also that where such a note, with the interest thereon, has been paid, neither the borrower nor his assignee in bankruptcy can recover back more than the excess of the interest over the allowed rate. *Darby v. Boatman's Saving Institution*, 1 Dill., 147.

§ 338. The provision of a bank charter which prohibits it from taking a greater rate of interest than six per cent. has only the same effect as a law of the state making the same restrictions upon individuals. If the state law, as applied to individuals, only imposes the forfeiture of the excess of interest, no greater forfeiture can be imposed upon the bank under its charter. The fact that the act of taking such interest is forbidden to banks does not make the whole transaction void. Though the bank can exercise only those powers conferred upon it by its charter, and all its acts outside thereof are void, yet the express duty of the bank to act within the law is no greater than the implied duty of each individual so to do. *M'Lean v. Lafayette Bank*, 8 McL., 615. See INTEREST AND USURY.

§ 339. **Constitutional law.**—A law which purports to prescribe the mode of proving bills of a bank tendered for taxes, and the rules of evidence applicable thereto, does not create a new contract, but only a new remedy. *South Carolina v. Gaillard*,* 11 Otto, 433.

National Banks, see BANKS, NATIONAL.

As to Checks and Drafts, see BILLS AND NOTES.

As to Bank Notes, see MONEY.

Taxation of Banks, see REVENUE.

As to duties and liabilities of Collecting Agents, see AGENCY, VII.

See CORPORATIONS.

BANKS, NATIONAL.*

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| <p>I. POWERS AND DUTIES OF THE COMPTROLLER OF THE CURRENCY, §§ 1-26.</p> <p>II. RECEIVERS, §§ 27-58.</p> <p>III. STOCK AND STOCKHOLDERS, §§ 54-138.</p> <p>IV. CLAIMS AGAINST THE BANK, §§ 139-155.</p> | <p>V. LOANS AND DEPOSITS, §§ 156-192.</p> <p>VI. INTEREST AND USURY, §§ 193-238.</p> <p>VII. REAL ESTATE SECURITY, §§ 239-244.</p> <p>VIII. SUITS, §§ 245-287.</p> <p>IX. MISCELLANEOUS, §§ 288-331.</p> |
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I. POWERS AND DUTIES OF THE COMPTROLLER OF THE CURRENCY.

SUMMARY — *Rights and duties*, § 1. — *Receiver the instrument of*, § 2. — *Decision as to liability of stockholders*, § 3. — *Remedy of creditors of insolvent bank*, § 4. — *Power to appoint a receiver*, § 5.

§ 1. The rights and duties of the comptroller as laid down in the national banking law. *Kennedy v. Gibson*, §§ 6-12.

§ 2. The receiver is the instrument of the comptroller and must act under his direction. *Ibid.*

§ 3. The decision of the comptroller as to the liability of the stockholders is conclusive upon them. They will not be heard to controvert it. *Ibid.* See § 18.

§ 4. The creditors of an insolvent national bank, in the hands of a receiver, must seek their remedy through the comptroller in the mode prescribed by the statute. *Ibid.*

§ 5. The comptroller has no authority to appoint a receiver except in the contingencies mentioned in the banking act. *Irons v. Manufacturers' National Bank*, §§ 13-17.

[NOTES. — See §§ 18-26.]

KENNEDY v. GIBSON.

(8 Wallace, 498-507. 1869.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS. — This is an appeal in equity from the decree of the circuit court of the United States for the district of Maryland. The bill was filed by the appellant. For the purposes of the points necessary to be considered, the case may be briefly stated. The appellant has been duly appointed receiver of the Merchants' Bank of Washington City, under the fiftieth section of the act of June 3, 1864, and brings this bill to charge the defendants, who are alleged to be stockholders of the bank, with the personal liability prescribed by the twelfth section of the act. The facts necessary to warrant the appointment of a receiver are sufficiently set forth. It is averred that he "has already ascertained that the assets and credits of the association are wholly insufficient to pay its debts and liabilities, and that it will be necessary to the complete and entire administration of the trust reposed in him that recourse shall be had to the personal liability imposed upon the stockholders;" that two thousand shares of the capital stock, amounting to \$200,000, were issued by the bank to its stockholders; that it will be necessary to collect from them this amount, to make good the deficiency in the means to meet the balance of the indebtedness of the bank which will remain after the application of all the

available assets to the discharge of its liabilities, and that "after such application is made, a balance of indebtedness will remain due, largely exceeding the said sum of \$200,000." The stockholders, besides the defendants, are named, and it is alleged that a part of them reside in the District of Columbia and one of them in the state of New York. The prayer of the bill is that an account may be taken, and that each of the defendants shall be decreed to pay to the receiver his *pro rata* share of the indebtedness of the bank which may remain after applying to the liabilities all its effects, as required by the act before mentioned, and for general relief. The bill is signed by the special counsel of the receiver. The name of the attorney of the United States does not appear in the case. The defendants demurred. Our opinion will cover all the points brought to our attention by their counsel in the argument, without particularly stating them.

§ 6. *It is not competent for defendants to object that a suit to enforce national bank liabilities is not conducted by district attorney.*

The receiver is the agent of the United States, and according to the fifty-sixth section of the act (13 Stat. at Large, 116) this suit should have been conducted by their attorney. But this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in no wise concerned, and they cannot be heard to make the objection that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law.

§ 7. *Duties of the comptroller with reference to liquidation of the liabilities of national banks.*

The fiftieth section of the act provides that the receiver, under the direction of the comptroller of the currency, shall take possession of the books and assets of every description of the association, collect all the debts and claims belonging to it, and may—proceeding in the manner prescribed—sell or compound bad and doubtful debts, and sell all its real and personal property; "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." He is required to pay all the moneys he may realize to the treasurer of the United States, subject to the order of the comptroller, and to report to the comptroller all his proceedings. The comptroller is required to give notice to all persons having claims against the association to present and prove them, and after making provision for refunding to the United States "any deficiency in redeeming the notes of such association, as mentioned in this act," to make a ratable dividend of the moneys paid over to him by the receiver, "on all claims which have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." He is to make further dividends, from time to time, as the means shall come into his hands, "on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the stockholders of such association or their legal representatives."

§ 8. *The receiver the instrument of the comptroller.*

The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determina-

tion is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

§ 9. *The liability of stockholders of national banks.*

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court — if such action should subsequently prove to be necessary — until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law, the interests of the creditors require it, and it was the obvious policy and purpose of congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain, after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants.

§ 10. *Proceedings against delinquent national banks.*

The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit.

§ 11. *Suits by or against national banks may be brought in the courts of the United States.*

The fifty-ninth section of the act of February 25, 1863, provides that all suits *by or against* such associations may be brought in the proper courts of the United States or of the state. The fifty-seventh section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the fifty-ninth section of the preceding act. In the latter, the word "*by*" in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the

courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1864. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits *against* the associations, there is none for suits *by* them in any court. *Theriat v. Hart*, 2 Hill, 381, note. The fifty-ninth section directs "that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury." Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship. *United States v. Babbit*, 1 Black, 61.

§ 12. *Stockholders cannot be held personally liable without an averment of some action by the comptroller.*

The bill in the case before us contains no averment of any action by the comptroller touching the personal liability of the stockholders. The demurrer of the defendants was therefore properly sustained, and the decree of the circuit court is affirmed.

IRONS v. MANUFACTURERS' NATIONAL BANK.

(Circuit Court for Illinois: 6 Bissell, 301-307. 1875.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—This is a creditor's bill, setting forth in substance that the complainant was a depositor in the Manufacturers' National Bank; that, at the time the bank closed its doors in October, 1873, he had a large sum deposited there; that the bank has since that time gone into voluntary liquidation, or pretended to do so; that it has withdrawn its bonds on deposit with the treasurer of the United States, and has since that time in some manner, through the agency of various officers, converted its funds, under the pretexts of paying portions or some of its debts, and that in the meantime the complainant has brought suit against the bank, and recovered judgment in this court for the amount of his debt,—something over \$12,000,—issued his execution, and been unable to make anything. He charges that the officers of the bank have fraudulently applied the funds of the bank to the payment of other persons than himself; that they have made fraudulent settlements and dispositions of the property of the bank; and there is no property subject to seizure or execution, which the complainant can obtain by proceeding at law, and asks for the discovery of whatever assets the bank or the officers of the bank may now have under their control belonging to the bank, and for the appointment of a receiver to take possession of these assets; and also that the adjustments or settlements which have been made by the officers of the bank, which are fraudulent, and in violation of the provisions of the banking law under which the defendant was organized, shall be set aside and held for naught, and the property equally distributed among all the creditors alike.

The bill does not show the fact, but an exhibit filed with the bill shows that within the last few months certain creditors of the bank have applied to the comptroller of the currency, under the provisions of the general banking law of the United States, asking that he appoint a receiver for this bank under the

provisions of that law, and pursuant to it, for the purpose of winding up its affairs, and the comptroller has responded to that request by the statement, in substance, that some time in the early part of January, 1874, the bank deposited government notes with the treasurer to the amount of its circulation, and took up its bonds; and that the relations between the bank and the department of the comptroller of currency from that time on have ceased, and the comptroller now has, or claims that he has, no authority to appoint a receiver; that he has no official notice of any protest of any of the circulating notes of the bank, and thinks that he has no authority to appoint a receiver. The defendant files a general demurrer.

§ 13. *The comptroller has no authority to appoint a receiver except in certain contingencies. In other cases the power lies with any competent tribunal.*

It would seem, from an examination of the banking law, that the comptroller of the currency has no authority to appoint a receiver except in certain contingencies, such as the failure to make good a reserve, the failure to redeem circulating notes on demand, the failure to make good the capital stock, whenever the same becomes impaired, and the failure to meet certain other requirements of the banking law. Now, neither of these contingencies are charged in this bill to have occurred, and it is only in the case of such contingencies that the comptroller acquires the right to appoint a receiver. It is claimed on the part of the defendant, and has been very strenuously and ingeniously argued, that there is no power in any court to appoint a receiver for this bank, because the delegation of the power to the comptroller of the currency to appoint a receiver in certain contingencies to wind up the affairs of the bank excludes the authority of any other tribunal or person to appoint a receiver. I have carefully examined the banking law, and the decisions of the supreme court; and those of various states made since this banking law took effect upon the various questions which have arisen, and do not find that this precise question has ever been made. But I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation, created as this is under an act of congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against this corporation as much as against any other corporation, except where there are specific provisions to meet those cases. For instance, a holder of the circulating notes of the bank, who had presented them for payment, and payment had been refused, would undoubtedly find this remedy within the special provisions of the banking law itself, because there is a specific provision meeting that case, and his remedy would undoubtedly be found in the action of the comptroller of the currency. But there are many cases like the one before us, where the bank may not have so violated any of the provisions of the banking law as to call for the appointment of a receiver by the comptroller.

The allegations in this bill are very full that this bank was insolvent at the time it closed its doors, and has been ever since; that it failed to pay its debts, that a large amount of its debts are still unpaid; and the question is, what remedy have the creditors of this bank if a court of equity cannot take on itself the administration of its affairs, where the banking law does not provide that it shall be done by the comptroller of the currency? It is true that in the case of *Kennedy v. Gibson*, 8 Wall., 498 (§§ 6-12, *supra*), the supreme court state that the provision of the banking law making the stockholders liable for the debts of the corporation to the amount of the stock held by them respectively,

could not be enforced except under the action of the comptroller through a receiver appointed by him. Whether that opinion will be found to entirely express the full meaning and intention of the supreme court whenever they come to examine it in the light of future cases and facts which may be brought before it, is at least a matter of doubt. I do not feel sure that the supreme court will adhere to quite as broad a statement as is made in that case; but still they may. But even that does not oust the jurisdiction of a court of equity to take hold of whatever assets the bank may have aside from the personal liability of the stockholders, and administer those as it would the affairs of any insolvent corporation.

§ 14. *Where the assets of a corporation are not subject to a levy, the creditor's remedy is by a bill in equity to marshal and distribute the assets.*

The law is well settled in this state and in the courts of the United States, that the proper remedy of a creditor against a corporation, when the assets are of such a nature that they cannot be levied upon and sold on execution, is by a proceeding in equity to marshal and distribute the assets. It is unnecessary to cite authorities upon that question. The law, I think, is as well settled as any branch of the law can be considered settled in this country.

§ 15. *Section 52 of national banking act.*

The general banking law provides, by the fifty-second section, "That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any national banking association, or of deposits to its credit; or assignment of mortgages or sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void." Rev. Stat. 1874, § 5242. Now by the fiftieth section of the banking law it is provided in substance that, after making provision for the payment, or rather indemnification, of the government for the redemption of the circulating notes of a national bank, all the remainder of the proceeds of its assets shall be divided *pro rata* among its creditors, share and share alike, according to the amount due to each. And the section which I have just read makes void all payments and settlements which are made to one creditor, to the exclusion of other creditors, after the commission of an act of insolvency. The allegations in this bill, which are confessed by the demurrer as true, show that the bank became insolvent, closed its doors, and, I think, was guilty of an act of insolvency within the meaning of the banking law — the organic act of incorporation.

§ 16. *The act of insolvency, referred to in the fifty-second section, construed to mean any act which would be an act of insolvency on the part of an individual banker.*

It was urged by defendant's counsel that the only act of insolvency contemplated by this fifty-second section was such an act of insolvency as authorized the comptroller to appoint a receiver, that would be merely the failure to pay its circulating notes, and that a failure to pay a depositor, or its bills of exchange, or notes, or drafts, would not be an act of insolvency. It can hardly be possible that congress intended to give all the remedies in the banking law merely to the note-holder of these national banks, and leave depositors and general creditors entirely unprovided for. It must have been in the contem-

plation of congress in the enactment of this act, that these national banks could receive deposits, because they are specially authorized to do so; that they would issue bills of exchange, and be otherwise liable to individuals and corporations, because there is express provision in various sections for payment of that class of indebtedness. And I think the term, "act of insolvency," mentioned in the fifty-second section, is clearly an act which would be an act of insolvency on the part of an individual banker; that is, the closing of the doors, refusal to pay depositors on demand, refusal to go on in the due course of business to transact its business as a bank, and discharge its liabilities to its creditors.

§ 17. *Where it is made to appear that a bank is paying some of its creditors to the exclusion of others, equity will interfere and appoint a receiver.*

So that upon the allegations in this bill, which are, as I said before, admitted to be true by the demurrer, it would seem that this bank has been making preferences in direct contravention of the provision of the banking law for a year past. How far a court of equity will deem it its duty to disturb these transactions, and require repayment from parties who have received payment from the officers of the bank in the course of liquidation of its affairs, is a matter for future consideration. But it certainly furnishes the ground for the intervention of a court of equity, it seems to me, when it is made to appear that a bank is going on and paying some creditors to the exclusion of others. It was the plain intention of the banking law that all creditors should share equally, and that no preference should be allowed in favor of one creditor against others; that the United States government, as the guarantor of the circulating notes of the bank, is the only party that is entitled to any preference whatever; that all other creditors are to share alike. And, therefore, it would seem to follow that, if a bank is not in a condition to pay all its creditors, it can only pay them *pro rata*,—that it has no right to pay a part in full and have others unpaid. Entertaining these views, and without taking longer time to explain my views upon the question, it is sufficient to say that I think a case is made by the bill for the appointment of a receiver.

§ 18. *Decision of comptroller as to liability of stockholders.*—The decision of the comptroller as to the necessity of an assessment upon the stockholders and the amount thereof is conclusive upon them. *Strong v. Southworth*,* 8 Ben.; 331; *Bailey v. Sawyer*,* 4 Dill.; 433; *Casey v. Galli*, 4 Otto, 676. See the case, §§ 75-81. *National Bank v. Case*, 9 Otto, 623. See the case, §§ 82-85.

§ 19. It is held that the order of the comptroller to the receiver to enforce the stockholder's liability is not in itself sufficient evidence that the bank is insolvent to the extent claimed. *Bowden v. Morris*,* 1 Hughes, 378. But a new trial was granted on its appearing that the attorney for the United States relied upon the case of *Kennedy v. Gibson*, 8 Wall., 408 (*supra*), and therefore omitted to introduce evidence which he had at hand. *Ibid*.

§ 20. Where, under the amendatory act of June 30, 1876, a court of equity has appointed a receiver of a national bank which had gone into voluntary liquidation, the comptroller has no authority to appoint a receiver to take charge of the assets of such bank. *Harvey v. Lord*, 10 Fed. R., 236. See the case, § 44. See § 33.

§ 21. *Compounding claims.*—The comptroller has no power to compound and settle claims of an insolvent national bank without the authority of the court. *Case v. Small*,* 10 Fed. R., 722.

§ 22. *Certificate.*—The banking act makes the certificate of the comptroller that the bank is lawfully entitled to commence the business of banking conclusive upon the stockholders. *Casey v. Galli*, 4 Otto, 676. See the case, §§ 75-81.

§ 23. *Injunction.*—Should the comptroller attempt to enforce an assessment, clearly and palpably contrary to the provisions of the act, a court of equity, if its aid were invoked, would promptly restrain him by injunction. *United States v. Knox*, 12 Otto, 422. See the case, §§ 90-93.

§ 24. *Distribution of currency.*—Though the comptroller of the currency is obliged to fill requisitions for currency from states and territories with reasonable expedition, yet of requisitions arriving at about the same time, he may fill those from states and territories having a relatively small proportion of their distributive share, before those of states and territories having a relatively larger share. *National Banks*,* 14 Opp. Att'y Gen., 417.

§ 25. Under the act of June 20, 1874, providing for the redistribution of \$55,000,000 of currency, the means by which the comptroller is to secure the same is by requisitions on the national banks of the states having an excess over their distributive share, and no other source of supply may be resorted to. *Ibid.*

§ 26. *Disposition of surplus of bonds; jurisdiction.*—Plaintiff loaned to a national bank \$60,000 of \$111,200 of bonds of the United States, to enable the bank to obtain notes for circulation. The bonds were duly deposited with the treasurer of the United States. The bank went into liquidation, and plaintiff filed a bill in the United States circuit court for New York against the comptroller of the currency, the treasurer and the receiver of the bank, to discover the amount of bonds yet in the treasury, the amount of notes of the bank outstanding, the amount of interest undisposed of, etc., and to enjoin the defendants from disposing of the bonds, after redeeming the circulation of the bank, against plaintiff's rights. *Held*, that the court had no jurisdiction. *Van Antwerp v. Hulburt*,* 7 Blatch., 426; S. C., 8 Blatch., 232. See § 31.

II. THE RECEIVER.

[See §§ 2, 4, 5, 20.]

SUMMARY—*Who may question his appointment.* § 27.—*How he may bring suits,* § 28.—*Is an officer of the United States,* § 29.—*How he may sue stockholders,* § 30.—*His relation to bonds securing circulation,* §§ 31, 32.—*Cannot be appointed after creditor's bill filed,* § 33.

§ 27. The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment, but the bank may do so. *Cadle v. Baker*, § 33.

§ 28. The receiver may sue the stockholders either in his own name or in the name of the bank for his use. *Stanton v. Wilkeson*, §§ 34-39.

§ 29. The receiver is an officer of the United States, and may sue as such in the federal courts. *Ibid.*

§ 30. In enforcing the stockholders' liability the receiver may sue them separately at law. He is not bound to resort to a court of equity. *Ibid.*

§ 31. The receiver has no control over the bonds of the bank deposited with the treasurer of the United States to secure its circulation. *Van Antwerp v. Hulburt*, §§ 40-43. See § 26.

§ 32. He is entitled to the surplus of such bonds after the circulating notes are redeemed. *Ibid.*

§ 33. Where a national bank has gone into voluntary liquidation, and a creditors' bill has been filed under the act of June 30, 1876, to enforce the liability of the stockholders, a suit commenced for the same purpose by a receiver appointed by the comptroller thereafter will not lie. *Harvey v. Lord*, § 44. See §§ 20, 45.

[NOTES.—See §§ 45-53.]

CADLE v. BAKER.

(20 Wallace, 650-652. 1874.)

ERROR to U. S. District Court, District of Alabama.

STATEMENT OF FACTS.—Cadle, as receiver, brought suit to recover upon a certain bill of exchange. The declaration simply averred his appointment. A demurrer was filed, upon the ground that the several steps preceding his appointment, as provided for in sections 46 and 47 of the act, were not specifically averred in the declaration.

§ 33. *Debtor cannot question appointment of receiver.*

Opinion by WAITE, C. J.

We think such averments as the defendant alleges to be necessary and the want of which he has assigned for cause of demurrer were not necessary. The debtors of a bank, when sued by a receiver, cannot inquire into the legality of

his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact. As to debtors, the action of the comptroller in making the appointment is conclusive until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot. Section 50 makes express provision for a contest by the bank. The court below erred in sustaining the demurrer, and for that reason the judgment is reversed and the cause remanded with instructions to overrule the demurrer to the declaration and proceed accordingly.

STANTON v. WILKESON.

(District Court for New York: 8 Benedict, 357-365. 1876.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The plaintiff is the receiver of a national bank which was organized under the act of February 25, 1863. 12 U. S. Stat. at Large, 665. The defendant, at the time the bank suspended, was the holder of one hundred shares of its capital stock, of the par value of \$10,000. This suit is brought to recover an assessment of sixty per cent., or \$6,000, thereon. The complaint is demurred to. The first ground of demurrer is that the plaintiff has no capacity to sue. It is contended that, as section 721 of the Revised Statutes provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," the Code of Procedure of New York forbids the bringing of this suit by the plaintiff. The sections of the code which are referred to are section 111, which provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113; and section 113, which provides that a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. The plaintiff was appointed receiver by the comptroller of the currency on the 19th of September, 1873, under the provisions of section 50 of the act of June 3, 1864. 13 U. S. Stat. at Large, 114. It is contended that the receiver is not the real party in interest, and is not a trustee of an express trust, and is not expressly authorized by the statute to sue.

§ 34. *Section 5234 of the banking act authorizes the receiver to sue the stockholder, either in his own name or in the name of the bank for his use.*

The fiftieth section of the act of 1864 (now section 5234 of the Revised Statutes) provides that the receiver shall take possession of all the assets of the bank and collect all debts, dues and claims belonging to it, and may sell all the property of the bank, and may, if necessary, to pay the debts of the bank, "enforce the individual liability of the stockholders." The receiver is required to "pay over all money so made to the treasurer of the United States," subject to the order of the comptroller, and to make report to the comptroller of all his acts and proceedings. It is quite plain, from these provisions, that the receiver, and he alone, is authorized to sue, either in his own name or in the name of the bank for his use, to collect the assets of the bank, and to enforce the individual liability of the stockholders. No such authority is given to the comptroller. No money can be made by any collection of assets or by any enforcement of the individual liability of stockholders, unless it is made by the receiver, and the statute contemplates that he shall make it, and does not con-

template that any one else shall make it. No one else is required to pay over to the treasurer any money so made, and no provision is made for the paying over to the receiver, by any other person, of any money so made. Hence it follows that the money which the receiver is to pay over, so far as it is made by collections by suit and enforcement by suit of the individual liability of stockholders, can come into the receiver's hands only through suits brought by himself in his own name or in the name of the association for his use. He is, therefore, authorized to sue in his own name. His right to sue to collect debts due to the bank, and his right to sue to enforce the individual liability of stockholders, rest upon the same provisions of law, and both of those rights have been sustained by abundant judicial authority. *Kennedy v. Gibson*, 8 Wall., 498 (§§ 6-12, *supra*); *Bank of Bethel v. Pahquioque Bank*, 14 id., 383, 401 (§§ 252-256, *infra*); *Bank v. Kennedy*, 17 id., 19.

§ 35. *When state laws applicable as rules of decision in trials at common law in federal courts.*

I do not intend to intimate that the law of the state applies to this case, in respect to the capacity of the plaintiff to sue, because section 721 of the Revised Statutes makes the state laws applicable as rules of decision, in trials at common law, in the federal courts, only where it is not otherwise provided by federal enactment. In the present case, the power of the plaintiff to sue is conferred by, and grows out of, the provisions of section 5234 of the Revised Statutes.

§ 36. *The receiver is an officer of the United States.*

It is also objected that this court has no jurisdiction of this suit. It is provided by section 563 of the Revised Statutes that the district courts shall have jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." This is a suit at common law, as distinguished from a suit in equity, and the receiver is, as we have seen, authorized by law to sue. The remaining question is whether the receiver is an officer of the United States. It has been held by the supreme court, in *United States v. Hartwell*, 6 Wall., 385, that a clerk appointed by an assistant treasurer of the United States, pursuant to a statute authorizing such appointment, with a prescribed salary, and whose tenure of place would not be affected by the vacation of office by the assistant treasurer, and whose duties, although such as his superior should prescribe, were continuing and permanent, is an officer within the meaning of the sub-treasury act, and subject to the penalties prescribed by it for the misconduct of officers. He was appointed by the assistant treasurer with the approbation of the secretary of the treasury, under a statute which authorized the appointment of clerks in such manner. The court say, in that case, that the clerk was a public officer; that an office is a public station or employment, conferred by the appointment of government; and that the term embraces the ideas of tenure, duration, employment and duties. A receiver of a national bank is in the public service of the United States. He is appointed pursuant to law. Vacation of office by the comptroller does not vacate the receivership. His duties are continuing and permanent. The secretary of the treasury is declared by section 233 of the Revised Statutes to be the head of the department of the treasury. By section 324 the comptroller of the currency is made the chief officer of a bureau in the department of the treasury, charged with the execution of all laws passed by congress relating to the issue and regulation of a national currency secured by United States bonds, and it is enacted that he shall perform his duties under the general direction of the secretary of the treasury. Re-

ceivers of national banks are authorized to be appointed by sections 5141, 5191, 5195, 5201, 5205 and 5234, under the circumstances prescribed in those several sections, which correspond to sections 15, 31, 32, 35 and 50 of the act of 1864, and section 1 of the act of March 3, 1873. 17 U. S. Stat. at Large, 603. In only one of these sections is it enacted that the appointment of the receiver shall be made by the comptroller with the concurrence of the secretary of the treasury. But this is implied; and, where the comptroller appoints a receiver, the concurrence or approval or approbation of the secretary of the treasury is to be presumed till the contrary appears, for the comptroller is required to perform his duties under the general direction of the secretary of the treasury. See *Cadle v. Baker*, 20 Wall., 650 (§ 33, *supra*). In *United States v. Hartwell*, it was held that the appointment of the assistant treasurer's clerk by that officer, with the approbation of the secretary of the treasury, constituted an appointment by the head of a department, within the meaning of the provision of the constitution (art. 2, sec. 2), that congress may by law vest the appointment of such inferior officers as they think proper in the heads of departments. This point has been decided in the same way by the district judge for the eastern district of New York, in *Platt v. Beach*, 2 Ben., 303, and I entirely concur in his views.

§ 37. *The receiver may sue the stockholders at law, and separately.*

It is further objected that the proper remedy of the plaintiff is not by separate suits at law against individual stockholders, but by a suit in equity. The view urged is that, if the sixty per cent. assessed in this case shall turn out, if it be all collected, to be more than is necessary, there is no provision of law for refunding it; and that, if there are insolvent stockholders who cannot pay the sixty per cent., another assessment may be sought to be made on stockholders who can pay, and thus they be compelled, perhaps, to pay more than their proper proportion of the debts. The individual liability sought to be enforced in this suit is that imposed by section 12 of the act of 1864, now section 5151 of the Revised Statutes, as well as that imposed by the act of 1863, under which the bank in question was organized. The liability imposed by section 12 of the act of 1863 was in these words: "For all debts contracted by such association for circulation, deposits or otherwise, each shareholder shall be liable to the amount, at their par value, of the shares held by him, in addition to the amount invested in such shares." The act of 1864 and the Revised Statutes enact that the shareholders "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." The provisions of the acts of 1863 and 1864 in this respect do not differ in substance. The stockholder is to be individually liable, to the extent of the amount of his stock, at its par value, in addition to amount of the stock. The limit in amount or extent is the par value of his stock. Within this limit each stockholder is to be liable equally and ratably; that is, no one is to be assessed a larger percentage than any other one on the par value of his stock, and, when one is assessed a given percentage, every other one shall be assessed a like percentage. Each is to be liable in respect only of his own stock, and because he is a stockholder, and up to the full par value of his stock; but he is not to be liable in respect of the stock of any other stockholder, or because any other person is a stockholder, or beyond the full par value of his stock. This is a several liability. The stockholders are not jointly liable. There is

no contribution among them provided for, whereby one of them has any right to call any other one directly to account, in contribution, in respect of any sum paid in discharge of the statutory liability. The proceedings are not taken by first ascertaining how much is necessary to be collected, and then apportioning that amount among the stockholders, and then collecting, by suit or otherwise, the sum so apportioned. The comptroller is to make an assessment, by determining how much each stockholder must be liable for, in the percentage on the par value of his stock. These views of the statute are those determined by the supreme court in *Kennedy v. Gibson*, 8 Wall., 498, which case is approved in *Sanger v. Upton*, 1 Otto, 56.

§ 38. *Pollard v. Bailey*, 20 Wall., 520, distinguished.

There is nothing in the case of *Pollard v. Bailey*, 20 Wall., 520, that is in conflict with these views. That was an action at law by a creditor against a stockholder in a state bank to recover the amount of the creditor's debt, under a statute which declared that individual stockholders in a bank should be "bound respectively for all the debts of the bank, in proportion to their stock holden therein." In delivering the opinion of the court in that case, Chief Justice Waite points out that, by the provisions of the statute in that case, each stockholder is bound for the debts in proportion to his stock; that his liability is not limited to the par value of his stock, and he is not bound absolutely for the payment of the full amount of that; that he must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more; that no stockholder is liable for more than his proportion of the debts; that such proportion can be ascertained only upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders; that the proper action in such case is one in equity, to state an account and make distribution; and that the case is different from one where the statute provides generally that all stockholders shall be individually liable for the payment of the debts. The latter is the liability prescribed by the statutes in relation to national banks, the liability being limited, however, to the par value of the stock. The court manifestly did not intend that the decision in *Pollard v. Bailey* should apply to the liability of stockholders in national banks.

The suggestion that, where there is an enforced contribution of too much from stockholders, there is no provision for refunding it, is not a sound one. In addition to the fact that, in such a case, the stockholders would have a right to enforce the refunding by suit, the provision of section 50 of the act of 1864, now section 5236 of the Revised Statutes, is not open to the criticism made upon it that it only directs that the surplus of the proceeds of the assets of the bank shall be paid to the stockholders, and does not provide for the payment back to them of surplus money collected in enforcement of their individual liability. If it were necessary, the money collected from stockholders might fairly be considered as the proceeds of assets of the bank for the purposes of the statute; but, at all events, as the statute provides that the money to be made by enforcing the liability of stockholders is to be paid to the treasurer, subject to the order of the comptroller, and that the comptroller is to make dividends of such money and other money, and that the remainder of the proceeds, after paying the debts, shall be paid to the shareholders, it is entirely clear that such proceeds include surplus money collected from stockholders. It is not necessary now to anticipate or decide any question in regard to a second assessment. No considerations growing out of the same properly affect any question aris-

ing on this demurrer. The cases of *Kennedy v. Gibson* and *Sanger v. Upton* decide that the comptroller is vested with authority to determine the extent to which the individual liability of stockholders is to be enforced. This decision was followed by the district court for the eastern district of New York in *Strong v. Southworth*, 8 Ben., 331.

§ 39. *The words "contracts, debts and engagements," in section 5151, are not restricted by the words "to pay the debts," in section 5234.*

The complaint alleges that the assets of the bank are insufficient to pay "its debts and liabilities," and that, in order to provide for paying the same, it is necessary to enforce the personal liability of the stockholders; and that the comptroller has determined that such assets are insufficient to pay such "debts and liabilities," and that it is necessary, in order to pay "the same," to enforce to the extent named in the complaint the individual liability of the stockholders. The criticism is made that the liability imposed by the statute is for all "contracts, debts and engagements" of the bank, and that the statute (section 5234) provides that such individual liability may be enforced only where it is "necessary to pay the debts" of the bank, and not for the purpose of paying "liabilities of the bank." It is a sufficient answer to this criticism to say that the complaint, after the foregoing averments, goes on to set out *in hæc verba* the determination or assessment made by the comptroller, and that in that it is stated that he determines that the assessment is necessary to pay the duly proven debts of the bank. Moreover there could have been no intention, by the language of section 5234, "to pay the debts," to narrow the individual liability imposed by section 5151, which is for all "contracts, debts and engagements," and the word "liabilities" imports no broader meaning than the word "debts" in section 5234, when the word "debts" in that section must necessarily be held to include the "contracts, debts and engagements" mentioned in section 5151.

The demurrer is overruled, with costs, with leave to the defendant to answer in twenty days, on payment of costs.

VAN ANTWERP v. HULBURD.

(Circuit Court for New York: 8 Blatchford, 282-295. 1871.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—The object of the present suit is to establish the title of the complainant to the United States bonds which were deposited with the treasurer of the United States by the National Unadilla Bank, under the act of congress entitled an act to provide a national currency, secured by a pledge of United States bonds, etc., approved June 3, 1864 (13 U. S. Stat. at Large, 99), and the acts amendatory thereof, for the purpose of securing circulating notes. The complainant alleges that the bank determined to go into liquidation and close its affairs as a national bank, and, upon considerations stated, assigned to him all the right, title and interest of the bank in or to such bonds, and that he agreed to redeem the circulating notes; that the comptroller of the currency and the treasurer of the United States refuse to recognize his rights, have sold some of the bonds, have given notice of the redemption of such circulating notes, and have redeemed a portion thereof; that, although the complainant has offered to deposit legal tender notes to the amount of such circulating notes, provided the bonds are returned to him, the officers mentioned refuse to deliver the bonds, or the proceeds thereof, to him; that, shortly after such as.

signment to the complainant, the comptroller of the currency, acting under the said act of congress, but without any legal ground therefor, the said bank not having done or omitted any act which warranted the same, assumed to appoint the defendant Kingsley receiver, and he accepted such appointment, and has taken possession of the assets and property of the bank; that the comptroller of the currency has wrongfully sold some of the bonds, and the proceeds have been paid into the treasury of the United States, and he, in defiance of the complainant's rights, threatens to dispose of the residue, and, as the complainant is informed and believes, intends to retain the proceeds, and, after the redemption of all the circulating notes, to pay any surplus thence arising to the general creditors of the National Unadilla Bank, or to the said Kingsley, as the pretended receiver thereof; and that, as the complainant is informed and believes, the said Kingsley claims, in his capacity of receiver, an interest adverse to the complainant in the bonds so deposited with the treasurer for the redemption of the said circulating notes, and afterwards assigned to the complainant. The bill, upon these facts and others, which it is unnecessary here to recite, bearing upon the administration of the defendants Hulburt and Spinner in respect to the bonds, calls upon the latter to account for their administration, and to disclose what they have done, and what they intend to do, and asks a decree establishing the complainant's title, and that, after the redemption of the said circulating notes, or adequate provision made therefor, the officers last named be decreed to deliver the surplus of the bonds, and interest accrued or accruing thereon, to the complainant; and that it be decreed that the pretended appointment of Kingsley is null and void, with a prayer, also, for an injunction. To the bill of complaint the defendant Kingsley demurs generally, for that the complainant is not entitled to the relief prayed by the bill against the defendant.

The complainant shows no interest in the National Unadilla Bank, or its property or assets, of any description, except such title and interest in the bonds which that bank deposited with the treasurer of the United States, to procure circulating notes, as he alleges he acquired by the assignment of those bonds to him by the bank. In so far as the receivership of the defendant Kingsley extends to any other property than those bonds, the complainant has no right to assail the appointment of such receiver as illegal or irregular. Whether the appointment is valid or void does not concern him. The sole object of the action is to assert the rights acquired by the assignment of those bonds to the complainant, and control the administration thereof. If, therefore, it appears, upon the bill of complaint, that this court has no jurisdiction of the officers of the government, in whose possession and control the bonds, or the proceeds thereof, now are, and cannot, as to them, grant the relief which the complainant seeks, there would seem no ground for sustaining the suit as against the demurrant, unless he has done, or is about to do, some act which prevents or hinders the prosecution of the complainant's title before the government officers, or which prevents a recognition of those rights by them.

§ 40. *Upon an assignment of bonds deposited with the comptroller of the currency and treasurer of the United States by a national bank this court has no jurisdiction of those officers at the suit of such assignee.*

Upon a consideration of the subject growing out of the argument upon the bill of complaint and the plea interposed by the comptroller of the currency and the treasurer of the United States, I have discussed the question at some length (*Van Antwerp v. Hulburt*, 7 Blatch., 426), and have come to the conclusion that this court, in this action, and upon the admitted facts, has no

jurisdiction as against those officers, to grant the relief sought, and that as to them the bill must be dismissed. (See § 26, *supra*.) So far as the views there expressed are material to the right of the complainant to maintain the action at all, it is sufficient to refer to the opinion. But, in my judgment, the making of the defendant Kingsley a party to the suit was erroneous, upon grounds independent of the question there considered.

§ 41. *The receiver of a national bank has no control over the bonds of the bank deposited to secure circulation, or their proceeds, and is not responsible for them.*

The defendant Kingsley has no custody, possession or control of the bonds in question, and, under no administration thereof, under the act of congress, can they, or any proceeds thereof, ever come to his possession, custody or control. He has no title nor interest in the bonds, or their proceeds, legal, equitable or official, nor has he any duty to perform in respect thereto. His authority and his duty are founded upon section 50 of the act, which, with sections 31 and 34, declares the case in which the comptroller of the currency may appoint a receiver. The character, powers and duties pertaining to such receivership are distinctly defined in section 50. He shall, under the direction of the comptroller, "take possession of the books, records and assets, of every description, of such association, collect all debts, dues and claims belonging to such association, and, upon the order of a court of record, of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of the currency of all his acts and proceedings." This is the beginning, scope and end of his duty and functions. It is the comptroller who is to advertise for claims against the bank, and divide the money (after redeeming the circulating notes), to and among the creditors of the bank. Whatever power to sue may be implied as necessary to the performance of the duties of the receiver, and even if such receivership be held to involve the vesting in him, *pro hac vice*, the legal title to the property and the debts, dues and claims which he is to collect or sell and convert into money, the receivership is limited by the object of its creation and the duties which it involves. For the full accomplishment of the object and the due discharge of those duties it may be conceded he has all necessary title, authority and power. But he cannot touch one of the bonds deposited with the treasurer or a dollar of the proceeds thereof. They are committed to a different and a higher administration. All that he collects he is to pay to the treasurer. The bonds and all proceeds thereof are already there. Practically, the receiver is the mere agent of the comptroller to bring the residue of the assets into the United States treasury. True, the language of the section is, that he shall take possession of the books, records and assets of every description of such association. But this was not intended to displace the custody of the bonds held by the treasurer, or the authority of the comptroller of the currency over such bonds. The administration of such bonds and the mode and manner of their appropriation to the purposes for which they are held are fully prescribed in other sections of the act, and these are to be had in view in the construction of the language last cited. The bonds, and the interest accrued thereon, and the proceeds thereof, are already, by the other express enactments, in the hands of the

treasurer, and it is absurd to say that the title thereto, or some interest therein, was vested in the receiver, for the purpose of paying them over to the treasurer. The bonds, if sold, are to be sold by the comptroller of the currency. The receiver has no office or duty to perform in respect thereto, and has no administration of the proceeds when the comptroller has made the sale and paid them over to the treasurer. In short, the receiver has no concern in the subject matter of this suit. He has no power to do anything, and it is not alleged that he has done, or has attempted to do, anything which impairs, in any manner, the alleged rights of the complainant, or hinders or prevents his obtaining the recognition of his rights, or any redress to which he is entitled, if those rights are not respected.

§ 42. *Rule of pleading in equity; averment upon information and belief that a party holds an adverse interest.*

But the complainant has inserted in his bill the statement that he is informed and believes that the demurrant claims, in his capacity as such receiver, an interest adverse to him in the bonds so deposited with the treasurer; and, inasmuch as a demurrer admits the facts stated, it is claimed that the fact and the admission thereof are a sufficient ground for making the receiver a party defendant and for requiring him to answer the bill. I am, of course, aware that it is the common practice in the state of New York, in actions for the foreclosure of mortgages and perhaps some others, to assign as a reason for making some defendants parties that they claim some interest, as mortgagees, judgment creditors, or otherwise, in the premises. But this is a part of a plan devised to save the expense of setting out their interest in detail, and is accompanied by provisions for giving them notice that no formal claim is made against them, and, on the one hand, relieving them from the necessity of answering when in fact no interest adverse to the complainant exists, and from liability for costs; and, on the other, saving the plaintiff from the effect of a disclaimer. This practice has no bearing upon the present question. It is not true, when the bill of complaint shows affirmatively on its face that the defendant has no interest in the matter, has neither a legal nor an equitable interest in the subject of the controversy, has no apparent documentary or other means of asserting a title or interest, not even color for a claim; when he has nothing which can be affected by the decision the court is required to make touching the rights of the complainant; or, in short, where, upon the facts stated, it is clear that he stands wholly indifferent and unaffected, that the complainant may make him a party and compel him to answer by merely stating that he is informed and believes that he claims an interest. This is not enough to set the power of a court of equity in motion. This does not show that a resort to a court of equity is necessary to protect the complainant against such claim or that he is in any danger by reason thereof. In the present case it not only is not shown that such claim is not an idle, harmless pretense, but the bill states a case in which the court is bound to say, as matter of law, it is utterly groundless, if not frivolous, and the complainant states no fact which warrants an appeal to a court of equity to protect him. It is not suggested in the bill that this alleged claim is used, or has been used, in any manner to the complainant's prejudice, or that it is in any way an obstacle to his obtaining possession of his bonds, or their proceeds, from the officers of the government. No facts are stated bringing this alleged claim within any analogy to suits to settle doubtful or conflicting claims, or to remove a cloud upon title, or to suits *quia timet*. A bill of interpleader resting upon such a naked allegation would not be entertained for

a moment. The case, in this respect, stands upon the assumption that a complainant may bring into his controversy with one who holds and claims to hold the subject matter in dispute, any defendant of whom he can say that he is informed and believes that such defendant claims an interest therein, and this, although as matter of law, in the case made, no such interest, legal or equitable, exists, and no fact is stated showing that such person is doing anything whatever in hostility to, or to the prejudice of, the complainant's right. When to this is added that, upon grounds more fully stated in reference to the other defendants who have pleaded to the bill, we have no jurisdiction to grant any relief to the complainant, against the only defendants who are shown to have any possession or control over the subject of the controversy, the conclusion is inevitable that the demurrer of this defendant must be sustained.

Opinion by HALL, J.

The bill in this case sets forth the organization of the National Unadilla Bank, under the general banking act of the United States; the subsequent deposit by the bank with the treasurer of the United States of \$111,200 in United States registered bonds, as security for circulating notes to be issued under the authority of that act; the receipt by the bank, from the comptroller of the currency, of \$100,000 in circulating notes; and that such bonds were held exclusively for the redemption of such circulating notes. It also states that afterwards, and on the 8th of June, 1867, the said bank, by a vote of its directors and shareholders owning at least two-thirds of its capital stock, determined to go into liquidation as a national bank, and notified the comptroller of the currency thereof; that all lawful proceedings were had and taken in due form to put all its affairs in liquidation; that on the last mentioned day the bank assigned to the complainant all its interest in the bonds so deposited; that the complainant agreed to redeem all such circulating notes, and has always been ready to do so; that the treasurer of the United States and the comptroller of the currency were immediately notified of such assignment and its conditions; that the complainant offered to deposit with the proper officer \$100,000 of the legal tender notes of the United States, to secure such circulating notes, on receiving the bonds so deposited, and such offer was refused; that afterwards, and in August, 1867, the defendant Hulburd, the comptroller of the currency, without any legal right or authority whatever (the non-existence of any fact or condition of things upon which such legal right or authority could be based being expressly alleged by the bill), assumed to appoint the defendant Kingsley as a receiver of the assets of said National Unadilla Bank; that the comptroller of the currency has wrongfully sold some of the said bonds, and has paid the proceeds into the treasury of the United States, and intends to sell the remaining bonds and retain all the proceeds thereof, and, after the redemption of the circulating notes of the bank, to pay any surplus thence arising to the general creditors of the bank, or to the defendant Kingsley, as the pretended receiver thereof; that Kingsley thereafter took possession of all the assets of the bank as such receiver; and that the complainant is informed and believes that the said Kingsley, in his capacity as such receiver, claims an interest in said bonds so deposited, adverse to the complainant. It is expressly averred that the National Unadilla Bank had ceased to exist as a national bank, and had not failed to redeem its notes, and had committed no act authorizing the comptroller of the currency to appoint a receiver, and that he and the treasurer had no official duty to perform in respect to such securi-

ties, except to hold them as security for the redemption of the circulating notes of such national bank, or dispose of them for the payment and redemption of such notes in the manner provided for in said general banking act, and that such securities had a market value of about eight per cent. over their par value. To this bill the defendant Kingsley demurred, and alleged that the bill shows that the plaintiff is not entitled to the relief prayed.

The bill contains sundry other allegations, but it is unnecessary to state its allegations more fully, as the ground upon which the validity of the demurrer was based is well set forth in the opinion of my learned brother (to whose conclusion in this respect I am unable to assent) in the statements that the defendant Kingsley has no custody, possession or control of the bonds in question, and that under no administration thereof, under the act of congress, can they, or any proceeds thereof, ever come to his possession, custody or control; and that he has no title or interest in the bonds, or their proceeds, legal, equitable or official, or any duty to perform in respect thereto. In one sense, and upon the allegations of the plaintiff's bill, it is certainly true that the defendant Kingsley has no interest in the bonds deposited by the bank; but its truth, in that sense, furnishes no ground for the demurrer. It is true, because upon the allegations of the bill the plaintiff's right to the bonds, or their proceeds, after the payment of the \$100,000 of the circulating notes of the bank, is perfect, and necessarily excludes all right of any representative of the bank; but it is not in that sense that the statements of my learned brother are intended to be understood. *It is quite certain, from other portions of his opinion, that he bases such statements upon the conclusion that the defendant Kingsley would have had no right to the possession, custody or control of such bonds, or any portion of their proceeds, after the full redemption of all the circulating notes of the bank, even if there had been no assignment of the interest of the bank in the bonds so deposited. It is true that there is some language in his opinion which might indicate that this was not the sole ground upon which the statements referred to are based; but such language must be considered in connection with the general law of pleading, and it is not likely that it was intended to be based upon the fact that the bill showed that the defendant Kingsley had no interest in the subject matter of the suit, inasmuch as it showed that the plaintiff's title to the residue of the bonds, or their proceeds, after the circulating notes of the bank were redeemed, was perfect and unquestionable as against the bank and its representative. On that ground, many, if not most bills, would be demurrable; for it is, ordinarily, the very object and purpose of a bill in equity to show that the defendant against whom relief is sought has no paramount or other right to the subject of the controversy, and that the plaintiff's right to relief is unquestionable. Surely this is no ground for a demurrer to a bill which shows an interest in the defendant if the plaintiff's claims are not sustained, and also shows, by direct and express averment, that such defendant claims a right adverse to that asserted by the plaintiff.

In this view of the case it is proper to consider the provisions of the general banking act under which such securities were deposited, and also the provisions of the same act under which the comptroller of the currency assumed to appoint the defendant Kingsley as such receiver. These bonds were deposited by the bank with the treasurer of the United States under the sixteenth, twenty-sixth, and other sections of the general banking act of June 3, 1864 (13 U. S. Stat. at Large, 99); and under the twenty-sixth section they were to be held *exclusively* for the purpose of securing the circulating notes of the

bank. By the sixteenth section the bank is authorized to return its circulating notes to the comptroller and take up the securities deposited therefor, in the proportions and to the extent described; and, by the twenty-sixth section, the bank is entitled to a power of attorney to receive and appropriate to its own use the interest on these securities, until it shall have failed to redeem its circulating notes. These and other provisions of the act show conclusively that the bank, before its assignment to the plaintiff, had the equitable, if not the legal, interest in these securities, subject only to the power and right of the proper officers of the government to dispose of them, or so much of them as might be necessary, in the manner prescribed by the act, for the redemption of the circulating notes of the bank; and this residuary interest the bank might, in the ordinary course of its business, before the appointment of any receiver, assign for a proper consideration. This residuary interest, if not assigned by the bank before the appointment of a receiver, is necessarily a part of the assets of the bank; and the fiftieth section of the act, under the provisions of which the defendant Kingsley acts as receiver, after authorizing the appointment of a receiver under certain circumstances, provides that he "shall take possession of the books, records and *assets of every description* of such association" (bank), "collect all debts, dues and claims belonging to such association," etc. The same section also provides that the receiver shall pay the moneys made or realized by him *out of the assets of the bank* "to the treasurer of the United States, subject to the order of the comptroller of the currency," and that the comptroller (after paying preferred claims, etc.) "shall make a ratable dividend *of the money so paid over to him by such receiver* on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." There is nowhere in the act any other provision for the division or disposition of the moneys arising out of the residuary interest of the bank in bonds pledged as security for its circulating notes, and it is only of the moneys *paid over by the receiver* under this fiftieth section that the comptroller is authorized to make a dividend. There is no provision in the act authorizing the comptroller or treasurer to dispose of the residue or surplus proceeds of such bonds in payment of the debts of the bank, or otherwise, and, therefore, until the moneys arising therefrom are legally transferred from the treasurer to the receiver, they are in the possession of the treasurer, as the officer of the United States, as the holder of a pledge for the bank; and the comptroller has no power to make any distribution thereof in payment of the general debts of the bank until they have passed into the hands of the receiver, and have been by him paid over to the treasurer subject to the order of the comptroller of the currency. The residuary interest of the bank in the securities thus pledged is a part of the assets of the bank the same as though such securities had been pledged to a private person as collateral security for the payment of an ordinary commercial debt; and a properly appointed receiver, as the representative of the bank, has the right to demand and receive the property so pledged, as an asset of the bank, in the one case the same as in the other.

§ 43. *The receiver of a national bank is entitled to the surplus of the bonds of the bank after paying the circulation.*

It seems very clear, then, that, upon the case made by the bill, the right to this residuary interest is in the plaintiff, and that, if the plaintiff's right under the assignment set forth is not established, no one but the defendant Kingsley, as such receiver (if he has been legally appointed and become vested with the right of the bank), has a right to the same. There is, therefore, a question of

property between these parties, upon the claim made by the defendant as expressly charged in the bill, and the demurrer, consequently, admits that the defendant, as such receiver, claims an interest in such securities adverse to the plaintiff. These adverse claims to this residuary interest may, therefore, be properly litigated in this suit between the plaintiff and Kingsley as the only party who appears to claim a legal pecuniary interest adverse to the plaintiff's alleged right and as the only party who can now have a legal standing in court to represent that interest and litigate the claims of the plaintiff, if the receiver was properly appointed. It does not appear that any one but the defendant Kingsley asserts any claim to such residuary interest in the subject in controversy as against the plaintiff, and he claims as such receiver, and as the representative or legal assignee or successor of the bank, for the purpose of paying the same to the general creditors of the bank; and as a decree in this case would determine the question of right as between these two parties, the demurrer should, in my judgment, be overruled, in case this court has jurisdiction of this suit as between the plaintiff and the defendant Kingsley.

I do not remember that this question of jurisdiction was raised upon the hearing, and my minutes of the argument do not show that it was discussed by the counsel, or that any act of congress conferring jurisdiction in such a case as this, when the plaintiff and defendant are alleged to be citizens and residents of the same state, was cited. And I am not aware that any such act is in force. For that reason, I concur in the conclusion that the demurrer must be allowed.

HARVEY v. LORD.

(Circuit Court for Illinois: 10 Federal Reporter, 236-239. 1832.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—This is a suit at law brought by Harvey, as receiver of the Manufacturers' National Bank of Chicago, against Thomas Lord, to enforce his liability as a stockholder of the bank. To this suit the defendant has pleaded in abatement that on the 3d day of February, 1875, one James Irons, who was then a judgment creditor of the Manufacturers' National Bank, filed in this court a creditor's bill to enforce payment of his judgment; that such proceedings were taken in the case that Joel D. Harvey was appointed receiver of all the property and effects of the bank, and entered upon the discharge of the duties of his office and took possession of the property of the bank; that afterwards, on the 5th of October, 1876, an amended bill was filed in said cause, to which all the stockholders of the bank were made parties, by which the complainant sought, in behalf of himself and all other creditors, to enforce the liability of the stockholders of the bank for the purpose of discharging the indebtedness of the bank; that the defendant in this suit, as one of the stockholders of the bank, was made a party to the Irons suit; that said suit in chancery is still pending, and this suit at law is brought for the same cause, and to enforce the same liability, which the creditor's bill by Irons seeks to enforce as against this defendant; and therefore he prays an abatement of this suit.

At the time the original bill was filed by Irons there was no express provision in the national banking law for the enforcement of a stockholder's liability by the machinery of a creditor's bill, and the supreme court, in *Kennedy v. Gibson*, 8 Wall., 498 (§§ 6-12, *supra*), had decided that the stockholder's liability could only be enforced through a receiver appointed by the comptroller of the currency. But on June 30, 1876, congress passed an act amendatory of

the national banking law which provided by the second section as follows: "When any national banking association shall have gone into liquidation under the provisions of section 5220 of said statute, the individual liability of the shareholder provided for by section 5151 of the said statute may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof in any court of the United States having original jurisdiction in equity for the district in which said association may be located or established."

The amended and supplemental bill was filed by Irons after the passage of this amendment, and was intended to bring all the stockholders of the Manufacturers' National Bank before the court, and to enforce their liability through the agency of the receiver appointed by the court in that case. This defendant is a party to and has answered in that suit. About a year ago, and long after the amended and supplemental bill of Irons was filed, the comptroller of the currency appointed a receiver to wind up the affairs of this bank, and named the same person whom this court had appointed in the Irons suit, and under that appointment, acting under the advice of counsel, he has brought suits at law against the stockholders. The only question is whether the suit which had been brought by Irons, and which had been amended to adapt it to the provisions of the act of June 30, 1876, can be pleaded in abatement to this suit at law which has been instituted by the receiver under the authority or sanction of the comptroller. After the filing of the original Irons bill the powers of the court under such a bill were materially enlarged by the act of congress just quoted. That bill was pending when this law took effect, and Irons undoubtedly had the right by amendment to make a case which would enable the court to administer these enlarged powers with which it had been clothed *pendente lite*. Story, Eq. Pl., 336; *Mix v. Beach*, 46 Ill., 311.

§ 44. *When the comptroller is estopped to appoint a receiver of an insolvent national bank.*

It seems to me that there is no room to doubt that this stockholder's liability can be completely enforced in the Irons case; and if it can, then I see no reason why the general rule that a debtor shall not be vexed by two suits in the same jurisdiction for the same cause of action is not clearly applicable. I may also say in the same connection that I have great doubts whether the comptroller had any authority to appoint a receiver for a bank which was in voluntary liquidation, after the court had appointed a receiver and taken steps under a creditor's bill to enforce the stockholders' liability. The statute gives the comptroller authority to appoint a receiver in certain cases, and then in another section of the same statute provides expressly, where a bank has gone into voluntary liquidation and is in process of winding up its affairs, any creditor may enforce the liability of the stockholder by a creditor's bill; and if the comptroller had not acted and appointed a receiver for the purpose of enforcing the stockholders' liability, I have no doubt but what the action of the court supersedes the right of the comptroller to act in the premises, and gives the authority solely to the court to enforce the individual liability of the stockholders. It cannot, I think, be maintained that congress intended by the act of June 30, 1876, to leave the comptroller any authority over the assets of a national bank which has gone into voluntary liquidation under section 5220, after a court of competent jurisdiction had, under a creditor's bill, appointed a receiver and taken possession of the assets, and initiated proceedings to enforce

the liability of stockholders, because that would bring about a conflict between the officers of the court and those of the comptroller. The grant of power to enforce the liability of the stockholders is plenary and ample, and I see no need for any function of the comptroller when the affairs of the bank are once properly in the hands of the court.

The demurrer to the plea in abatement is overruled, and judgment rendered on the demurrer.

§ 45. **Appointment.**—The receiver is appointed by the comptroller, and the power of appointment carries with it the power of removal. *Kennedy v. Gibson*, 8 Wall., 498. See the case, §§ 6-12.

§ 46. A court of equity may appoint a receiver of an insolvent national bank in all cases except where the act has authorized the comptroller to appoint one. As for example, where the bank is paying some of its creditors to the exclusion of others. *Irons v. Manufacturers' Nat. Bank*, 6 Biss., 801. See the case, §§ 13-17.

§ 47. **Receiver may sue, where.**—District and circuit courts of the United States have jurisdiction of suits at common law where the United States or any officer thereof brings the action. A receiver of a national bank is an officer of the United States and as such is entitled to sue in the federal courts. *Platt v. Beach*, * 2 Ben., 303.

§ 48. **Dissolution of bank.**—The bank is not dissolved by the appointment of a receiver. For many purposes it continues to exist. *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 383. See the case, §§ 252-256.

§ 49. **Compromise, power to order.**—A district court of the United States is a court of competent jurisdiction to order the receiver of a national bank to compromise a doubtful claim. *In re Platt*, 1 Ben., 534.

§ 50. **Receiver cannot transfer suits to the federal courts.**—The receiver, as such, has not the privilege of the bank he represents as to transferring suits by or against him from the state to the federal courts. *Bird v. Cockrem*, 2 Woods, 32.

§ 51. **Title to assets.**—The title of the receiver to the assets of the bank is the same as that of an assignee in bankruptcy. He cannot avoid a pledge which the bank could not avoid. *Casey v. La Societé*, 2 Woods, 77. See the case, §§ 294-301.

§ 52. **How the receiver may sue.**—The receiver may sue in his own name, or in the name of the bank, without special authority from the comptroller, to recover an ordinary debt: but it seems that such authority is necessary in an action by him against the stockholders. *Bank v. Kennedy*, 17 Wall., 21.

§ 53. **Judgment against receiver is not judgment against United States.**—It seems that the receiver of a suspended national bank in no sense represents the United States, so that in a proceeding against him a judgment could be rendered against the United States without its appearance. *Case v. Terrell*, 11 Wall., 202. See RECEIVERS.

III. STOCK AND STOCKHOLDERS.

SUMMARY — *Bank has no lien on its stock*, § 54. — *Decision of comptroller conclusive on stockholders*, §§ 55, 58. — *Stockholder cannot deny existence of bank*, § 56. — *Party holding stock is liable*, § 57. — *Refusal of cashier to transfer stock*, § 59. — *Individual liability of stockholders*, § 60. — *Transfer of stock*, §§ 61, 65-70. — *Colorable transfer*, § 62. — *Set-off against bank*, § 63. — *Bank cannot purchase its stock*, § 64.

§ 54. The powers of the bank are to be measured by the act. A by-law giving the bank a lien upon the stock of its debtor stockholder is invalid. *Bullard v. Bank*, §§ 71-74.

§ 55. The amount to be paid by the stockholders upon their individual liability rests in the judgment and discretion of the comptroller, and when sued thereupon they cannot controvert his determination in that regard. *Casey v. Galli*, §§ 75-81.

§ 56. When suit is brought to enforce such liability, the stockholder cannot deny the existence or legal validity of the bank. *Ibid.*

§ 57. One who appears upon the books of the bank as the owner of stock is liable as a stockholder for the benefit of creditors. This is the rule, although the stock is really held as collateral security only. A transfer for the mere purpose of evading this liability is fraudulent and void. *National Bank v. Case*, §§ 82-85.

§ 58. The orders of the comptroller to the receiver as to the liability of the stockholders are conclusive upon the latter. *Ibid.*

§ 59. Where suit was brought against the bank in the hands of a receiver for damages arising from the refusal of the cashier to transfer stock upon the books of the bank, it was held that the refusal of the cashier was the refusal of the bank, and a judgment that the receiver pay the amount recovered, or certify it to the comptroller, was correct. *Case v. Bank*, §§ 88-89.

§ 60. Construction of the acts of 1863 and 1864 relative to the liability of stockholders in cases of insolvency. They are not guarantors "one for another." The manner in which the separate liability of each stockholder is fixed. *United States v. Knox*, §§ 90-93.

§ 61. The banking act as to the transfer of shares of stock discussed. The title to shares of stock passes when the seller delivers the certificate to the buyer with authority to have it transferred on the books of the bank. The validity of the sale must be determined by the relations the parties openly bear to each other at the time the contract is made. *Johnson v. Laffin*, §§ 94-98.

§ 62. A stockholder who, to escape liability, transfers his stock to an irresponsible person, still remains subject to assessment. *Davis v. Stevens*, § 99.

§ 63. A stockholder of an insolvent bank cannot set off against an assessment made against him as a stockholder, any claims he may have as a creditor of the bank. *Hobart v. Gould*, § 100.

§ 64. National banks cannot purchase their own stock. *Johnson v. Laffin*, §§ 101-114.

§ 65. The shareholder may make a *bona fide* sale of his stock to any one capable of taking the same. The mode of transfer is governed by the by-laws of the bank. The purchaser may compel the bank to make the transfer on its books. Except for good cause the bank cannot refuse to make the transfer. *Ibid.*

§ 66. As between the parties the transfer is complete without action on the part of the bank. *Ibid.*

§ 67. Either seller or buyer may demand the transfer by the bank. *Ibid.*

§ 68. Neither buyer nor seller, without notice, is liable for acts *ultra vires*. *Ibid.*

§ 69. The liability of the seller ends when he has completed the assignment of the stock. *Ibid.*

§ 70. This unrestricted right of transfer is limited to solvent banks, and cannot be used for fraudulent purposes. *Ibid.*

[NOTES.— See §§ 115-138.]

BULLARD v. BANK.

(18 Wallace, 539-598. 1873.)

CERTIFICATE OF DIVISION from the Circuit Court for Massachusetts.

STATEMENT OF FACTS.— The National Eagle Bank was duly organized in Boston in 1865. Clapp became a stockholder in 1871 by purchasing one hundred and fifty shares, and in a short time contracted debts to the bank to a considerable amount. On the 19th January, 1872, he was decreed a bankrupt, and Bullard, his assignee, claimed the bank stock as part of the assets to which he was entitled, and demanded a transfer from the bank. It was refused on the ground that the bank held a lien upon Clapp's stock to secure the debt which he owed the bank. Suit was brought by Bullard, and the court was divided in opinion on three questions, to wit: (1) Whether a national bank can acquire a lien on the shares of its stockholders by its articles or by-laws. (2) Whether, if so, a lien attached to the shares before there was an existing debt due and unpaid? (3) Whether the National Eagle Bank could hold Clapp's stock by way of security for his notes?

§ 71. *The powers of national banks.*

Opinion by MR. JUSTICE STRONG.

The extent of the powers of national banking associations is to be measured by the act of congress under which such associations are organized. The fifth section of that act enacts that the articles of association "shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the associa-

tion and the conduct of its affairs." And the eighth section of the same act empowers the board of directors "to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred." There are other powers conferred by the act, but unless these confer authority to make and enforce a by-law giving a lien on the stock of debtors to a banking association, very plainly it has not been given.

§ 72. *Under the act of 1863, section 36, a national bank had a lien to secure debts due to it on the stock of any debtor shareholder.*

What, then, were the intentions of congress respecting the powers and rights of banking associations? The act of 1864 was enacted as a substitute for a prior act, enacted February 25, 1863, and in many particulars the provisions of the two acts are the same. But the earlier statute, in its thirty-sixth section, declared that no shareholder in any association under the act should have power to transfer or sell any share held in his own right so long as he should be liable, either as principal debtor, surety, or otherwise, to the association for any debt which had become due and remained unpaid.

§ 73. *By the act of 1864 section 36 of the act of 1863 was expressly repealed.*

This section was left out of the substituted act of 1864, and it was expressly repealed. Its repeal was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors. Such was the opinion of this court in *Bank v. Lanier*, 11 Wall., 369 (§§ 164-169, *infra*). In that case it appeared that a bank had been organized under the act of 1863, and that it had adopted a by-law, which had not been repealed, that the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of congress, among which provisions and restrictions was the one contained in the thirty-sixth section, that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt due and unpaid. And when the bank was sued for refusing to permit a transfer of stock, it set up, in defense, that the stockholder was indebted to it, and that under the by-law he had no right to make the transfer. But this court said, "congress evidently intended, by leaving out of the act of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell so did that part of the by-law relating to the subject fall with them." But this could have been only because the restriction was regarded as inconsistent with the policy and spirit of the act of 1864. It cannot truly be said that the by-law was founded upon the thirty-sixth section, though it doubtless referred to that section. It was not in that the power to make by-laws was given. The eleventh section was the one which authorized associations to make by-laws, not inconsistent with the provisions of the act, for the management of their property, the regulation of their affairs, and for the transfer of their stock; and that was substantially re-enacted in the act of 1864. Moreover, the sixty-second section of the latter act, while repealing the act of 1863, enacted that the repeal should not affect any appointments made, acts done or proceedings had, or the organization, acts or proceedings of any association organized or in the process of organization under the act aforesaid, and gave to such associations all the rights and privileges granted by the act, and subjected them to all the duties, liabilities and restrictions imposed by it. It is, therefore, manifest that it was not the repeal of the thirty-sixth section

which caused the by-law to fall. It fell because it was considered a regulation inconsistent with the new currency act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors. It is impossible, therefore, to see why the decision in the case of *The Bank v. Lanier* does not require that the certified question should be answered in the negative.

§ 74. *The by-laws of a national bank cannot create a lien for its debts against its shareholders upon their stock in the institution.*

An attempt was made in the argument to distinguish that case from the present by the fact that the articles of association of the Eagle Bank contain the provision to which we have referred, namely, that the directors should have the power to make by-laws which may prohibit the transfer of stock owned by any stockholder who may be a debtor to the association, without the consent of the board, a provision which, it is said, the associates were justified in making by the fifth section of the act of 1864. The argument is that, though the act of congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does, by the words of its fifth section, authorize the creation of such a lien by the articles of association and by by-laws made under them. This leads to the inquiry whether the fifth section does authorize any provision in the articles of association that by-laws may be made prohibiting the transfer of stock of debtors to a bank, for if it does not the foundation of the argument is gone. Certainly there is no express grant of authority to make such a prohibition contained in that section. There is no specification of such a power. And if such a grant could be implied from the words used by congress, the implication would be in direct opposition to the policy indicated by the repeal of the thirty-sixth section of the act of 1863, and the failure to re-enact it, as well as by the provisions of the thirty-fifth section, which prohibit loans and discounts by any bank on the security of the shares of its own capital stock, and prohibit, also, every bank from purchasing or holding any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Surely an implication is inadmissible which contradicts either the letter or the spirit of the act. Surely when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien from anything contained in the fifth section. But were there no such policy manifest in the act, the words of the fifth section would not bear the meaning attributed to them. The articles of association required by that section to be entered into must specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of the act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. To us it seems that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as a regulation of the business of the bank or a regulation for the conduct of its affairs. That congress did not understand the section as extending to the subject of stock transfers is very evident, in view of the fact that in another part of the statute express provision was made for such transfers. The eighth section empowers the board of directors of every banking association to define and regulate by by-laws, not inconsistent with the provisions of the act, the manner in which its stock shall be transferred. This would be superfluous if the power had been previously given in the fifth section. That congress considered it necessary to make such an enactment is convincing evidence that they thought it had not elsewhere been

made. Whatever power, therefore, the directors of a bank possess to regulate transfers of its stock, they derive, not from the fifth section of the act, and not from the articles of association, but from the eighth and twelfth sections by express and direct grant. It cannot, therefore, be maintained that the present case is not governed by the decision made in *Bank v. Lanier*, because the articles of association for the Eagle Bank authorized the directors to make a by-law restricting the transfer of stock. In that case there was a by-law prohibiting the transfer as in this. Independent of the thirty-sixth section of the act of 1863, there was as much authority to make and enforce such a by-law as is given by the act of 1864. The eleventh and twelfth sections of the act of 1863 enacted that associations formed under it might make by-laws, not inconsistent with the laws of the United States or the provisions of the act, for the transfer of their stock, and that the stock should be transferable on the books of the association "in such manner as might be prescribed in the by-laws or articles of association." These powers given to the associates under that act are quite as large as those given by the act of 1864. Yet this court held that after the passage of the latter act a by-law giving a lien upon a debtor's stock was inconsistent with its provisions and invalid. Of course if the act destroyed an existing by-law, it must prevent the adoption of a new one to the same effect.

We hold, therefore, on the authority of *Bank v. Lanier*, that the first question certified must be answered in the negative, and consequently the same answer must be given to the other two questions.

Answered in the negative.

Dissenting opinion by MR. JUSTICE CLIFFORD.

I dissent from the judgment and opinion of the court in this case for the reasons assigned in the opinion delivered by me in the case of *Knight et al. v. Bank*, decided in the circuit court, Rhode Island district, June term, 1871 (3 Cliff., 429. See § 131, *infra*), which I still believe to be correct, and consequently refer to that case as a full expression of the reasons of my dissent in the present case.

CASEY v. GALLI.

(4 Otto, 673-681. 1876.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The declaration avers as follows: On and before the 3d day of June, 1864, the Bank of New Orleans was a banking corporation organized under the laws of the state of Louisiana, and as such carried on the business of banking until about the 1st day of July, 1871, when the bank, by due proceedings under the act of congress, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, became a national banking association under said act of congress, and as such took the name and style of the "New Orleans National Banking Association," and carried on the business of banking until the 4th day of October, 1873, when it failed and suspended payment.

Thereupon the comptroller of the currency, after due proceedings had, appointed a receiver for the association, and it was put in liquidation under the act of congress before mentioned and the acts amending it, and the plaintiff is such receiver, being lawfully appointed under the said act. By the conversion of the Bank of New Orleans into such banking association, every holder of the

shares of the capital stock of said Bank of New Orleans became a shareholder of the capital stock of said New Orleans Banking Association to the amount of his shares, and as such subject to the liabilities imposed by said act of congress on such shareholders. There is owing by the association to its creditors large sums of money. Its assets are insufficient to pay its debts. It has become necessary, in order to pay the debts, to enforce the liability of the shareholders. The comptroller has decided that this shall be done. On the 7th day of June, 1875, by his order in writing, he required the plaintiff, as such receiver, to enforce such liability against each stockholder to the amount of the par value of his stock held at the time of the failure of the association. The capital stock of the association was \$600,000, divided into twenty thousand shares of the par value of \$30 each.

The defendant is an alien, a subject of the kingdom of Italy, and vice-consul, etc. At the date of the failure of the association he was the owner of fifty shares of the capital stock of the par value of \$30 for each share. By reason thereof he is liable to pay the sum of \$1,500. He has been specially requested to pay that sum, and has refused to do so. The plaintiff is, therefore, entitled by force of the statute to recover the said sum of \$1,500, with interest at the rate of five per cent. per annum.

It was agreed by the parties that demurrers, pleas, replications and other pleadings might be filed without reference to the order in which they were properly pleadable. The defendant demurred to the declaration, and assigned the following causes: 1. That the defendant is bound to contribute ratably, and that the proper amount can be ascertained only in equity. 2. That the defendant is bound to contribute ratably to pay a large sum; that this sum is not stated in the declaration, and hence what would be ratable and proper does not appear. 3. That the obligation of the defendant is to pay into the hands of the comptroller of the currency a ratable portion of the debts of the association proved before him, and that the declaration does not show that any debts had been so proved. 4. That the declaration demands a larger sum than the defendant is required by the statute to pay, and also an additional sum by way of interest.

§ 75. *The order of the comptroller of the currency as to the extent of the liability of stockholders is conclusive.*

In regard to the first three of these objections, it is sufficient to say that *Kennedy v. Gibson*, 8 Wall., 498 (§§ 6-12, *supra*), is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the comptroller; that his determination cannot be controverted by the stockholders in suits against them; and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation.

§ 76. *Pleas in abatement.*

The defendant filed three pleas in abatement: 1. *Nul tiel corporation.* 2. That there was not then, nor when the plaintiff was appointed such supposed receiver of said New Orleans Banking Association, nor before nor since that time, any such corporation in existence, because the Bank of New Orleans

had no power by its charter, nor authority otherwise from the state of Louisiana, to change its organization to that of a national banking association under the laws of the United States; wherefore it was prayed that the declaration be quashed. 3. That there was not then, nor when the plaintiff was appointed such supposed receiver of the New Orleans Banking Association, nor before nor since that time, any such corporation in existence, because the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a national banking association under the laws of the United States, nor to accept an organization certificate as such banking association; wherefore it was prayed that the declaration be quashed. The plaintiff filed a joint demurrer to all these pleas. At the argument the first plea was abandoned. The other two remain to be considered. The pleas were properly framed in abatement, and not in bar. *Jones v. Bank of Tennessee*, 8 B. Mon. (Ky.), 122; *Woodson v. Bank of Gallipolis*, 4 id., 203.

§ 77. *Authority from state not necessary to enable a state bank to become a national bank.*

The second plea is clearly bad. No authority from the state was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the banking act of congress. 13 Stat., 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the state. It was as competent for congress to authorize the transmutation as to create such institutions originally.

§ 78. *Comptroller's certificate conclusive as to completeness of organization of bank.*

The third plea is also bad. The eighteenth section of the act requires the comptroller to make a careful examination in all cases of original applications, and, if he found the association was "lawfully entitled to commence the business of banking," he was to give a certificate to that effect; and it is declared that the association "shall transact no business except such as is incidental to its organization, and necessarily preliminary, until authorized by the comptroller of the currency to commence the business of banking." 13 Stat., 101. A like examination and certificate are required by the forty-fourth section, where an existing bank organizes under the act. That section provides "that when the comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges and shall be subject to the same duties, responsibilities and rules, in all respects, as are provided in this act for associations organized under it." 13 Stat., 113.

§ 79. *Rule of pleading; comptroller's certificate conclusive.*

The declaration avers that the association became such by due and regular proceedings under the act. The plea denies the regularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the bank did not authorize the directors of said bank to convert it into a national banking association, nor to accept an organization certificate as such banking association. According to the law of pleading, what is not denied is conceded. The giving of the comptroller's certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate, and contradict it. This cannot be done. The comptroller was clothed with jurisdiction to decide as to the

completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation. It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association. No question can be raised in this collateral way as to either. In *Thacher v. West River National Bank*, 19 Mich., 196, it was held that whether there was any defect in the process of organization was a question for the comptroller to decide, and that "his certificate of compliance with the act of congress removes any objection which might otherwise have been made to the evidence upon which he acted." In this we concur.

§ 80. *Stockholder is estopped to deny the existence or legal validity of the corporation.*

There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it. *Eaton v. Aspinwall*, 19 N. Y., 119; *S. C.*, 6 Duer (N. Y.), 176; *Cooper v. Shaver*, 41 Barb. (N. Y.), 151; *Camp v. Byrne*, 41 Mo., 525; *Danbury & N. Railroad Co. v. Wilson*, 22 Conn., 435; *Ellis v. Schmoeck & Thomas*, 5 Bing., 521; *McFarlan v. Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Rector & Co. v. Lovett*, 1 Hall (N. Y.), 191; *Topping v. Beckford*, 4 Allen (Mass.), 121; *Dooley v. Wolcott*, id., 407; *Eppes v. Railroad Company*, 35 Ala., 33; *Hamtramack v. Bank of Edwardsville*, 2 Mo., 169; *Jones v. Cincinnati Type Foundry*, 14 Ind., 89; *Worcester Med. Ins. v. Harding*, 11 Cush. (Mass.), 285; *Hughes v. Bank of Somerset*, 5 Litt. (Ky.), 47; *Tar River Nav. Co. v. Neal*, 3 Hawks (N. C.), 520.
Demurrer sustained.

FURTHER HEARING ON ADDITIONAL PLEAS.

Opinion by MR. JUSTICE SWAYNE.

Since the opinion of the court was delivered in this case, the defendant obtained leave to plead further, and has filed three pleas. They are: *First. Nil debet*, upon which the plaintiff has taken issue. *Second.* That the comptroller of the currency has "determined and decided to exact from the defendant, and from a number of stockholders of said National Banking Association less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said National Banking Association, with the intent and purpose to compel this defendant and others of said shareholders who may be solvent to contribute the entire sum necessary to pay the debts and liabilities of the said National Banking Association, without any contribution from those who are insolvent."

§ 81. *Order of comptroller on stockholder to pay to receiver, conclusive.*

It is a sufficient objection to this plea that the comptroller has ordered that each stockholder shall pay to the receiver the par of his stock. This order cannot be controverted in a suit against the stockholder. It is conclusive upon

him, and makes it his duty to pay. *Kennedy v. Gibson*, 8 Wall., 498 (§§ 6-12, *supra*). What may be done or intended with respect to other stockholders is immaterial in his case.

The plea is, also, manifestly bad for vagueness and uncertainty.

Third. That the comptroller has decided to pay a large amount of claims against the bank for which the bank is not responsible, and that, aside from these claims, there are means enough already in his hands to meet the liabilities of the bank. The same objection lies to this plea as to the preceding one, and the same authority applies. If the receiver intends to violate, or shall violate, his duty in discharging the trust confided to him, the remedy must be sought in another proceeding. It cannot avail the defendant in this action. Both demurrers are sustained.

The parties have filed a written stipulation submitting the issues raised upon the first plea to the court and waiving the intervention of a jury. With respect to this issue we find the proofs in the record amply sufficient to sustain the plaintiff's case. Judgment must, therefore, be rendered against the defendant for the par of his stock, with interest, as claimed in the declaration, and costs; and it is so ordered.

NATIONAL BANK v. CASE.

(9 Otto, 628-635. 1878.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed, and the bank lost heavily by the failure,—nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest.

In reference to the alleged ownership by the Germania Bank (one of the appellants) of shares in the Crescent City Bank, the facts appear to be as follows: On the 14th day of December, 1872, it loaned to Phelps, McCullough & Co. \$14,000 on a note of the firm dated December 7, 1872, payable in ninety days, and to secure the payment of the loan the borrowers pledged to the bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the note, to dispose of the stock for cash, at public or private sale, without recourse to legal proceedings, and to this end to make transfers on the books of the corporation whose stock it was. At the same time a power of attorney was given to Mr. Roehl, empowering him to transfer the stock to the Germania Bank, of which he was cashier. The note fell due on the 10th of March, 1873, and was not paid, and on that day a transfer of the one hundred shares to the Germania Bank was made on the transfer books of the Crescent City Bank. The Germania then caused seventy-six of the shares to be transferred to William A. Waldo, one of its clerks, and on the next day transferred to him the remainder. It has ever since stood in his name. Waldo acquired by the transfer no beneficial interest in the stock, and there was an understanding between him and the officers of the bank that he should retransfer it at their request. The cashier has testified in answer to the ques-

tion, "Was not the transfer made (to Waldo) with a view to avoid the liability under the national bank act in case of suspension of the Crescent City Bank?" that it was not exactly in that way. "We simply transferred," says he, "because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name. That was the object." When further asked whether he was well aware of the fact that the stockholders of national banks were liable to contribute to the payment of their debts in case of insolvency, he replied in the affirmative. When asked whether he did not have that in contemplation at the time of this transfer, he answered, "That may be one of the reasons why we did not want to own any stock." And when further asked, "Was not that one of the principal motives of this transfer to Waldo?" his reply was, "Yes."

From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCullough & Co. were no longer the owners.

§ 82. *One who appears as stockholder on the books of a national bank is liable as such to the creditors of such bank.*

Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S., 328; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly v. Storm*, 6 Hill (N. Y.), 624; *Rosevelt v. Brown*, 11 N. Y., 148; *Holyoke Bank v. Burnham*, 11 Cush. (Mass.), 183; *Magruder v. Colston*, 44 Md., 349; *Crease v. Babcock*, 10 Mete. (Mass.), 525; *Wheelock v. Kost*, 77 Ill., 296; *In re Empire City Bank*, 18 N. Y., 199; *Hale v. Walker*, 31 Ia., 344. For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on "The Liability of Stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide* ch. 13.

§ 83. *The holder of bank stock, even as collateral security for a loan, becomes subject to the liabilities of a general stockholder to creditors of the bank. A colorable transfer will not avert this liability.*

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off

that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out;" that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham — if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, "but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories." Williams' Case, Law Rep., 9 Eq., 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; Payne's Case, id., 223; Kintrea's Case, Law Rep., 5 Ch., 95. See, also, Lindley on Partnership (2d ed.), p. 1352; Chinnock's Case, 1 Johns. (Eng.) Ch., 714; Hyan's Case, 1 De G., F. & J., 75; Budd's Case, 3 id., 296. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out." Nathan v. Whitlock, 9 Paige (N. Y.), 152; McClaren v. Franciscus, 43 Mo., 452; Marcy v. Clark, 17 Mass., 330; Johnson v. Laflin, by Dillon, J., 6 Cent. L. J., 131. The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the circuit court against the Germania Bank was correct. Its case, no doubt, is a hard one; but it is not in our power to give relief, without a sacrifice of the well-established rules of law and equity both in this country and in England.

§ 84. *A national bank may make a loan on the security of the stock of another national bank.*

There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the national banking act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.

In support of the other appeals which were taken from the decree of the

court below, no argument has been submitted, and they require only brief remarks. Alcus, Scherck & Autey in their first answer to the bill, after setting forth several matters perfectly immaterial, admit that they were at one time the owners of seventy shares of the stock of the Crescent City National Bank, but aver that on the [blank] day of [blank], 1873, they sold them all to one Julius Fox, a white person, about twenty-one years old, and a clerk by occupation; that the price paid to them by Fox for the stock was \$5, and that they never offered to Fox any money or other valuable consideration or promise to induce him to accept the stock. The utter worthlessness of this as a defense sufficiently appears in what we have said respecting the appeal of the Germania Bank. Subsequently what is called a supplemental and amended answer was filed, quite inconsistent with the one first made. It admits the ownership of the stock by the respondents at the time of the bank's insolvency and suspension, and merely denies any unlawful confederacy. That no defense was shown by this supplemental answer we need spend no time to prove.

The only material averment in the answer of the Crescent Mutual Insurance Company was, in substance, that they had owned shares of the stock of the Crescent City Bank before it became a national bank, and that though the state bank had become a national bank with their consent, and they had received dividends, they had not received new certificates. The stock ledgers of the bank, however, show that one hundred and thirty shares stood in their name when the bank failed, and, therefore, taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders.

The appeal of Benjamin J. West is equally without merit. It was admitted by his answer and proved by his own testimony that on the 13th of March, 1873, the day before the bank ceased paying its depositors, he was the owner of fifty-eight shares of its stock. On that day he transferred it to one Vincent, whom he describes as a white man, about thirty-five years old, a salesman by trade, for the price of about \$10 a share. Nothing more than the testimony of Mr. West himself is needed to show that this is what is called in the English books a sham sale, made to conceal his liability. Vincent was West's clerk at the time, and, so far as it appears, without any pecuniary responsibility. No certificate of the stock was issued to him. He paid nothing at the time of the alleged transfer, and never has paid anything since. He gave no note or other written acknowledgment of indebtedness, and West continued to pay his salary as a clerk six or eight months after the transfer, without deducting anything for the price of the stock. Indeed, the price of the stock was never charged against Vincent in West's books. Add to this the fact, plainly visible in his testimony, that the alleged transfer was made when Mr. West had become alarmed about the condition of the bank, and nothing more is needed to show that it was inoperative, as against the creditors of the bank, according to the doctrine of the cases hereinbefore cited.

§ 85. *The orders of the comptroller are conclusive.*

There are some other averments in the answer of the appellants of which it is hardly necessary to say anything. Former decisions of this court have ruled that the determination of the comptroller of the currency and his order to the receiver are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

Decree affirmed.

CASE v. BANK.

(10 Otto, 446-456. 1879.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Lizardi & Co. pledged to the Citizens' Bank stock owned by them in the Crescent City Bank, to secure a note, with power to sell and transfer. The stock was sold, but the Crescent City Bank refused to permit a transfer, on the ground of indebtedness to it by Lizardi & Co. The Crescent City Bank failed, and Case was appointed receiver. This suit was against the receiver, and a judgment was rendered in favor of the Citizens' Bank for the amount of the verdict, and that the receiver do pay the same, or certify the same to the comptroller, to be paid in due course of administration; and that the Citizens' Bank receive its *pro rata* of dividends with those already paid to other creditors.

Opinion by MR. JUSTICE CLIFFORD.

Associations formed under the act to provide a national currency are required to enter into articles of agreement, specifying the object of the association; and the articles may contain other regulations, not inconsistent with the act, which the association may see fit to adopt for the conduct of their business and affairs. Such an association may make contracts, sue and be sued, and complain and defend in any court of law or equity as fully as natural persons. They may also elect directors; and the board of directors may appoint a president, vice-president, cashier, and other officers, and define their duties. 13 Stat., 101; Rev. Stat., sec. 5136; *Knight v. Bank*, 3 Cliff., 429, 431.

Sufficient appears to show that the plaintiff bank discounted for the firm named in the transcript their promissory note, in the sum of \$20,000, payable to the order of the bank in thirty days; and that the promisors, to insure the payment of the note, pledged to the holders two hundred and twenty shares of the capital stock of the bank of which the defendant is the receiver,—part standing in the name of the debtor firm, and part in the name of their senior partner. Authority was given to the pledgees, at the time the stock was pledged, in case the note was not paid at maturity, to sell the shares pledged at public or private sale, the pledgors agreeing to sign all required transfers of the same necessary in the premises. Payment of the note, when it fell due, was refused; and the pledgees of the stock, having found purchasers for the same at the rate specified in the declaration, requested the bank of which the defendant is the receiver for permission to transfer the stock to the purchasers of the same; and the charge is that the bank peremptorily refused the request, on the ground that the promisors of the note were indebted to the bank, and that their stock could not be transferred before payment of their indebtedness. Nothing appears to show when the indebtedness of the pledgors of the stock was contracted to the defendant bank; but it is not alleged that it preceded the pledge of the stock, nor is it claimed that the defendant bank had any lien on the stock for the payment of the alleged indebtedness.

Process was served, and the defendant bank appeared and filed a peremptory exception to the declaration: 1. Because the supposed cause of action did not accrue within one year next before the commencement of the suit. 2. Because the petition or declaration does not disclose any cause of action against the defendant. Hearing was had, and the court overruled the exception. Proceedings now unimportant followed, when defendant again appeared and filed an answer, denying all the material allegations of the petition. Issue being

joined, the parties went to trial, and the verdict and judgment were in favor of the plaintiff; and the defendant excepted, and sued out the present writ of error. Since the cause was entered here, errors have been assigned to the effect following: 1. That the circuit court erred in holding and instructing the jury that the action rose *ex contractu*, and that it was not prescribed by one year. 2. That the circuit court erred in instructing the jury that the defendant was liable for the refusal of the cashier to permit the stock to be transferred. 3. That the circuit court erred in refusing the two prayers for instruction presented by the defendant. 4. That the circuit court erred in ordering the receiver to pay the amount of the judgment or to certify the same to the comptroller.

By-laws were adopted by the defendant bank, which provide that the stock of the bank shall be assignable only on the books of the bank, subject to the provisions and restrictions of the act of congress, and that a transfer-book shall be kept, in which all the assignments of stock shall be made. Certificates of stock signed by the president and cashier may, as the by-laws provide, be issued to stockholders; but the requirement is, that the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank,—the further requirement being that, when stock is transferred, the existing certificates shall be canceled and returned, and that new ones shall be issued.

Provision is made by the code of the state that persons are responsible for the damage they occasion, not merely by their acts but by their negligence, their imprudence, and their want of skill, which is not different in its application to this case from the rule which prevails at common law. Rev. Code La., arts. 2315, 2316. Whenever an agent violates his duties or obligation to his principal, and loss ensues to the principal, he is responsible therefor, says Judge Story, and is bound to make a full indemnity. Story, Ag. (6th ed.), sec. 217 *a*. Actions for injurious words, whether verbal or written, and those for damages caused by animals, or resulting from offenses, or *quasi* offenses, are prescribed by one year in the jurisprudence of the state. Rev. Code La., sec. 3536. And the first proposition of the defendant is that the circuit court erred in holding that the action in this case was not barred by that article of the code.

§ 86. *An action against a bank, or its representative, for damages caused by a refusal to permit a transfer of stock to be made, is not barred by the lapse of one year by Louisiana law.*

Causes of action resulting from offenses or *quasi* offenses are barred by the lapse of one year, and the defendant bank contends that the cause of action set forth in the petition in this case falls within the one or the other of those designations. Argument to show that it was not an offense is certainly unnecessary, as the proposition if made would be wholly without merit, from which it follows that the theory must be wholly rejected, unless the act for which the damages are claimed in this case can properly be regarded as a *quasi* offense within the meaning of that provision. Even suppose the terms of the provision apply to such a cause of action, it is by no means certain that the admission, if made, would benefit the defendant, as the supreme court of the state has decided that prescription in respect to a promissory note is interrupted so long as the holder is in possession of collaterals pledged by the maker to secure its payment. *Blanc v. Hertzog*, 23 La. An., 199. Stocks pledged as security for a loan, the same court holds, constitute a standing acknowledgment of the debt which interrupts prescription during the time the securities

pledged remain in the possession of the creditor. *Police Jury v. Duralde*, 22 id., 107; *Citizens' Bank v. Knapp*, id., 117. Suppose, however, the claim for damages resulting from the refusal of the bank to transfer the stock must be considered as a cause of action wholly distinct from the note and the collaterals, then it becomes necessary to examine the objections taken by the plaintiff bank to the validity of the defense of prescription. Coming to that defense, the plaintiff bank contends that the cause of action does not fall within the rule of prescription by the lapse of a year, because the act which gives rise to the claim was neither an offense nor a *quasi* offense within the meaning of that article of the Revised Code. Precisely the same question was presented to the supreme court of the state and was decided by that court adversely to the views of the defendant. *Campbell v. Miltenberger*, 26 id., 72. Compensation was claimed by the plaintiff in that case for damages occasioned by the defective and improper construction of a fence around his dwelling and premises by the defendant. The prescription of one year was pleaded, setting up the same article of the code, but the court decided that the rule of prescription of one year only applied to cases arising from damages caused by the commission of an offense or *quasi* offense, and overruled the defense as inapplicable to the case. Actions arising under the article referred to survive, in case of the death of the injured party, for the space of one year, in favor of the minor children and widow of the deceased. Rev. Code, art. 2315. Personal actions are not in general prescribed in that state short of ten years, even when the creditor is present, nor short of twenty years if he be absent. Id., art. 3544. Many decisions have been made in the state upon the subject, but a few of each of the classes in question will be sufficient to show that the act which gave rise to the cause of action in this case cannot be regarded either as an offense or *quasi* offense within the rules of decision adopted in that state. Wilful trespass in cutting wood upon another man's land, and refusing to account for the same when accused of the act, was held to be prescribed by that provision. *Whitehead v. Dugan*, 25 La. An., 409. Where damages were claimed for the illegal and wrongful seizure of the defendant's property by virtue of an execution against another party, whereby much of the property was lost or destroyed, it was held that the claim for damages fell within the category of that rule. *De Lizarde v. New Orleans Canal and Banking Co.*, 25 id., 414. Claims for injuries occasioned by a railroad to individuals, or for the destruction of domestic animals, are held to fall within the same category as charges of *quasi* offenses. But the right to recover of a banker for failure to protest a note, whereby the indorser is charged, is only prescribed by ten years. *Eichelberger v. Pike*, 22 id., 142; Rev. Code, 3544.

So an action against a telegraph company for loss on goods by a mistake in the message may be maintained unless prescribed by ten years. *La Grange v. Southwestern Telegraph Co.*, 25 La. An., 383.

Cases in great number of a like character might be cited, but it must suffice to refer to one other, which seems to be decisive of the point. *Percy v. White*, 7 Rob. (La.), 513. It was an action by the stockholders against the directors to recover damages for losses sustained through their negligence, fraud and mismanagement, and the court held that it was not prescribed short of ten years from the acts which were the subject of complaint. Such a case every one must admit is much stronger than the case at bar, as the directors were directly charged as wrong-doers, and as guilty of negligence, fraud and mismanagement in the performance of their official duties. Opposed to that the

defendant refers to the case of *Taylor v. Graham*, as being inconsistent with the prior case, but the court is not inclined to adopt that view, as the notary is a public officer, and the charge against him was that of gross negligence in the performance of his official duty. *Taylor & Raddin v. Graham*, 15 La. An., 418. Promptitude and fidelity are expected of notaries in giving notice of protest in all jurisdictions where that duty is required of those officers, and it cannot be doubted that the court regarded the charge as imputing a *quasi* offense. In the case at bar the demand of transfer was made by the plaintiff bank in behalf of the purchaser of the stock, and the cashier answered that by order of the directors he could not allow the transfer, as the holder of the certificates was indebted to the bank. Instructions from the directors were obligatory upon the cashier, who in point of fact assumed no responsibility. He acted by order of the directors, who for that purpose constituted the bank, it appearing that he merely obeyed their instructions not to transfer any stock whose owner had discounted notes in the bank unpaid.

§ 87. *The refusal of the cashier of a bank to transfer stock is the refusal of the bank.*

Evidence was introduced by the plaintiffs tending to show that the cashier of the defendant bank was the officer intrusted by the directors with the transfer of stock, and they also gave in evidence the note secured by the pledge of the stock, but they gave no other evidence to show that the note was due and unpaid, or that any effort had been made to collect the same of the maker, or that the maker was insolvent, nor was any evidence introduced to show that anything had occurred to interrupt or suspend prescription. Both parties having closed, the defendant bank requested the court to instruct the jury that the defendant is not liable for the refusal of its cashier or other officer to transfer the stock, unless he acted in the premises under the authority of the charter or by-laws of the bank, or pursuant to some general or special authority derived from the corporation through its board of directors; but the court refused to give the requested instruction, and instructed the jury that if they found that a person representing the plaintiff, having in his possession the certificates of the stock, sent to the defendant bank during the ordinary hours of business, and found there the cashier, and that he was the officer customarily intrusted by the directors to make such transfer of stock, and that he, the person having the certificates, demanded the transfer of the cashier, at the same time offering to deliver up the old certificates, and that the cashier refused to allow the transfer, upon the ground that the owner was indebted to the defendant bank, that such a refusal was a refusal of the bank. Compare the instruction given with that requested, and it will be seen that the introductory part of the request is fully given in the instruction given to the jury. They were told that if they found that a person representing the plaintiff, having the certificates of the shares in his possession, went to defendant bank and there found the cashier, and that he was the officer customarily intrusted by the directors to make the transfers, which was fully equivalent to the request, though stated in the affirmative and not in the negative form. Unless the jury found all those facts to be true, they were not authorized to find a verdict for the plaintiff; and inasmuch as the verdict returned was in favor of the plaintiff, it must be assumed by the appellate court that the entire theory of fact involved in the instruction is proved. Suppose that is so, then it is plain that the whole instruction is correct, as it is not controverted that the demand was regularly made, nor that the cashier refused to allow the transfer.

§ 88. *Third parties have a right to presume that a cashier has all the powers generally attached to that office.*

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by such institutions; and their acts, within the scope of such usage, practice and course of business, will in general bind the bank in favor of third persons "possessing no other knowledge." *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 46. Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice and course of business; and it would be the height of injustice to hold that the bank, as the principal to the cashier, may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. *Story, Ag. (6th ed.)*, sec. 127. Such an officer is *virtute officii* intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs within the scope of authority evidenced by such usage, practice and course of business. Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier, and the evidence introduced by the plaintiff tended to show that the practice of the defendant bank was in accordance with the general usage. Evidence to that effect having been introduced, it was certainly competent for the court to submit it to the jury, and the judge might have instructed them that, in view of that evidence, they would be warranted, if they believed the testimony, in finding that the cashier had the authority to make the transfer. *Wild v. Bank*, 3 Mass., 505. Official acts may be performed by a cashier which constitute the ordinary and customary functions of such an officer, and persons dealing with the bank are warranted in believing that the cashier is duly authorized to perform any customary duty falling within the scope of that category, and may to that extent hold the bank responsible, and if he was so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved, and actual knowledge of that fact is brought home to the third party. Concede that, and it follows that the cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer of shares of the capital stock, and that a person showing a *prima facie* legal right to claim such a transfer to himself may demand it from that officer or any other principal officer left in general charge and superintendence of the bank during the regular hours appointed by the bank for the transaction of banking business. *Smith v. Northampton Bank*, 4 Cush. (Mass.), 1, 11; *Morse on Banking (3d ed.)*, pp. 155, 177.

Authorities to show that the acts of a cashier or other officer of a bank, within the scope of the general usage, practice and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it are quite numerous, provided it appears that the persons dealing with the officer did not know at the time that he was transcending his authority. *Lloyd v. West Branch Bank*, 15 Pa. St., 172; *Bank of Vergennes v. Warren*, 7 Hill (N. Y.), 91; *Franklin Bank v. Steward*, 37 Me., 519, 522. It may be fairly presumed, says Chancellor Walworth, that the principal officer or clerk in attendance at the bank during the usual hours of business is authorized to permit the transfer of shares when the case presented is one proper to be allowed.

Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.), 348, 350. *Assumpsit* in the form of a special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal. Kortright *v.* Commercial Bank of Buffalo, 20 id., 91; Angell & Ames, Corporations (9th ed.), sec. 381. Enough has already been remarked to show that it is immaterial whether the declaration or petition is regarded as an action *ex contractu* or *ex delicto*, as it is clear that it is not barred by the prescription of one year, so that the point in any view cannot avail the defendant bank. Pontchartrain Railroad Co. *v.* Heirne, 2 La. An., 129; Ware *v.* Barataria Co., 15 La., 169; Etting *v.* Commercial Bank of New Orleans, 7 Rob. (La.), 459.

No further remarks are required to show that the refusal of the court to grant the first prayer of the defendant was not error in view of the instruction given, as that given was quite as favorable to the defendant as the law would allow. Nor is there any just ground of complaint on the part of the defendant that the court refused to give the third request. Instead of giving that, the court instructed the jury that, in order to enable the plaintiff to recover, they, the jury, must be satisfied from the evidence that the debt of the owners of the stock was still due and unpaid, and that if that has not been established the jury must find for the defendant. Comment upon these instructions is needless, as it is clear that the verdict finds that the note is still unpaid. Exceptions not assigned for error will be passed over without remark as not necessarily re-examinable in this court.

Nothing appears in the case to show that the defendant bank ever adopted any by-law providing for a lien on the shares of a stockholder in case of his indebtedness to the bank, nor is it even shown in this case that the debt, if any, of the owner of the shares to the bank was contracted before the stock was pledged to the plaintiff, nor is there anything given in evidence by the defendant to show that it was inequitable for the plaintiff to claim the benefit of the collaterals which the bank held to secure the payment of the note they discounted for the owners of the stock.

§ 89. *The judgment that the receiver pay or certify to the comptroller is correct.*

Beyond all doubt, the validity of their debt is established by the verdict and judgment; and, if so, it requires neither argument nor authorities to show that the order given by the circuit court to provide for the payment of the amount recovered was proper and correct.

Judgment affirmed.

1.

UNITED STATES *v.* KNOX.

(12 Otto, 422-426. 1880.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This case is a petition for a writ of *mandamus* directed to the comptroller of the currency. It was fully heard in the court below upon the merits. The writ was refused, and judgment for costs rendered against the relator, the Citizens' National Bank of Louisiana. This writ of error was thereupon sued out, and the case is thus brought before us for review.

There is no controversy as to the facts. The only question presented for our consideration is a question of law. The case made in the record, so far as it is necessary to be stated for the purposes of this opinion, is as follows: On

the 7th of April, 1874, the Crescent City National Bank of New Orleans was and for some time had been insolvent, and in the hands of a receiver. On that day the comptroller assessed each shareholder seventy per cent. upon the par value of each share of his stock, and ordered the receiver to collect the assessment. This the receiver proceeded to do by filing a bill in equity in the circuit court of the United States for the district of Louisiana, against all the shareholders. Thereafter he obtained a decree against all the defendants severally, who were within the jurisdiction of the court, for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make, and it is still pending. The capital stock of the bank was \$500,000; seventy per cent., therefore, was \$350,000. This sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over. But by reason of the insolvency of many of the shareholders the assessment netted only \$112,658.13, and nothing, or very little, more will hereafter be realized from it. From the proceeds of the assessment and other assets of the bank, eighty per cent. of the principal of its debts have been paid. The relator, being a large creditor of the bank, requested the comptroller to order a further assessment of thirty per cent. upon each share of the capital stock, for the discharge of the balance of principal and interest still due to its creditors, and to direct the receiver to proceed as before to collect the amount of the new assessment. The comptroller refused, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent. He holds that no such liability is imposed, on the solvent shareholders, and that he has, therefore, no right or power to make the assessment as requested. The point to be decided is whether he is clothed with this power and duty, and whether the shareholders are thus liable.

§ 90. *Construction of acts of 1863 and 1864 relative to national banks, and assessments on shareholders in case of insolvency.*

The first bank law was passed February 25, 1863 (c. 58, 12 Stat., 665). The last clause of section 12 is as follows: "For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares." This provision was changed in 1864, and has been since and is now in force in these terms: "The shareholders of every national banking association shall be held individually responsible, *equally and ratably, and not one for another*, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." R. S., sec. 5151. The act of 1863 made no provision for enforcing the personal liability of shareholders, while that of 1864 provided that it might be done through a receiver appointed by the comptroller, and acting under his direction. Id., sec. 5234. The difference between the clause creating the individual liability as it was originally, and as it was after it was amended and altered, is obvious and striking. The change was plainly made *ex industria*, to prevent the possibility of doubt as to the meaning of congress. What the effect of the clause would have been without the change is a point we are not called upon to consider. The charter of a private corporation is a contract between the law-making power and the corporators, and the rights and obligations of the latter are to be measured accordingly.

§ 91. *Shareholders in national banks are not guarantors "one for another."*

By the common law the individual property of the stockholders was not liable for the debts of the corporation under any circumstances. Here the liability exists by virtue of the statute, and the assent of the corporators to its provisions given by the contract which they entered into with congress in accepting the charter. With respect to the character of that liability, it is entirely clear, from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay.

§ 92. *The rules by which shareholders in national banks are assessed on their stock.*

In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by *all the shareholders*; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock. The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease v. Babcock*, 10 Metc. (Mass.), 525. These rules have been applied in several well-considered judgments of other courts, where the words we have italicized were not in the statutes upon which they proceeded. We have found no case in conflict with them. See *Crease v. Babcock*, *supra*; *Atwood v. R. I. Agricultural Bank*, 1 R. I., 376; In the Matter of the Hollister Bank, 27 N. Y., 393; *Adkins v. Thornton*, 19 Ga., 325; *Robinson v. Lane*, id., 337; *Wiswell v. Starr*, 48 Me., 401. See, also, *Morse on Banking*, 503.

§ 93. *When comptroller would be enjoined.*

Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction. Nothing in this opinion is intended in any wise to affect the authority of *Kennedy v. Gibson*, 8 Wall., 493 (§§ 6-12, *supra*), and *Casey v. Galli*, 94 U. S., 673 (§§ 75-81, *supra*). On the contrary, we approve and reaffirm the rule laid down in those cases. The comptroller decided correctly as to his duty in this case.

Judgment affirmed.

JOHNSON v. LAFLIN.

(13 Otto, 800-806. 1880.)

APPEAL from U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—The questions raised in this case are important to owners of shares in national banks, but they are not difficult of solution. The

delay in their decision has been caused by the great pressure of business upon the court, and not from any doubt as to their proper disposition. The appellant, the complainant below, is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency on the 27th of June, 1877. The bank failed on the 20th of that month. The defendant James H. Britton was its president, and had been so for some years. On the 16th of May, 1877, and for some time previously, the defendant Laffin was a stockholder of the bank, owning eighty-five shares of full-paid stock. He was not a director of the bank, nor had he any personal knowledge of its actual financial condition. It is to be presumed that he regarded that condition as sound, for, up to the time of the failure, he continued to deposit funds with it for a company of which he was a resident director at St. Louis. On the day mentioned, May 16, 1877, he sold his eighty-five shares to a broker, to whom he delivered his certificate of the stock, with a blank power of attorney indorsed thereon, authorizing the attorney, whose name might be subsequently inserted by the broker, or any other party becoming the owner of the certificate, to transfer it on the books of the bank in such form and manner as might be necessary or required by its regulations. Laffin did not at the time know for whom the stock was bought; information on the subject was withheld from him. He received for the price agreed the broker's check on a banking house in St. Louis, which was paid the same day on presentation. The broker was, however, in fact acting for Britton, the president of the bank, who represented that he was purchasing for himself or for a party whose name he did not disclose. There was no intimation that he was making the purchase for the bank or in its interest. He gave the broker his individual check on the bank for the price of the stock, which was paid on presentation. Subsequently, but on the same day, he received the certificate, and thereupon directed a book-keeper in the bank, named Geralt, to fill up the power of attorney with his, the book-keeper's, name, and to transfer the certificate to his, Britton's, name, as trustee, on the transfer book or stock register of the bank, which was accordingly done. He had at the time, to his individual credit, at the bank several hundred dollars more than sufficient to meet his check. He had for years dealt largely on his own account in its stock, and there was nothing in the transaction between the broker and himself to awaken suspicion as to its legality or propriety. Some days afterwards, on the 29th of the same month, at an election of directors, he represented and voted on the stock purchased.

It appears, however, that whilst the shares stood on the official stock register in the name of Britton as trustee, without stating for whom he was trustee, the transaction was entered on the stock ledger in an account with him as "trustee of the bank." And by his directions the book-keeper credited his individual account with the amount of the check given for the shares, and charged the same amount to the "sundry stock account." In other words, the entries on the books — other than the official stock register — showed that the stock was purchased by Britton for the benefit of the bank, and paid for with its funds. But neither Laffin nor the broker had any notice of the manner in which the transfer was made, or of the entries on the books of the bank, or that the purchase had been made with its funds. The book-keeper, Geralt, who made the transfer and the entries, had, however, actual knowledge of the facts. The present suit is brought by the receiver of the bank to set aside the purchase of the eighty-five shares, to compel Laffin to repay the money received, and Britton to retransfer to him the shares on the books of the

bank, and to have him declared to be still a stockholder in respect of those shares.

§ 94. *The law as to the transfer of the shares of national bank stock.*

The statute declares that the capital stock of every national banking association shall be divided into shares of \$100 each, and be transferable on its books in such manner as may be prescribed by its by-laws or articles, and that every person becoming a stockholder, by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder. There was no by-law of the association here regulating transfers of its shares, but each certificate of stock contained this provision: "Transferable only on the books of the said bank, in person or by attorney, on the return of this certificate, and in conformity with the provisions of the laws of congress and the by-laws which may be in force at the time of such transfer." The statute also declares that no association shall be the purchaser of any shares of its own capital stock, unless the purchase be necessary to prevent a loss upon a debt previously contracted. The purchase by the bank, through its president, in the present case, was not made to prevent such a loss. Laffin was not indebted to the bank at the time he sold his shares. The receiver, therefore, starting with the conceded fact that the purchase by the bank was prohibited, and therefore illegal on its part, seeks to charge Laffin with the consequences of such illegality, as though he had dealt directly with the bank, or had known at the time that the purchase was made for it. He assumes such knowledge by Laffin because the party with whose name the blank power of attorney was filled, to make the transfer of the certificate of stock, was cognizant of the facts. His argument is substantially this: The transfer of the stock is not complete until made on the books of the bank, and the attorney who made it knew that the purchase was by the bank and with its funds, and his knowledge was the knowledge of Laffin.

§ 95. *The law of principal and agent.*

The general doctrine that the principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent pending the proceeding, is not questioned. Had Geralt, the book-keeper, been appointed by Laffin to make the sale, and had he in negotiating it learned the facts as to the purchase and use of the funds of the bank, there would be ground to invoke the application of the doctrine. But such was not the position of Geralt to Laffin. The sale was consummated, so far as Laffin was concerned, when he delivered the certificate, with the power to transfer it to the broker. The latter did not mention the name of the principal for whom he was acting. He declined to give it. Laffin had a right, therefore, to treat him as the principal, and if he was competent to make the purchase the sale was valid. Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers, or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders. It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none.

§ 96. *The title to shares of national bank stock passes when the vendor delivers to the vendee his certificate with authority to have it transferred on the books of the bank.*

As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them. *Bank v. Lanier*, 11 Wall., 369 (§§ 164-169, *infra*); *Webster v. Upton*, 91 U. S., 65; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.), 770; *Gilbert v. Manchester Iron Co.*, 11 Wend. (N. Y.), 627; *Commercial Bank of Buffalo v. Kortright*, 22 id., 348; *Sargeant v. Franklin Insurance Co.*, 8 Pick. (Mass.), 90. The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transaction. A different doctrine would put a speedy end to the signing of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.

§ 97. *Where an agent declines to disclose his principal he may be regarded as himself a principal.*

The further position of the receiver, that the assets of the bank constituted a trust fund for the benefit of its creditors, and, where wrongfully diverted, can be followed in whosoever hands they can be traced, may, as the statement of a general doctrine, be admitted. But it has no application to the case at bar. Here no assets of the bank were received by Laflin. What he received came from the broker, the only person with whom he dealt or whom he knew as principal in the negotiation. The circumstance that the purchase was actually in the interest of the bank—though of that fact the broker was ignorant—cannot affect the latter's character as principal, so far as Laflin was concerned, which he bore in the negotiation.

§ 98. *The validity of a sale of stock must be determined by the relation the contracting parties at the time openly bear to each other.*

The whole transaction, on the part of Laffin, was free from any imputation of fraud. He sold his shares to a person competent to purchase and hold them, and received the stipulated price. It would be a perversion of justice and of the ordinary rules governing men in commercial transactions to hold the sale, under such circumstances, vitiated by the relations of the purchaser to others, of which the seller had no knowledge, or any grounds to entertain a suspicion. The validity of the sale of stock cannot be made to depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other. Of course the whole case here would be changed if the sale by Laffin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.

Decree affirmed.

DAVIS v. STEVENS.

(Circuit Court for New York: 17 Blatchford, 259-263. 1879.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This was a suit at law by the receiver of an insolvent national bank to enforce the individual liability of an alleged shareholder, under section 5151 of the Revised Statutes. The bank failed December 12, 1871, and it is conceded that Calvin Stevens, the decedent, did not then appear on the books as a shareholder, and had not appeared as such since October 29, 1870. On that day one hundred and seventeen shares stood in his name, which he caused to be transferred to one Elston, an irresponsible person, and a porter in the office of his New York broker. At the time of this transfer, so far as appears from the evidence, there was no suspicion of the insolvency of the bank, and it remained in good credit for more than a year afterwards. Subsequently Stevens made other purchases of the stock of the bank and sometimes made sales. His purchases were put to the credit of Elston on the stock books, and, to meet his sales, he acting as the agent of Elston, under a power of attorney for that purpose, caused the necessary transfers to be made from the same account. On the 22d of November, 1871, there stood to the credit of Elston, on the books, one hundred and sixty-one shares, for which a formal certificate was issued in his name, and delivered to Stevens, as his agent. It did not appear, from the testimony, that any of the shares which once stood in Stevens' name were included in this certificate. The account on the books remained unchanged from that time until the failure.

§ 99. *A purchaser of stock, who, to escape liability, transfers it to another in fraud of the act, still remains a "shareholder."*

Upon this state of facts, the court below directed a verdict in favor of the defendant; and the single question now presented is, whether that was right. For all the purposes of this inquiry it must be assumed that, as between Stevens and Elston, Stevens was the real owner of the stock. Clearly the evidence tended to prove that fact, and there was enough to make it wrong to take the question from the jury. There is no pretense that Elston did not give

his assent to the transfer to him on the books. This made him liable as a shareholder. *Upton v. Tribilcock*, 91 U. S., 48; *Webster v. Upton*, id., 65; *Pullman v. Upton*, 96 U. S., 328. The point to be decided now is, whether, in an action at law, by a receiver of the bank, the real owner of stock in a national bank, standing, by his procurement, in the name of another, and never having been in his own name on the books, can be charged, as a shareholder, with the statutory liability for debts. The banking act (Act of June 3, 1864, 13 U. S. Stat. at Large, 106, sec. 6, now Rev. Stat., sec. 5134) provides that the certificate of organization shall specify, among other things, "the names and places of residence of the shareholders, and the number of shares held by each of them." Section 12 of the original act is as follows: "That the capital stock of any association formed under this act shall be divided into shares of \$100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act . . . shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; . . ." In the Revised Statutes these provisions are separated and reproduced as sections 5139 and 5151, but, for the purposes of construction, they are to be considered together. Rev. Stats., sec. 5600. Section 63 of the original act (now Rev. Stats., sec. 5152) provides "that persons holding stock as executors, administrators, guardians and trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in said trust funds would be, if they were respectively living and competent to act and hold the stock in their own names." Section 40 (now Rev. Stats., sec. 5210) requires that a full and correct list of the names and residences of all the shareholders shall be at all times kept in the office where the business of the association is transacted, subject to the inspection of shareholders and creditors, and that a verified copy of this list must be transmitted to the comptroller of the currency.

Under these provisions of the law, it is contended that the registered shareholders alone can be charged with the statutory liability, and that an assignee of stock does not make himself responsible unless he accepts an actual transfer in his own name on the books. As has just been seen, the registered holder is liable. By holding himself out to the world as owner, as he does when he permits his name to appear to that effect on the books kept for the information of shareholders and creditors, he estops himself from denying that he is in fact what he represents himself to be. The question still remains, however, whether the person for whom the registered owner holds the stock, if actually the owner, may not also be liable.

The supreme court, at its last term, held, in *National Bank v. Case*, 99 U. S., 628 (*supra*, §§ 82-85), that if a registered owner transferred his stock in a failing corporation to an irresponsible person, for the mere purpose of escaping liability, or if his transfer was colorable only, the transaction was void as against

creditors. At the same time, in *Case v. Marchand* (not reported), an effort was made to charge Marchand with liability as the real owner of stock standing in the name of one Lubie, the allegation being that Marchand, having bought the stock from one Keenan, caused it to be transferred to Lubie, for the purpose of concealing his ownership and avoiding liability under the act of congress. The court decided the case on the ground that the evidence was not sufficient to show the actual ownership of Marchand, but there is nowhere an intimation that, if the facts had been as alleged, the action might not be sustained. The present case shows that Stevens bought the stock from registered owners, and took assignments of their certificates, with authority to complete the transfers on the books. As between Stevens and the vendors this made Stevens the owner. At that time the vendors could have registered their transfers, and thus, while relieving themselves from liability, charged Stevens. *Webster v. Upton*, 91 U. S., 65. If Stevens had omitted to register the transfer, and on that account his vendors had been compelled, as registered owners, to respond to their statutory liabilities for debts, I cannot think there would be a doubt of their right to call upon him to reimburse them for the money so paid. The reason is obvious. While the vendors were the registered owners, Stevens was the actual "shareholder," and the money paid by the vendors would have been for his use and recoverable from him as such.

Stevens, by his transfers on the books, undoubtedly released his vendors from all future liability, because, as to them, the transfers were "out and out," in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston, the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, Stevens was the real owner, and Elston his authorized representative in the bank. As such representative, Elston could vote the stock at elections and receive and receipt for dividends. So, too, he could sell and transfer the stock on the books, and such sale and transfer to a *bona fide* purchaser would pass the title, free from any claim of Stevens. Neither would the bank, under ordinary circumstances, be liable to Stevens for permitting the transfer to be made. So far as Elston was concerned, the transfer to him was colorable only, and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal. By the rules of law which govern the relation of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens. Assuming, then, as I must, for the purposes of this case, that the facts were as they are claimed by the plaintiff to have been, I cannot reach any other conclusion than that Stevens, the decedent, was, in law, a "shareholder" of the bank at the time of its failure, and, as such, liable in this action. It was error, therefore, to direct a verdict for the defendant.

The judgment of the district court is reversed and the cause remanded for a new trial.

HOBART v. GOULD.

(District Court for New Jersey: 8 Federal Reporter, 57-60. 1881.)

Opinion by NIXON, D. J.

STATEMENT OF FACTS.—Section 5151 of the Revised Statutes of the United States, among other things, provides that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such associations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; and section 5234 authorizes the comptroller of the currency, on proof of the existence of certain conditions not necessary to be specified here, to appoint a receiver, whose duty it shall be to enforce such individual liability of the stockholders. The plaintiff is the receiver of the First National Bank of Newark, and has brought this suit against the defendant to recover the amount due to the receiver upon the assessment made by the comptroller upon the defendant as one of the shareholders of the association.

§ 100. *A stockholder of an insolvent national bank cannot set off against an assessment made against him as stockholder his claims against the bank as its creditor.*

The third plea, to which the plaintiff has demurred generally, sets forth that the First National Bank of Newark, of which the plaintiff is receiver, is indebted to the defendant in large sums of money, which exceed the damages sustained by the plaintiff by reason, etc., out of which sum the defendant is ready and willing, and offers to set off and allow the full amount of the damages claimed. The demurrer raises the question whether such set-off is allowable; *i. e.*, whether a stockholder of a national bank, who happens also to be a creditor, may cancel or diminish his assessment by offsetting his individual claim against the association. Considering the ends plainly in contemplation by the foregoing provisions of the statute, it would seem, upon principle, that no such escape from liability should be permitted by the shareholder. The object of the act was to make the holders of the stock responsible for a trust fund equal, if necessary, to the amount of the capital of the bank, and to be devoted to the payment of all the creditors alike. If the receiver, in his appeals to the shareholders for the payment of the assessments against them, may be met by their claims as creditors of the association, it is not difficult to imagine cases in which the beneficent object of the law might be wholly defeated. Besides, the right to a set-off in pleading is a creature of the statute, and applies only to mutual dealings, and no such relations exist between the parties here. The liability to be enforced against the shareholder is not a debt due to the bank, but is a sum of money equal to the par value of his stock, payable by him to the receiver as an officer of the government by force of the law, and the assessment authorized and made by the comptroller. The effect of allowing such a set-off is to give the shareholder an advantage over other creditors. It practically pays his debt in full, and by leaving so much less for others, diminishes his liability as a stockholder, which it was clearly the design of the law to impose.

The reported cases, so far as they go, sustain this view. It was upon this principle that the chancellor of New Jersey, in the recent case of *The Attorney-General v. The Mechanics' & Laborers' Savings Bank*, 5 Stew., 163, held that a depositor who borrowed money from the bank, secured by his note or mort-

gage, could not offset his debt against the amount of his deposit at the time when the decree of insolvency was made. In reaching this result he was following the well-considered case of *Osborn v. Byrne*, 43 Conn., 155, in which the supreme court of Connecticut, in answer to the petition of the receiver of an insolvent savings bank, praying for instructions, decides that the borrower of the funds of the corporation should not be allowed to offset his deposits against his indebtedness. The question, so far as I know, has never been before the supreme court of the United States for decision; but the cognate one, whether a stockholder who had given his notes for his stock subscription and who was sued thereon after the insolvency of the institution, might offset debts due to him from the corporation in the ordinary course of business, has received full discussion, and the court has refused to allow such offset on the ground that the money arising from the unpaid shares was a trust fund, to be equally divided among all the creditors. *Sawyer v. Hoag*, 17 Wall., 610. If there be any difference in principle between that case and this, I am not able to perceive it. The whole object of the individual liability of the shareholder provided for in the act was to create a fund in case of insolvency for the payment of the general creditors equally and ratably; and if the capital must be regarded and treated as a sacred trust for such a purpose, much more so the equivalent sum to be derived from the enforcement of the liability provision.

The court of appeals of New York (*In re Empire City Bank*, 18 N. Y., 199) examined the same question, arising under the general banking law of that state; and the provisions of the two banking systems are so nearly alike in regard to the personal liability of the shareholders that the judgment of the learned court is entitled to great weight and consideration here. Judge Denio, in answer to the claim of one of the appellants that, being a creditor of the bank as well as a stockholder, he was entitled to set off the indebtedness of the bank to him against his liability, speaking for the court, said: "Under a proceeding for winding up a corporation, where an account of all the debts and of all the effects, including the aggregate liabilities of the stockholders, is required to be taken, there is no reason why a creditor should be in any better situation on account of being at the same time a stockholder. In the latter character the constitution and the statute make him liable to the creditors to an amount equal to his stock, or to his just proportion of that amount, if the whole is not required; but as a creditor he is entitled only to a dividend in proportion to the other creditors. In case of a deficiency in means to pay all the debts, he must take his dividend *pro rata*. But if he could set off his claim as a creditor against his liability as a stockholder, he might be paid in full, while the other creditors would receive only a part of the amount due them." And Morse, in his excellent treatise on Banks and Banking (p. 500), in stating the different defenses in suits against shareholders, says: "Where one is a creditor as well as a stockholder he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share. His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions."

Upon authority, as well as principle, the demurrer to the plea is sustained.

JOHNSON v. LAFLIN. (a)

(Circuit Court for Missouri: 5 Dillon, 65-86. 1878.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency June 23, 1877, the bank having suspended payment three days before (Rev. Stats., sec. 5234). The defendant Laffin had for some years prior to May 16, 1877, been the holder of eighty-five full-paid shares in that bank. At the date of the suspension of the bank the defendant James H. Britton was its president, and had been such for years prior to that event. On the 16th day of May, 1877, Laffin sold, through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon indorsed to transfer the shares on the books of the bank. Laffin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for \$5,037.50, which was immediately presented and paid. Laffin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check, and the money received, but on the same day, they were transferred, in pursuance of Mr. Britton's directions, by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laffin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laffin's agent, who negotiated the sale of the shares, nor Laffin himself had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault, the book-keeper of the bank, who made the entries, and who had inserted his name in Laffin's blank powers of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff, as the receiver of the bank, against Laffin and Britton, to compel Laffin to repay the \$5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the eighty-five shares on the stock transfer book of the bank. The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats., sec. 5151), it is important to those shareholders who made no sale of their stock to know who are shareholders with them, liable to contribute to meet "the contracts, debts and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act, to which we shall refer as we proceed.

(a) Affirmed in the supreme court. See §§ 94-97, *supra*.

§ 101. *National bank cannot purchase its own stock.*

Inasmuch as this act, in express terms, prohibits a national bank from thus becoming a "purchaser of the shares of its own capital stock" (Rev. Stats., sec. 5201), if Laffin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *ultra vires* and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *Re* London, etc., Exchange Bank, Law Rep., 5 Ch., 444, 452; Great Eastern Railway Co. v. Turner, id., 8 Ch., 149; Currier v. Lebanon Slate Co., 56 N. H., 262. And although Laffin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received and have him declared still to be a shareholder. It would be easy to support these propositions by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so. But Laffin or his agent, Keleher, did not deal with the bank or with the president with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laffin was acting in good faith. Neither he nor his agent, Keleher, had any actual knowledge of Britton's purpose to turn these shares over to the bank and to pay for them out of the funds of the bank. If Laffin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or, second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer book of the bank under Laffin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

§ 102. *The right of a shareholder, under the banking act, to make a bona fide transfer and sale of his shares.*

The controlling question in the case is whether Mr. Laffin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferrer from liability to the bank, its stockholders and creditors. In considering these questions our first proposition is that, under the national banking act, a shareholder has the unrestricted right to make an out and out *bona fide* and valid sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of assuming the transferrer's liability in respect thereto. The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount, for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the

partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country, shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

§ 103. *The mode or manner of such transfer governed by the by-laws of the banking association.*

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactments or in authorized by-laws. The national banking act (Rev. Stats., sec. 5139), by providing that shares shall "be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied in the section just referred to (Rev. Stats., sec. 5139), and that right the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exists except such as is implied from the nature of the transaction or from other provisions of the act. Another section (Rev. Stats., sec. 5201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder in selling his shares to the bank itself or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders who would be injured by the transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights, of the transferrer of the shares in respect thereto, but we have no occasion to determine this point. Rev. Stats., sec. 5139; compare *id.*, sec. 5152; *Weston's Case*, Law Rep., 4 Ch., 20. And, on general principles, there may also be an implied prohibition against the transfer of shares to a pauper or man of straw or insolvent person, for the fraudulent purpose of escaping liability — but this is a matter that need not now be considered. Subject, however, to such prohibitions and limitations, the right of the share owner to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same and of assuming the liabilities of the transferrer in respect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions construing the provisions of the banking act in this regard and similar provisions in other legislative enactments.

§ 104. *Transferee may compel bank to register transfer on its books.*

In *The Bank v. Lanier*, 11 Wall., 369 (§§ 164-169, *infra*), arising under the national banking act, it was expressly held by the supreme court of the United States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned chief justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its transferable quality,

says: "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned with power to transfer, is entitled to have the stock transferred," even if the transferrer is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

§ 105. *Purpose of requiring transfer.*

It was urged in the argument at the bar in the present case that the provision that the shares should "be transferable on the books of the bank" gave the directors of the bank the power to approve or disapprove of any transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the shareholders, and as such entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register *bona fide* transfers, is settled beyond all question by numerous decisions in the English and the federal and state courts. *Black v. Zacharie*, 3 How., 483; *Union Bank v. Laird*, 2 Wheat., 390; *Webster v. Upton*, 1 Otto, 65, 71; *Bank v. Lanier*, 11 Wall., 369 (§§ 164-169, *infra*); *St. Louis, etc., Insurance Co. v. Goodfellow*, 9 Mo., 149; *Chouteau Spring Co. v. Harris*, 20 Mo., 382; *Moore v. Bank*, 52 Mo., 377; *Hill v. Pine River Bank*, 45 N. H., 300; *Re London, etc., Telegraph Co.*, Law Rep., 9 Eq., 653.

§ 106. *English cases on the right of transfer.*

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various companies acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a *bona fide* transfer of stock unless the power to do so is expressly given in the act of parliament or the articles of association. The leading authority on this point is *Weston's Case*, Law Rep., 4 Ch., 20. See, also, *Gilbert's Case*, id., 5 Ch., 559. In *Weston's Case*, Law Rep., 4 Ch., 20, Lord Justice Page Wood, in considering this subject, said: "I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility at any time they please, by going into the market and disposing of and transferring their shares, without the consent of directors or shareholders, or anybody, provided only it is a *bona fide* transaction; by which I mean an out and out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge v. Bosanquet*, 16 Beav., 84, which went to the house of lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the companies act of 1862, in the twenty-second section, gives a power of transferring shares. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of

association. . . . It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And I may add that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause." In *Gilbert's Case*, Law Rep., 5 Ch., 559, 565, Lord Justice Giffard said: "I agree that, according to *Weston's Case*, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

§ 107. *Directors must have some valid and lawful reason to refuse to register transfer.*

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. *Ex parte Penny*, Law Rep., 8 Ch., 446; *Nation's Case*, id., 3 Eq., 77; *Fyfe's Case*, id., 4 Ch., 768; *Allen's Case*, id., 16 Eq., 449; id., 559; *Weston's Case*, id., 5 Ch., 614, 620; *Ex parte Elliott*, id., 2 Ch., 104. In a case where the directors had power to approve or reject the transfer of shares, one of the vice chancellors, speaking of the right of a share owner to dispose of his shares, said: "One of the incidents [of this class of property] is the right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer, or to furnish some [valid and sufficient] reason for refusing to transfer." *Re Stranton, etc., Co.*, Law Rep., 16 Eq., 559, per Bacon, vice chancellor. Similar observations are made by the supreme court of the United States in *The Bank v. Lanier*, *supra*. Mr. Justice Davis there said: "The power to transfer their stock is one of the most valuable franchises conferred by congress. . . . It enhances the value of the stock. Although neither in form nor character negotiable paper, they [the share certificates] approximate to it as nearly as possible." It would be a new, and I apprehend a startling, doctrine to proclaim that the holder of shares in a corporation where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse, and so foreign to all received notions and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist.

§ 108. *The established doctrine of the right of shareholders under national banking act.*

For these reasons, and upon these authorities, the proposition must be considered as established that a share owner in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a *bona fide* and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same and of assuming the transferor's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laflin did make a complete and effectual sale

and transfer of his shares to James H. Britton individually, and that, as to Laffin, it was not a sale and transfer of the stock to the bank. Laffin sold through the broker or agent, Keleher, and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned in blank, with powers of attorney in blank thereon indorsed, authorizing the transfer of the shares on the books of the bank.

§ 109. *When transfer was complete.*

As between Laffin and Britton, the transfer was complete by the sale, assignment, delivery and payment, without registration, and this whether it gave Britton before the registration the legal title to the shares as against Laffin, or only a complete equitable title. *Union Bank v. Laird*, 2 Wheat., 390; *Webster v. Upton*, 1 Otto, 65, 71; *Black v. Zacharie*, 3 How., 483; *Bank v. Lanier*, 11 Wall., 369, 377; *Chouteau Spring Co. v. Harris*, 20 Mo., 382; *Moore v. Bank*, 52 Mo., 377; *New York, etc., Railroad Co. v. Schuyler*, 34 N. Y., 80; *McNeill v. Bank*, 46 id., 325; *Grymes v. Hone*, 49 id., 17, 22; *Bank of Utica v. Smalley*, 2 Cow., 778; *Bank of Commerce's Appeal*, 73 Pa. St., 59; *Ross v. Southwestern Railroad Co.*, 53 Ga., 514; *Hoppin v. Buffum*, 9 R. I., 513; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *Davis v. Lee*, 26 Miss., 505; *German Union Ass'n v. Sendemeyer*, 50 Pa. St., 67; *Leavitt v. Fisher*, 4 Duer, 1.

§ 110. *Both vendor and vendee have power to make transfer; vendor may compel vendee to record transfer.*

That the transaction is complete as between seller and purchaser of stock by the assignment and delivery of the certificate assigned, with the power to transfer and the receipt of payment, is fully shown by these cases, and is also evident from the fact that thereupon each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. *Webster v. Upton*, 1 Otto, 65, 71. And, for the like reason, the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books may file a bill to compel the vendee to record the transfer. *Shaw v. Fisher*, 2 DeG. & S., 11; *Cheale v. Kenward*, 3 DeG. & J., 27; *Wynne v. Price*, 3 DeG. & S., 310; *Webster v. Upton*, 1 Otto, 65, 71. So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. *Bank v. Lanier*, 11 Wall., 369 (§§ 164-169, *infra*); *Hill v. Pine River Bank*, 45 N. H., 300; *Bank of Utica v. Smalley*, 2 Cow., 778; *Commercial Bank v. Kortright*, 22 Wend., 348. The delivery of the share certificates assigned in blank and blank transfers will entitle the *bona fide* vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred" (*Bank v. Lanier*, 11 Wall., 369, per Davis, J.), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer, as in the case of the *Union Bank v. Laird*, 2 Wheat., 390. In that case the charter gave the bank a lien for the shareholder's debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances the bank was held to have a lien on the shares to secure the share owner's indebtedness to it, which was

superior to the right of the unregistered transferee of the stock. *Black v. Zacharie*, 3 How., 483.

If the foregoing propositions are sound, Britton, as against Laffin, had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers and have the transfer registered. *Re Tahite Cotton Co.*, Law Rep., 17 Eq., 273; *German Union Ass'n v. Sendemeyer*, 50 Pa. St., 67; *Leavitt v. Fisher*, 4 Duer, 1; *Commercial Bank v. Kortright*, 22 Wend., 348. Nothing more was required to be done by Laffin or needed to enable Britton to make his title complete. And Laffin could have compelled Britton to register the transfer. If Laffin had proceeded against Britton, he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. *Maxted v. Paine*, Law Rep., 6 Ex., 132. It would have been no answer to Laffin for Britton to have said, "I bought this stock, not for myself, but for the bank." Laffin could have rejoined, "You purported to act for yourself; I supposed you were so acting, and you had no authority, and could have had none, to act for the bank." It is held in England, under the companies act, that the transferrer of shares is liable to be treated as a stockholder until he transfers to one who is in law capable of holding and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. *Fyfe's Case*, Law Rep., 4 Ch., 768; *Lowe's Case*, id., 9 Eq., 589; *Shropshire, etc., Railway and Canal Co. v. The Queen*, id., 7 H. L., 496, 513; *McEuen v. West London Wharves, etc., Co.*, id., 6 Ch., 655; *Weston's Case*, id., 4 Ch., 20; *Gooch's Case*, id., 8 Ch., 266; *Gilbert's Case*, id., 5 Ch., 559; *Master's Case*, id., 7 Ch., 292; *Nickalls v. Merry*, id., 7 H. L., 530; *Symonds' Case*, id., 5 Ch., 298; *Heritage's Case*, id., 9 Eq., 5.

§ 111. *Bank not a cestui que trust.*

Assuming, without deciding, that this principle applies in all its force under the national banking act, if Laffin had sold to an infant, his liability would remain, notwithstanding the transfer was registered. *Nickalls v. Merry*, Law Rep., 7 H. L., 530; *Symonds' Case*, id., 5 Ch., 298. If he had sold to the bank, he would remain *prima facie*, if not actually, liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer,—that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it,—this principle will not make Laffin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laffin to do, registered it in his name as "trustee" without Laffin's knowledge. But the act (Rev. Stats., sec. 5152) authorizes the holding of stock by a trustee. If Laffin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que trust*. Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que trust* who is liable. He is liable for the unauthorized investment and use of the trust money of the bank, and can be compelled to refund it. *Great Eastern Railway Co. v. Turner*, Law Rep., 8 Ch., 149. If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que trust* capable of taking and holding the shares. If the sale of this stock had been reg-

istered to Britton individually, it is clear that Laffin would not have been liable to the bank or its creditors; and, as the matter now stands, the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of to him as "trustee."

§ 112. *Transferor or vendor of stock for value, having no notice of vendee's acting "ultra vires" in regard to registering a transfer, cannot be held liable.*

Our third proposition is that Laffin is not liable because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laffin parted with value—with his shares, with his power of control over them, and the right to sell them to others,—and had no notice at or prior to the consummation of the transaction that Britton was acting *ultra vires*, and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agent had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable. It is urged by the receiver's counsel that Laffin had constructive notice. Mr. Shields, in his argument, bases Laffin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if, in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same, irrespective of the question of knowledge on his part. *Curran v. Arkansas*, 15 How., 304; *Railroad Co. v. Howard*, 7 Wall., 392. But it is to be remembered in this case that Laffin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide*; and he has the same right to sell his shares to another shareholder that he would have to sell them to a person not a shareholder. Even directors have the right to make a *bona fide* sale of their shares, and thus get rid of liability, if they pursue the articles or charter, and take no advantage of their position and commit no fraud. *Gilbert's Case*, Law Rep., 5 Ch., 559; *Ex parte Littledale*, id., 9 Ch., 257. And shareholders, in the exercise of their right to transfer shares, are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. *Bargate v. Shortridge*, Law Rep., 5 H. L., 297, 323; *Taylor v. Hughes*, 2 Jo. & Lat., 24; *Ex parte Bagge v. North Coal Co.*, 13 Beav., 162. Nor are directors, it seems, much less shareholders, in the transfer of their stock, bound to take notice of the books of account of the company. *Cartmell's Case*, Law Rep., 9 Ch., 691; *Hill v. Manchester, etc., Co.*, 2 Nev. & M., 573; 5 Barn. & Ad., 874; *Haynes v. Brown*, 36 N. H., 568.

§ 113. *When sale and transfer are complete, and vendor is free from liability to creditors of corporation.*

We are of opinion, therefore, that the sale and transfer of the stock, as between Laffin and Britton, was complete as soon as the stock was delivered, assigned in blank, with the power to transfer, and payment received; and that what Britton, without Laffin's knowledge, afterwards did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laffin, whose *status* had already been fixed, and whose rights had already been acquired. *Bank of America v. McNeil*, 10 Bush, 54, 58. Mr. Henderson's argument for the receiver went mainly upon the ground that Laffin was

chargeable, through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares, and in the use of the bank's money to reimburse himself therefor. This argument rests upon these propositions: That the sale was not complete until the transfer was registered; that, in making the transfer, Girault, although acting under Britton's directions, was solely Laffin's agent (by virtue of his inserting his name in the blank power of attorney); and that, inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase money out of the general means of the bank, the law imputes this knowledge to Mr. Laffin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz., that the transaction between Laffin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank, and in the community. He was not then known to be insolvent—indeed, it is not shown by the proofs that he is now insolvent. Laffin could have compelled him to register the transfer in his own name. In the eye of the law, the transfer to Britton as "trustee" is a transfer to Britton individually; for, as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. *Ashhurst v. Mason*, Law Rep., 20 Eq., 225; *Ex parte Littledale*, id., 9 Ch., 257. If Laffin had a completed right, immediately on receiving payment for the shares, to have Britton register the transfer of the shares, and if, immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laffin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laffin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question, whether Girault, in consequence of his relations to Britton, and the fact that he acted as his servant, and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laffin, in such sense that knowledge acquired by him from Britton is to be imputed to Laffin. It deserves consideration, whether, under the circumstances, Girault was Laffin's agent, so as constructively to affect Laffin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights, as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laffin's behalf, and they certainly have great force. For, in this view, if the name of some one outside the bank, having no knowledge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had filled in his own name, Laffin would not be liable. It is certainly extremely narrow ground to make Laffin's liability depend upon the accident whose name shall be used to make the formal transfer, and upon what knowledge of the interior working of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made. It was strongly urged at the bar by Mr. Henderson, for the receiver, that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the share owner to transfer his stock in good faith, or the alternative that the direct-

ors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while, on the other hand, the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should, through the directors, have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given, and cannot, therefore, be held to exist.

§ 114. *The unrestricted right of transfer is limited to solvent corporations, and cannot be used for fraudulent purposes.*

It is proper to remark, in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right of transfer has reference to transfers in solvent and going concerns, and is not intended to enable shareholders to escape from liability where the association has committed an act of insolvency, or has ceased to be a going concern. *Allin's Case*, Law Rep., 16 Eq., 449, per Lord Chancellor Selbourne; *Chappell's Case*, id., 6 Ch., 902. While we maintain the right of a shareholder to dispose of his shares absolutely, by an out and out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferrer, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.

The result is, that there must be a decree dismissing the bill as to Laffin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

Bill dismissed.

§ 115. *Taking stock as security.*—A national bank cannot make a loan on the security of its own stock. *Bank v. Lanier*, 11 Wall., 369. See § 155.

§ 116. *Injunction.*—A stockholder may restrain the officers of a national bank from pursuing a course of conduct in violation of its charter and from wasting its assets. *Shoemaker v. National Mechanics' Bank*, 2 Abb., 416. See the case, §§ 189-185.

§ 117. *Rights of stockholder.*—If the bank misappropriate the funds of the stockholder he may sue for their recovery. *Wilson v. Rogers*,* 1 Wyom. T'y, 56.

§ 118. *A by-law is a contract.*—A by-law of a bank, taken in connection with a clause of its articles of association authorizing it, must be taken to be a contract between the bank and its stockholders, and interpreted accordingly. *In re Dunkerson*, 4 Biss., 232.

§ 119. *Where there is no stock the profits are divided among the depositors.*—The National Savings Bank of the District of Columbia, under the act of congress creating it, has no capital stock, and consequently no stockholders. The bond of \$200,000 required to be given as security to depositors is not capital stock. The corporators are entitled to no part of the profits of the institution, but these are to be divided among the depositors or accumulated for their greater security. *Huntington v. Savings Bank*, 6 Otto, 391.

§ 120. *Transfer of stock; liability of parties.*—The transfer of stock in a national bank to an insolvent person for the purpose of relieving the holder from liability is a fraud upon the rights of the creditors, and is void. *Bowden v. Santos*,* 1 Hughes, 158.

§ 121. *A transfer of stock on the books of the bank vests the title in the transferee, and renders him individually liable for the debts of the bank, although he holds such stock only as security for the payment of a debt.* *Moore v. Jones*,* 3 Woods, 53.

§ 122. *Where shares in a national bank were duly transferred on the books of the bank as collateral security, and afterwards the debt was paid but the shares were not retransferred, held, that the transferee was liable as stockholder to the creditors of the bank.* *Bowden v. F. & M. National Bank*,* 1 Hughes, 307.

§ 123. *A purchaser of stock which is not transferred on the books of the bank is entitled to such stock as against one who attaches the same as the property of the seller after the transfer.* *Continental National Bank v. Eliot National Bank*,* 7 Fed. R., 369.

§ 124. A national bank that permits a transfer of its stock on its books, without the surrender of the certificate, becomes liable to the party injured. *Bank v. Lanier*, 11 Wall., 369. See the case, §§ 164-169.

§ 125. Notwithstanding a state statute, that the stock of a bank shall be transferred only upon the books of a bank, and in the presence of the president and cashier, in conformity with the by-laws of the bank, a transfer made by the cashier in conformity with the general usage of the bank will be presumed to be with the knowledge and assent of the directors, in the absence of any by-law regulating the matter. *National Bank v. Watertown Bank*, 15 Otto, 220.

§ 126. A state law which forbids a stockholder of a bank to sell or transfer his stock in such bank while he is indebted to it, unless he shall give security, gives the bank a lien on such stock for its debt, but such lien may be waived by the bank, or by acts of its cashier acting under express or implied authority. As between the parties, the transfer of such stock by the debtor is good, and the bank, by its conduct, may lose its lien, as by acquiescence in the unauthorized transfer of such stock upon its books. *Ibid.*

§ 127. P. transferred to C. certain shares of bank stock as collateral security, with a power of sale in case of his default in making certain agreed payments. Having made the default, C. transmitted the stock to the cashier of the bank, and asked for a certificate in his name. The cashier transferred the stock on the stock ledger, but sent no certificate because he had no signatures of the president to blank certificates. It was the habit of the cashier to make similar transfers of stock without consulting the directors, and the bank had no by-law on the subject. Certain of these shares of stock were sold by the cashier, acting under power of attorney from C. P. becoming insolvent, and being indebted to the bank, the bank declined to ratify the act of the cashier in transferring the stock to C., and refused to give C. a certificate therefor. In an action by C. to compel the bank to issue such certificate, it was held that P. passed a good title to C.; that the act of the cashier vested a good title to the stock in C., and he was entitled to a certificate, and that the bank, by its laches and its acquiescence in the sale of a part of such certificates to other parties, had lost the right it might otherwise have had to object to the transfer of such stock by P. while indebted to it. *Ibid.*

§ 128. No lien on stock in favor of bank.—A by-law which gives the bank a lien upon its own stock for debts due from the holder to the bank is void. *Bank v. Lanier*, 11 Wall., 369 (§§ 164-169); *Bullard v. Bank*, 18 Wall., 589. See the case, §§ 71-74.

§ 129. Under the act of 1863, § 36, the bank had a lien to secure debts due to it, on the stock of any debtor stockholder. This section was left out of the substituted act of 1864. *Ibid.*

§ 130. A by-law declaring that a lien shall exist for all loans by the bank to its stockholders upon their stock is void because it is in violation of the banking act. *Evansville National Bank v. Metropolitan National Bank*, *2 Biss., 527.

§ 131. A national bank may, by its by-laws, prohibit its stockholders from transferring their stock while they are indebted to it. *Knight v. Old National Bank*, *3 Cliff., 429. See § 54.

§ 132. A by-law of a bank which provides that no stock shall be transferred by the holder while indebted to the bank, unless by the consent of the board of directors, creates a lien upon such stock for the indebtedness of the stockholder to the bank. So where a stockholder of a bank became bankrupt, owing the bank a greater sum than the value of his stock, it was held that the bank had a valid lien on such stock as against the assignee, and it was ordered by the court that the bank sell such stock and apply the proceeds to its claim against the bankrupt, and that it have permission to present the deficiency as a claim against the bankrupt's estate. *In re Dunkerson*, 4 Biss., 231.

§ 133. Liability of stockholders.—When the comptroller declares and orders an assessment, the precise amount each stockholder must contribute is a certain, exact sum, and a suit at law is the proper proceeding to collect the assessment. There is no necessity for invoking the aid of a court of chancery to determine the sum each stockholder must pay. *Bailey v. Sawyer*, *4 Dill., 463.

§ 134. Where the pledgee of national bank stock has the stock transferred to himself or to an irresponsible person to relieve himself, he is liable; but when it is put into the hands of a third person to hold for the benefit of both pledgor and pledgee, the latter is not liable. Merely holding the stock as pledgee does not render the holder liable. *Anderson v. Philadelphia W. Co.*, *4 Fed. R., 130.

§ 135. One who allows himself to be held out as the owner of stock is liable as a stockholder, through the receiver to the creditors, whether he is in fact such owner or not. *Case v. Small*, *10 Fed. R., 722.

§ 136. The liability of the stockholder is several and not joint. *Bailey v. Sawyer*, *4 Dill., 463.

§ 137. A plea by a stockholder to an action against him upon his stock liability, that the comptroller is about to pay certain claims for which the bank is not responsible, and that there are assets sufficient to pay the just debts of the bank, is bad. *Casey v. Galli*, 4 Otto, 676. See the case, §§ 75-81.

§ 138. The receiver may sue the stockholders upon their liability as such, either in his own name or in the name of the bank for his use. He may bring an action against them separately at law, and is not compelled to resort to equity. *Stanton v. Wilkeson*, 8 Ben., 357. See the case, §§ 84-89.

IV. CLAIMS AGAINST THE BANK.

SUMMARY — *Interest on claims*, §§ 139, 141. — *Effect of proof of claims*, § 140. — *Guaranty*, § 142. — *Monthly accounts*, § 143.

§ 139. A depositor in a national bank, in the hands of a receiver, is entitled to interest upon his claim from the day of demand. Also to interest upon such interest. *National Bank v. Mechanics' National Bank*, §§ 144-147.

§ 140. Claims when proved to the satisfaction of the comptroller stand upon the same footing as if they were in judgment. *Ibid.*

§ 141. Interest on claims against national banks in the hands of a receiver must be paid before distribution of the surplus, as the interest is an incident of the claim. An action for the recovery of such interest must be brought against the bank and not against the comptroller or the receiver. No demand for the payment of such a claim is necessary before suit can be brought, where a receiver has been appointed for the bank. *The Chemical National Bank v. Bailey*, §§ 148-150.

§ 142. A national bank has power to guaranty the payment of negotiable paper which it transfers. The vice-president of the bank may make such guaranty, and the latter is estopped to deny his authority where it retains the proceeds of the paper. *People's Bank v. National Bank*, §§ 151, 152.

§ 143. Where the president of a bank instructs its correspondent to charge to the account of his bank a private note held by the correspondent, which is done accordingly and the bank notified thereof, and it accepts such notification without objection, such bank and the receiver in charge of the same are estopped to question the validity of such action. *Burton v. Burley*, § 153.

[NOTES.— See §§ 154, 155.]

NATIONAL BANK v. MECHANICS' NATIONAL BANK.

(4 Otto, 437-441. 1876.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— This suit was brought by the defendant in error as an original claimant and as the assignee of other parties. All the claims have a common origin and involve the same principle. On the 22d of November, 1873, the Bank of the Commonwealth refused to pay its circulating notes on demand, and became in default. The comptroller of the currency appointed a receiver, and the bank has since been in his hands. The Mechanics' Bank and its assignors had funds on deposit. On the 24th of September, 1873, all the parties demanded payment. Nothing was paid. Instalments on account of the principal debts were subsequently paid from time to time to each of the parties. On the 20th of November, 1874, the last instalment was paid in each case, and the principal debts were thereby extinguished. At each payment interest from the 24th of September, 1873, on the amount so paid, was demanded and refused. The other parties assigned to the defendant in error their claims respectively for such interest. The Mechanics' Bank instituted this suit. The declaration demands the payment of this interest in all the cases, with interest upon the aggregate amount from the 20th of November, 1874. The Bank of

the Commonwealth demurred. Judgment was given against it, and this writ of error was thereupon prosecuted.

Two errors are assigned. 1. That the plaintiff below was not entitled to recover any interest. 2. If interest was recoverable, as demanded, on each instalment when paid, the plaintiff was not entitled to interest on the gross amount of such interest from the 20th of November, 1874, the time when the last instalments of the principal were paid. There is but one demurrer, and that is to the whole declaration. The point is, therefore, well taken by the counsel for the defendant in error, that, if any part of the declaration be good and divisible in its nature from the residue, the demurrer must be overruled. 1 Chitty's Plead., 664. But the view which we take of the case renders it unnecessary to apply this rule.

§ 144. *A depositor in a national bank in the hands of a receiver is entitled to interest upon his claim from the day of demand.*

By the common law interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Churchmen and laymen alike denounced it. Glanville, Fleta and Bracton all speak of it in terms of abhorrence. The first English statute upon the subject was the 37th Hen. VIII, c. 9. This statute fixed the lawful rate of interest at ten per cent. per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to time, until finally an act of parliament in 1854 (17 & 18 Vict., c. 90), swept all the usury laws in the English statute books out of existence and established "free trade in money." The first impulse to public opinion in this direction was given by Bentham near the close of the last century. The final result was doubtless largely due to his labors. The fiftieth section of the national banking act (13 Stat., 113) requires the comptroller of the currency to apply the moneys paid over to him by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition? Section 996 of the Revised Statutes, p. 182, declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the states respectively where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. Rev. Code of N. Y. (ed. 1859), vol. III, p. 637. If these claims had been put in judgment, whether in a court of the United States or in a state court of that state, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence they are within the equity, if not the letter, of these statutes, and bear interest as judgments would have done. Sedgw. on Constr., 311, 315. This is conclusive upon the first assignment of error.

§ 145. *Rule as to application of payments.*

The rule settled by this court as to the application of payment is that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it after a controversy upon the subject has arisen between

them, and *a fortiori* not at the trial. *United States v. Kirkpatrick*, 9 Wheat., 720; *United States v. January*, 7 Cranch, 572; *Field v. Holland*, 6 id., 8. In the present case, the appropriation was made unequivocally by the party from whom the money was received. How it would have been applied by the law if neither of the parties had given any direction is a question which we need not, therefore, consider.

§ 146. *Interest on interest allowed.*

The interest lawfully accruing upon each of the claims was as much a part of it as the original debt. The creditor had the same right to the payment of the one as of the other. If there had been a judgment, and the full amount due upon it had not been paid, an action of debt might have been brought upon it to recover the balance. 1 Chitt. Pl., 111. Such balance would have been adjudged to the plaintiff with interest in the shape of damages for the detention of the debt. If, in that case, the judgment debtor had chosen to pay only the principal of the judgment, leaving the interest unsatisfied, and the suit had been for the balance, consisting of interest only, the same result would have followed.

§ 147. *Claims, when proved to the satisfaction of the comptroller, are upon the same footing as if they were in judgment.*

We have shown that the claims, when proved to the satisfaction of the comptroller, were upon the same footing as if they had been in judgment. The amount in arrear was liquidated, and as certain as if it consisted wholly of principal instead of interest. This action was, therefore, well brought. If it had been in debt, damages would have been awarded for the detention of the debt sued for. The action not being in debt, the same amount was properly included in the mass of the damages for which the judgment was rendered. The compounding of interest, so far as it has occurred, was due entirely to the fault of the agent of the plaintiff in error. The principle of estoppel *in pais* applies. No exception can be taken upon that ground. The plaintiff in this action was entitled, *ex equo et bono*, to the money sought to be recovered. Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable. Kent, C. J., said upon this subject: "Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial." *Pease v. Barbour*, 3 Caines, 265. See, also, *Johnson v. Bland*, 2 Burr., 1087. In the latter case, Lord Mansfield said: "The interest is an accessory to the principal; and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it. . . . I don't know of any court in any country (and I have looked into the matter) which don't carry interest down to the last act by which the sum is liquidated." The treasury authority fell into an error. There should have been no discrimination between principal and interest in making the payments. The creditor had the same right with respect to both as if he had been pursuing the defaulting debtor under other circumstances. The comptroller should have done just what the law would have done if the case had not come under his cognizance. Numerous cases, both English and American, are to be found in which compound interest, under special circumstances, was recovered. It is sufficient to refer to a few of them. *Ex parte Beavan*, 9 Ves. Jr., 223; *Coliot v. Walker*, 2 Anstr., 495; *Hamilton v. Le Grange*, 2 H. Black., 145; *Kellog v. Hickock*, 1 Wend. (N. Y.), 521; *Tylee v. Yates*, 3 Barb. (N. Y.), 222; *Aurora City v. West*, 7 Wall., 82;

Town of Genoa v. Woodruff et al., 92 U. S., 502. The demand for the interest was properly made upon the plaintiff in error.

Judgment affirmed.

CHEMICAL NATIONAL BANK *v.* BAILEY.

(Circuit Court for New York: 12 Blatchford, 480-484. 1875.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—It is stated by counsel that these actions are brought to determine whether, when the comptroller of the currency has declared a national bank in default, and appointed a receiver under the provisions of the act under which such banks are organized, and a sufficient fund is realized from the assets to pay all claims against the bank and leave a surplus, the comptroller should, or should not, allow interest on the claims during the period of administration, before appropriating the surplus to the stockholders of the bank. It is to be assumed, from this statement, that the claims in question were due and payable when the comptroller took control of the affairs of the bank. If they were not, of course no interest should be allowed upon them, except from such time as they may have become due, unless they were for demands conditioned for the payment of interest. The equity of the creditors to receive interest on their claims for the time during which they have been precluded from receiving their principal is obvious. On general principles, and by adjudications in point, their right is clear. Interest is allowed, not only on strict legal grounds, where there is a contract for the payment of interest, or by way of damages, where there is a wrongful detention of a debt, but upon considerations of equity and natural justice, which always arise where a party is entitled to a payment of money and cannot obtain it, except by resort to a fund created by operation of law, the distribution of which is attended with delay. It is upon this ground that, when, by statute, preference is given to one class of creditors over another in the distribution of an estate, the preference includes interest on the preferred class of claims. *In re Shultz*, 11 Serg. & Rawle, 182.

§ 148. *Interest on claims against a national bank in the hands of a receiver must be paid before distribution of the surplus.*

There is nothing in the provisions of the act under which this fund is to be distributed in conflict with this general rule. While the comptroller is not directed, by express terms, to allow interest to creditors, the act contains no language which, in terms or by implication, prohibits him from doing so. The fiftieth section of the act of June 3, 1864 (13 U. S. Stat. at Large, 115), authorizes him, on becoming satisfied that an association has made default in the payment of any of its circulating notes, to appoint a receiver of its affairs, and place him in possession of its assets. The receiver is required to pay over all moneys realized from the assets to the treasurer of the United States, subject to the order of the comptroller, and it is the duty of the comptroller, from time to time, to make ratable dividends from such moneys upon "all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction," and to distribute the remaining proceeds among the stockholders. His position in reference to the distribution of the fund confided to him is analogous to that of an assignee of an insolvent estate, or an administrator of the estate of a deceased person. Where an insolvent law provides that, after the payment of all debts proved, the assignee shall pay any surplus

to the debtor or his legal representatives, the creditors are entitled to interest on their debts during the period of administration, and without regard to the fact whether the debts are those upon contract conditioned for the payment of interest or not. *Brown v. Lamb*, 6 Metc., 203; *Atlas Bank v. Nahant Bank*, 3 Metc., 581. Claims proved to his satisfaction are to be paid by the comptroller, as debts proved against an insolvent are to be paid by his assignee; and, in the one case as in the other, the interest is an incident of the debt or claim, and to be paid before distribution of the surplus. Thus far the general question of liability for interest has been considered. It remains to consider other questions presented by the record, which are necessary to the proper determination of these actions in the form in which they have been brought. In each action the complaint counts in *assumpsit*, and a general demurrer has been interposed, alleging that the complaint does not state sufficient facts to constitute a cause of action. The practice of the courts of this state now prevails in actions at law in this court, and, by that practice, judgment may be rendered for or against one or more of several defendants.

§ 149. — *an action to recover such interest must be brought against the bank.*

It is clear that this action cannot be maintained against the receiver or the comptroller. The receiver has no control over the assets, except to pay their proceeds to the treasurer of the United States, and would, therefore, not be liable to the plaintiff in any form of action. If an action could be maintained against the comptroller, it would be one to enforce a proper distribution of the fund, and, for this purpose, the action of *assumpsit* is not an appropriate remedy. As against these defendants, therefore, no cause of action is alleged in the complaint, and as to them the demurrer is well taken, and judgment must be ordered in their favor. As against the defendant, the National Bank of the Commonwealth, the demurrer must be overruled. The corporation continues to exist for the purpose of being sued, notwithstanding the comptroller has intervened pursuant to the provisions of the act under which it was organized; and demands against it can be prosecuted to adjudication in any court of competent jurisdiction. *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 383 (§§ 252-256, *infra*). In such an action interest is recoverable upon all demands originating in contracts conditioned for the payment of interest, and on all demands for money due and unpaid, by way of damages for the non-payment after such demands became due. It is urged that interest is not recoverable upon debts against the bank, because it has been prevented by law and by superior authority from paying the principal. It is a sufficient answer to this argument to say that this proposition is not applicable because the bank, by its own default, subjected itself to the proceedings of the comptroller, and it does not lie with the bank to assert any exemption from liability by reason of its own acts or defaults.

§ 150. *No demand is necessary before suit can be brought where a receiver has been appointed.*

In one of these cases a portion of the plaintiff's demand is for a balance due upon deposits made in the ordinary way with the bank, and it does not appear that any demand was made for the amount until a long time after the receiver had taken possession. Ordinarily an action cannot be maintained by a depositor against a bank until a formal demand has been made; and, of course, no interest can be recovered except that arising after the demand. The bringing of an action does not amount to a demand in such cases. *Payne v. Gardiner*, 29 N. Y., 146. But, if the bank, by words or conduct, denies the depositor's

right to his balance, it becomes presently liable to an action without formal demand, and interest would be recoverable as damages. All the facts are set forth in the complaint which justified and led to the action of the comptroller. The bank, by its default, initiated proceedings which resulted in a transfer of the moneys of its depositors to a receiver, and thus put it out of its own power to pay its depositors when called upon to do so. A demand, under such circumstances, would have been an idle ceremony. The bank cannot be permitted to say that the depositor should have made a demand, when, if made, it would have been nugatory and useless. It has been held that, in cases of insolvency, where a debt is payable on demand and no special demand is shown, interest is to be computed from the first publication of the proceedings in insolvency. *Brown v. Lamb*, 6 Metc., 203. Reason and analogy favor the application of the rule to the present case. Judgment is accordingly ordered for the plaintiff in each action as against the bank.

PEOPLE'S BANK v. NATIONAL BANK.

(11 Otto, 181-184. 1879.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This case was submitted to the court without the intervention of a jury. The court found the facts and gave judgment for the defendant. The plaintiff thereupon sued out this writ of error and brought the case here for review. The act of congress regulating the procedure adopted seems to have been carefully complied with. The People's Bank of Belleville, plaintiff, and the Manufacturers' National Bank of Chicago, defendant, in the court below, are respectively the plaintiff and the defendant in error here. For convenience, we shall speak of them in this opinion by their former designations.

The facts lie within a narrow compass, and there is no controversy about any of them. On the 8th of August, 1873, Henry E. Picket made his ten promissory notes of that date, each for \$5,000, all payable one year from date to his own order, indorsed by him, and bearing interest at the rate of ten per cent., payable semi-annually. Eight of these notes are described in the plaintiff's declaration. Picket delivered the notes to the defendant to be negotiated to the plaintiff, pursuant to a prior agreement between him and the defendant, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant. On the 8th of August, 1873, M. D. Buchanan, vice-president, and one of the directors of the defendant, with the knowledge and consent of the president and cashier of the defendant, who were also directors, but without any authority from the board of directors as a board, or of a majority of them individually, or any notification to the board of directors as a board, transmitted the notes to the plaintiff with a letter, in which occurs the following language: "In accordance with your telegram I herewith hand you ten notes of \$5,000 each, etc. . . . We debit your account \$50,000. . . . This bank hereby guaranties the payment of the principal sum and interest of said notes." This letter was written below one of defendant's letter-heads, and signed "M. D. Buchanan, vice-president." The notes were also indorsed, "Pay to the order of the People's Bank of Belleville. Henry E. Picket;" and below, "This bank

hereby guaranties the payment of this note, principal and interest, at maturity. M. D. Buchanan, vice-president Manufacturers' National Bank of Chicago." The defendant was the plaintiff's correspondent at Chicago, and the plaintiff's account with the defendant was debited with \$50,000 on account of the notes. At the same time, Picket's paper in the defendant's hands was canceled to the same amount. All the notes were protested at maturity for non-payment, and due notice was given to the defendant. Nothing has been paid on either of the notes. Besides a special count in the declaration upon the guaranty of each of the eight notes involved in this suit, there was a common count for money had and received. The case was submitted in this court without an oral argument. The opinion of the learned judge who decided the case in the circuit court is not in the record, and no brief has been submitted on behalf of the defendant. A few remarks will suffice to give our view of the law touching the rights of the parties.

§ 151. *A national bank may guaranty the payment of negotiable paper which it transfers.*

The national banking act (R. S., 999, sec. 5136) gives to every bank created under it the right "to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by *discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt*, by receiving deposits," etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. The doctrine of *ultra vires* has no application in cases like this. *Merchants' Bank v. State Bank*, 10 Wall., 604.

§ 152. — *its vice-president may make such guaranty. The bank is estopped to deny his authority.*

All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. *Wharton*, Ag., sec. 89; *Bigelow*, *Estoppel*, 423; *Railroad Co. v. Howard*, 7 Wall., 392; *Kelsey v. National Bank of Crawford County*, 69 Pa. St., 426; *Steamboat Co. v. McCutcheon & Collins*, 13 id., 13. A different result would be a reproach to our jurisprudence. Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count, is a point which we do not find it necessary to consider. See *United States v. State Bank*, 96 U. S., 33. The judgment of the circuit court will be reversed, and the case will be remanded with directions to enter a judgment in favor of the plaintiff in error; and it is so ordered.

BURTON v. BURLEY.

(Circuit Court for Illinois: 9 Bissell, 253-257. 1880.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—At the time the transactions which are the subject of controversy in this case took place, the City National Bank of Chicago was the correspondent of the First National Bank of La Crosse, and a large amount of business was done between the two banks, amounting often to the sum of \$100,000 per month. Generally the Chicago bank had a large balance in its hands to the credit of the La Crosse bank; and it was the custom of the Chicago bank to transmit regularly copies of the accounts between the two banks, showing the debits and credits, and these accounts were in all cases acknowledged by the La Crosse bank; and if there was any error or mistake it was pointed out. During the time this business was transacted, the La Crosse bank was in the habit of drawing checks and directing payment out of the funds in the hands of the Chicago bank; and everything concerning the matters in controversy in the case was done substantially in the same way as in other business matters between the banks; and not only was no objection made to the disputed charges, but they were admitted by the La Crosse bank, and everything that was done between the two banks was on the basis that the disputed charges were at the time acknowledged by the La Crosse bank. Sutor was formerly connected with the City National Bank of Chicago. He went to La Crosse and became the cashier of the First National Bank of that place, and remained in that position some time; and the result was, that he obtained the control of that bank and subsequently became president. There may have been some circumstances which enabled the president of the City National Bank, who held that position up to January, 1874, to know that Mr. Sutor was not a man of very large means, and that he would not have resources enough of his own to obtain the control of that bank; but admitting that to be so, the question is, whether there were facts known to authorize the officers of the bank here to conclude that at the time these various transactions took place, which are the subject of controversy, there was a fraud practiced upon the bank of La Crosse by Mr. Sutor. Fraud is not to be presumed. It must be proved. It is sufficient, of course, if it is proved by circumstances, which are sometimes the most satisfactory evidence to establish fraud.

§ 153. *Monthly accounts sent by one bank to another and accepted by the bank to whom sent estop the latter from disputing the items contained therein.*

Mr. Sutor owed the bank here for a loan that had been made. He had executed his note for the amount (\$7,000), and when he became president of the bank at La Crosse, he gave instructions to the bank here to charge the sum of \$2,000 to the La Crosse bank, and it was done; and he stated at the same time that he gave these instructions, that the balance of the amount which he personally owed, which, I take it for granted, referred to the note for \$7,000 which he had given, would soon be paid, and accordingly instructions were subsequently given to charge to the La Crosse bank the \$5,000 which was still due upon the note, and it was so charged. Besides this, which constitutes the main controversy in the case, it seems that a transaction took place between Mr. Sutor and Mr. Miner, the cashier of the City bank, by which the former purchased of the latter some real estate in Chicago or its vicinity, upon which Mr. Miner owed a balance evidenced by note, and this note Mr. Sutor had agreed to pay. That accordingly was taken up when it became due, by Mr. Sutor in the same

way, namely: By instructions to charge the amount to the La Crosse National Bank. If that were all there was in these transactions, it might be contended with some plausibility on the part of the plaintiff that it was not liable for the charges that were made by the City National Bank. But that is not all. Accounts were made out from time to time and transmitted to the La Crosse National Bank, in which were included the charges which are the subject of controversy, and made against the La Crosse bank by the City National Bank, and entered as payment *pro tanto*, on the amount due from the Chicago bank to the La Crosse bank, for deposits made by the latter from time to time. The receipt of these accounts was acknowledged by the La Crosse bank as they were forwarded, and it was then stated that the accounts conformed to the books of the La Crosse bank, although it turned out that in fact they did not so conform, which fact, however, was unknown to the Chicago bank. One of the notes, it seems, was transmitted to Mr. Sutor—the note which he was to pay for Miner. There is no evidence what became of the other note, but the facts prove the existence of the note given by Sutor to the bank here, and its payment in the way stated, viz.: In consequence of instructions from the president of the La Crosse bank.

In relation to the checks given in Chicago, by Mr. Sutor, as president of the bank, it is true that the general business of an officer of a national bank is to be transacted at its regular place of business. At the same time we know that in the course of business between banks occasionally officers of banks do give orders and instructions away from the place of business of the bank. And if they are within the general scope and authority conferred upon the officers, they may be binding upon the bank. But all accounts of this kind were included in those transmitted to the La Crosse National Bank. What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each other. One bank would never know what to do on instructions given, or a charge made. Here is an "individual" account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made and the account rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake, or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank, or else banks must cease doing business with each other. And it ought to be so. Where a bank, established under an act of congress, or in any other way, elects its own officers, the men who are interested in the bank, the stockholders, the depositors, ought to be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general mercantile usage of banks. So that, in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat*, but that admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the City bank was that Mr. Sutor had made some transactions with the

La Crosse bank by which he was authorized to act, and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City National Bank. If the defendant insists, the court must certify to the balance due from the La Crosse bank to the City bank, because I hold that these items of account which are the subject of controversy constitute a valid charge against the La Crosse National Bank.

This is a controversy between the creditors of two insolvent banks, and I think the loss occasioned by the wrong of the officers of the La Crosse bank should fall on the creditors of that bank rather than on those of the Chicago bank.

§ 154. *Suits on claims.*—The bank may be sued and judgment obtained against it after the appointment of a receiver; but such judgment has no preference over those claims which are allowed by the receiver and are not a lien upon the assets of the bank. *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 383. See the case, §§ 252-253.

§ 155. *Place of business.*—The national currency act as to the place of business of the bank does not invalidate checks certified by its cashier away from his banking house. *Merchants' Bank v. State Bank*, 10 Wall., 604.

V. LOANS AND DEPOSITS.

SUMMARY—*Cannot loan on its own stock*, § 158.—*May compromise a claim*, § 157.—*Loan on trust funds; relation of banker and depositor*, § 158.—*Cannot guaranty personal obligation of customer*, § 159.—*Loan on personal security*, § 160.—*Excessive loan*, § 161.—*Loan on negotiable paper*, § 162.—*Borrower cannot plead ultra vires*, § 163.

§ 156. A national bank cannot make a loan or discount on the security of shares of its own capital stock. A permanent deposit by one bank with another is a loan of money. *Bank v. Lanier*, §§ 164-169.

§ 157. A national bank may, by way of compromise, pay out a larger sum for certain stocks from which it was honestly believed the bank might ultimately make its claim or diminish the threatened loss. *First National Bank v. National Exchange Bank*, §§ 170, 171.

§ 158. A banker lending money on securities, which he has notice are trust funds, is liable for the value of the property converted. The relation between a bank and its depositor is that of debtor and creditor, but trust funds do not change their character by being deposited in a bank. Where a bank seeks to assert a lien against a trustee depositor growing out of his individual transactions, it is affected by notice of the trust and liable accordingly. Opening the account in the bank as trustee is notice to it of the trust. *National Bank v. Insurance Co.*, §§ 172-180.

§ 159. A national bank has no authority to guaranty the personal obligation of a person depositing collateral security. *Seligman v. Charlottesville National Bank*, §§ 181, 182.

§ 160. A national bank may loan its money on personal security, but cannot loan its credit. *Ibid.*

§ 161. A loan by a national bank exceeding one-tenth of its capital stock is not void. *Shoemaker v. National Mechanics' Bank*, §§ 183-185.

§ 162. A national bank may loan its money on negotiable paper secured by collaterals. *Ibid.*

§ 163. A borrower from a national bank is not permitted to plead in bar of a suit, on his debt, that the bank exceeded its powers in loaning him the money. *Gold-Mining Co. v. National Bank*, §§ 186-188.

[NOTES.—See §§ 189-192.]

BANK v. LANIER.

(11 Wallace, 369-378. 1870.)

ERROR to U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—Culver was the owner of one hundred and fifty shares in a national bank, which he pledged with the bank to secure deposits which the bank might make with the house of which Culver was a member. The

shares purported to be transferable on the books of the bank only on the surrender of the certificates. Culver sold one hundred and thirty-eight shares to Lanier and Handy, but the bank refused a transfer. In a suit against the bank it pleaded three pleas, the first and third setting up the pledge of the stock as above, and that a part of the stock had been sold to liquidate a balance due from Culver's house. The substance of the second plea is stated in the opinion. Demurrers to the pleas were sustained, and, the bank refusing to answer further, judgment was rendered against it.

§ 164. *It is unlawful for a national bank to take as a security for a loan its own stock.*

Opinion by MR. JUSTICE DAVIS.

It is unnecessary to decide whether the first and third pleas would answer the declaration if the transaction pleaded were lawful, because the directors of the bank were forbidden by law from dealing with Culver in the manner they did. At the time this proceeding took place the currency act of 1863 had been superseded by the act of June 3, 1864, which expressly repealed the former act. It is, therefore, by the provisions of the latter act that the conduct of banking associations must be governed, whether they were organized before or after it became a law. And in looking into this act we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see that if the power were given to a bank to loan money on the security of its shares it would imply, also, a power to become the owner of those shares, and this congress intended to guard against. These institutions were created to subserve public purposes, and not the mere private interests of their stockholders. And in no better way could this object be attained than by placing shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time were the debt secured outside of the shares of the bank. But it is unnecessary to seek for the reason of this prohibition, as the provision concerning it is explicit and free from ambiguity.

§ 165. *A permanent deposit by one bank with another is a loan.*

Although the section in question forbids loans or discounts by a bank on the security of its own shares of stock, it is argued that this inhibition does not extend to the case of deposits made by one bank with another. But a deposit is nothing but a loan of money, and is within both the letter and spirit of the provision. It is well known that country banks keep on deposit in New York, with bankers and merchants, a considerable amount of money for their own convenience, for which they receive more or less of interest. But whether interest is obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loans of money, and the reason of the rule is equally applicable to them.

§ 166. *Relation between banker and depositor.*

The banker is accountable for the deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it.

In both cases money is borrowed, to be returned in a greater or less period of time, according to the contract of the parties. Without pursuing the subject further, it is clear that the contract between the South Bend Bank and Culver was illegal, and cannot, therefore, be pleaded in avoidance of any duty imposed on the bank. It would seem, from the date of the certificates issued to Culver, that as soon as he took the stock he pledged it, and the bank is therefore without the excuse of endeavoring to secure a pre-existing debt contracted in good faith. The contract in its inception was in violation of law, and the bank cannot complain if it is made to suffer in consequence of it.

§ 167. *A bank has no lien for its loans to its own stockholders on their stock in the bank.*

The defense interposed by the second plea is equally unavailing to the plaintiffs in error. This plea assumes that the bank had a lien upon the stock of Culver for his indebtedness to it, without any special agreement on the subject, by virtue of the provisions of the thirty-sixth section of the currency act of 1863, restricting a shareholder from transferring his stock as long as he owes the bank, which remained in operation, although the section was repealed by the act of 1864, by means of a by-law adopted when the section was in force, declaring that the stock of the bank shall be transferable only on the books of the bank, *subject to the provisions and restrictions of the act of congress aforesaid.*

§ 168. *A by-law of a bank in derogation of a statute is void.*

If it be conceded that the by-law intended to embrace the restrictions contained in the thirty-sixth section, it is hard to see what good it accomplished, because, as long as this section was in force, it was the law of the corporation, known to all men, and did not need the aid of a by-law to render it operative. And if it be contended that a bank may, through the agency of a by-law, retain a particular section that has been repealed, it is difficult to see why it may not by the same means retain all the remaining sections of the repealed statute that are applicable to its business, and thus antagonize itself to the whole policy of congress on the subject. But of necessity a by-law cannot operate in this way, nor is there any reason to suppose it was intended that this one should have such an effect. In the absence of any action taken by the bank on the subject since the new law went into operation, the fair inference is that this by-law is used as an afterthought to serve the purposes of this suit. Congress evidently intended, by leaving out of the law of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them.

It remains to be seen whether, on the case stated, Lanier and Handy can recover of the bank for a breach of corporate duty, notwithstanding the specific shares had already been transferred to other persons through the power of attorney which Culver gave when he attempted to pledge his stock as security for the deposits to be made with his New York house. And, in considering this question, we are relieved of any necessity of deciding between conflicting equities, for this suit does not seek to disturb the title of the adverse purchasers to the specific stock. It leaves them in possession of the property, and undertakes to subject the bank to damages for refusing to transfer the stock to the defendants in error. And, as we view this controversy, it makes no difference whether the transfers were actually made to other parties before or after the

bank received notice of the assignment of the stock certificates by Culver to Lanier and Handy.

§ 169. *A national bank that permits a transfer of its stock on its books without the surrender of the certificates becomes liable to the party injured.*

The power to transfer their stock is one of the most valuable franchises conferred by congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates. In this state of case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the directions given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession. It is therefore clear, in making their purchase of Culver, that they had a right to rely on the certificates as securing to them the stock which they represented. And it is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty, and as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury. These views dispose of this case, and they are sustained by recent decisions in the court of appeals of New York and the supreme court of Connecticut (*Bridgeport Bank v. New York & New Haven Railroad Co.*, 30 Conn., 270; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y., 30), and, as we are advised, they also are supported by the supreme court of New Jersey in a case not yet reported.

Judgment affirmed.

FIRST NATIONAL BANK v. NATIONAL EXCHANGE BANK.

(2 Otto, 122-129. 1875.)

ERROR to the Court of Appeals of Maryland.

STATEMENT OF FACTS.—Plaintiff deposited with Bayne & Co., as security for an advance, a certificate of deposit, in a transaction looking to an increase of its capital stock. This certificate was indorsed and delivered by Bayne & Co. to the National Exchange Bank. Plaintiff deposited in New York a sum of money sufficient to satisfy the certificate, and received notice from Bayne & Co. that it was discharged. Bayne & Co. failed, and plaintiff was then notified by defendant that it held the certificate. To compromise the matter plaintiff paid the defendant \$40,000, and took certain stocks belonging to Bayne & Co., which were held as collaterals by defendant. Plaintiff afterwards sued to recover the \$40,000. Judgment for defendant.

Opinion by WARRE, C. J.

The question presented for our consideration in this case is whether a national bank, organized under the national banking act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

§ 170. *To make a doubtful debt the bank may pay a larger sum so as to obtain certain stocks, in the honest belief that ultimate loss might thereby be avoided.*

A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." R. S., sec. 5136, par. 7; 15 Stat., 101, sec. 8. Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances. To some extent, it has been thought expedient in the

national banking act to limit this power. Thus, as to real estate, it is provided (R. S., sec. 5137; 13 Stat., 107, sec. 28) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (sec. 5201; 13 Stat., 110, sec. 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for, and in payment of, debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

§ 171. *A compromise of a doubtful debt owing to a bank, by accepting certain stock in satisfaction thereof, is not a "dealing in stocks."*

Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner v. Bank of U. S.*, 8 Wheat., 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices. It is difficult to see how a debt due from, or a contested obligation resting upon, a bank occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterwards collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was, on this account, not only the right, but the duty, of the officers and agents of the plaintiff to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be,—a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the court of appeals did not err in so holding.

Judgment affirmed.

NATIONAL BANK v. INSURANCE COMPANY.

(14 Otto, 54-77. 1881.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—The Connecticut Mutual Life Insurance Company of Hartford, in the year 1864, appointed A. H. Dillon, Jr., its general agent for the territory consisting of the states of Maryland, Delaware, West Virginia, and the District of Columbia. He opened an office at No. 8 South street, Baltimore, conspicuously designated by signs as his place of business as general agent of the Connecticut Mutual Life Insurance Company. It was his duty, among others, to collect and receive premiums on policies issued by the company, from persons residing within his territory, and remit the same to the company at Hartford. This he usually did twice a month, finally accounting for the business of each month at its close. The mode of remitting was by checks upon a Baltimore bank to the order of the secretary of the company. To this end he at first opened an account with John S. Gittings & Co., transferred afterwards to the Chesapeake Bank, and on April 1, 1871, to the appellant, a national bank, then recently organized, whose banking house was across the street from his office. The account was designated on its books as follows: "Dr. Central National Bank in account with A. H. Dillon, Jr., gen'l ag't. Cr." To the credit of this account he deposited from time to time premiums collected for the insurance company, and remitted twice a month his checks, signed by him as general agent, and payable to the order of Jacob L. Greene, secretary of the appellee. When the premiums were paid by the checks of others, they were indorsed by him as general agent, and deposited to the credit of this account. In such instances an indorsement in this form was required by the bank. Dillon also deposited to the credit of this account, from time to time, various amounts of money received by him from other sources than from premiums belonging to the appellee, and drew upon this account checks for money applied and paid to his own use. The aggregate of the deposits made, as shown in this account, from the beginning till it was closed, amount to \$470,753.05. There were drawn against it, in all, four hundred and eleven checks, of which sixty-eight were on their face payable to the order of Greene as secretary of the appellee, representing, however, much the larger part of the gross sum of the deposits.

On June 12, 1874, this account was finally closed, with a balance, as between deposits and checks, of \$11,000.86. At that date Dillon owed an amount larger than this to the insurance company, and the proof is clear that the whole balance then shown by the account, as above stated, was the proceeds of collections of premiums made by him as its agent. His current deposits of premiums in this account included his own commissions as agent. Before opening this account with the Central National Bank, on March 9, 1871, Dillon had opened another account with it, in the name of his wife, Mrs. A. P. Dillon. This account was kept open until May 1, 1873, which is the date of the last entries, when it was balanced and closed. The deposits to the credit of this account were made by Dillon, and the checks were drawn by him in his wife's name. All the transactions represented in it were for his individual account. On both these accounts Dillon was, by agreement with the bank, allowed interest, which he collected for his individual use.

On March 14, 1872, Dillon was in distress for money to make good his mar-

gins on some speculations in stock, and applied to O'Connor, the president of the bank, for a loan. He explained the nature, extent and cause of his necessity to O'Connor, who, indeed, was already aware that he was in the practice of stock speculation, having been interested with him in some ventures of that character. O'Connor testifies that he declined making the loan without security, when Dillon proposed his wife as security for the amount required, not to exceed \$12,000, to be drawn upon checks in her name, which, if not made good in a few days, were to be taken up by a note signed by her, assuring O'Connor that certain real estate owned by her where they resided in Baltimore, with its furniture, was worth at least \$15,000 or \$20,000. He also urged, says O'Connor, that he kept a valuable account with the bank, and as he had never asked before for any loan, he thought he was entitled to it. The reference, doubtless, was to his agency account. The loan was made, the money being paid by the bank on checks drawn in the name of Alice P. Dillon, to the amount of \$13,000, on March 14, 15 and 16, 1872. These checks were debited to the bank account in her name, and constituted an overdraft of \$12,067.14. On April 2, 1872, the bank discounted Mrs. Dillon's note for \$12,000, and carried the proceeds to the credit of this account, in order to change the form of the debt. This note was renewed from time to time, the interest being paid in some instances by Dillon's check as general agent, charged to the account kept by him in that name. It was reduced at one time by a payment of \$2,000, paid in money. It was then carried in the same way until December 11, 1873, when the note of Mrs. Dillon for \$10,000 was given, dated November 29, 1873, at six months, falling due June 1, 1874. This note was signed by Dillon and his wife, in their own handwriting, both as makers and indorsers. The discount upon it, and the interest accrued on the prior note, overdue for some time, of which it was the renewal, making in all \$333.34, was paid to the bank by Dillon's check as general agent. The account in the name of Mrs. Dillon was balanced on May 1, 1873, by two entries of \$12,000 each, representing the debt as it then stood; and that account was closed. The note thereafter appeared only in the discount ledger, until it was charged up, as hereafter stated. It was expressed to be payable at the Central National Bank of Baltimore. The same day this note was given, November 29, 1873, an agreement was made in writing between the bank, by resolution of the directors, and Dillon and his wife, "that in consideration of Alice P. Dillon being a stockholder in this bank, and of A. H. Dillon, Jr., being a customer of the bank, their note for \$10,000, dated November 29, 1873, at six months, be discounted at six per cent. per annum, provided only that it be agreed in writing between the makers and indorsers of said note and the bank, that at the maturity of the note \$5,000 must be paid, and a new note at six months, to be discounted at six per cent., which at its maturity must be paid in full, being in full payment of the loan." In addition to these two accounts there was a third, entitled on the books of the bank, "A. H. Dillon, Jr.," spoken of in the testimony as his individual account. The first entry is dated October 15, 1873, the last, December 11, 1873. There are eight items on each side, amounting to \$28,337.50. In the first three items it is testified that Dillon had no interest at all. They represent transactions made by him for the bank itself. The last item in the account is \$10,000, being proceeds of his note discounted, which were used to take up a prior one, then matured.

On June 1, 1874, the note given by Dillon and his wife for \$10,000, dated November 29, 1873, at six months, became due and was not paid. By order of

the bank it was that day charged to Dillon in his account as general agent. In ignorance of that fact, he continued to make deposits in that account and draw checks upon it till June 12, 1874, when it was closed, showing a credit balance at that date, if the note of \$10,000 was not properly chargeable, of \$11,000.86. On June 10, 1874, Dillon drew his check as general agent on the bank for \$8,000 to the order of Greene, the secretary of the insurance company, and remitted it to him at Hartford. On June 13th it was presented to the bank for payment, and payment refused, on the ground that there were not funds to the credit of the drawee sufficient to pay it. In the settlement of his agency accounts with the company for May and June, 1874, he was allowed a credit for the amount of this balance in the Central Bank, \$11,000.86, and paid in addition, in full of his account to June 30th, \$4,550.66. On June 11th the directors of the bank, by resolution, recite the agreement made in respect to the \$10,000 note, on November 29, 1873, when it was discounted; that it had not been complied with; that the note was made payable at the bank; and declare that "this board approve of the act of the acting cashier in charging said note in full to the account and funds of A. H. Dillon, Jr., general agent," etc.

On July 18, 1874, the insurance company filed a bill in equity in the circuit court of Baltimore city against the bank to recover the balance, which it alleged remained in the account of A. H. Dillon, Jr., general agent, \$11,000.86, claiming it to be a fund received by him in his fiduciary character, as its agent, which they had a right to follow and reclaim as against the bank. To this bill the bank appeared and answered, denying its equity. The insurance company filed an amended bill on March 4, 1875, in which it repeated the allegations of the original bill, and further averred that the defendant bank had taken proceedings under the national bank act to wind up its business and cease to act as a national bank in the city of Baltimore, and that if it be permitted to do so, distributing its assets among its stockholders, the complainant will have no remedy except by a multiplicity of suits against individual stockholders, many of whom are not within the jurisdiction. It therefore prays, in addition to an account and a declaration that the fund in question is a trust fund, of which the complainant is beneficial owner, that an injunction may be granted restraining the bank from paying to its stockholders its assets without retaining a sufficient amount to satisfy the complainant's demand.

To the amended bill the defendant filed what are designated as pleas, as follows: 1. That the plaintiff is not in any sense a creditor of the defendant. 2. That there never was nor is any privity between the plaintiff and the defendant as to the various matters alleged in the bill. 3. That the court had no jurisdiction as to the matters alleged, the remedy, if any, being complete and adequate at law.

And afterwards an additional plea: 4. That under the provisions of the acts of congress, in reference to national banks, it is exempted from the process of injunction as prayed for.

By the amended bill A. H. Dillon, Jr., was made a party defendant. He appeared and filed his answer to the original and amended bill; but, having been lost or mislaid, it is not contained in the transcript of the record. Subsequently, on April 10, 1877, the cause was removed from the state court to the circuit court of the United States, on the petition of the defendant, the Central National Bank.

The bank, on May 23, 1878, filed a motion to dismiss the bill, on the grounds: 1. That the bank, by a vote of its shareholders, owning two-thirds of its stock,

taken July 15, 1874, had gone into liquidation, in pursuance of sections 5220, 5221 and 5222 of the Revised Statutes, and had thereby become dissolved. 2. And that the complainant, on June 8, 1878, had filed in the circuit court of the United States its bill of complaint, by virtue of section 2, c. 156, of an act of congress approved June 30, 1876, entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," praying process against said bank and against the persons who were shareholders thereof at the time the same went into voluntary liquidation, and seeking the enforcement of the same demand sought to be enforced in this case, which is still pending.

This motion was overruled. The cause having been set down for hearing, the complainant moved for leave to file a general replication to the original answer, *nunc pro tunc*, and also to file a replication to defendant's first plea, which motions were granted; and to deny the legal sufficiency of the defendant's second and third pleas, setting the said two pleas for argument, which was overruled. The motion to dismiss the bill on the ground that the bank had gone into liquidation, and was thereby dissolved, was renewed on June 10, 1878, with the additional averment that in the meantime all its property and assets had been distributed among its shareholders, and that the bank was wholly and finally closed, and had ceased to have a corporate existence. This motion was overruled as having been filed after the cause had been argued and submitted, and after the court had orally pronounced its opinion. And on the same day a decree was passed reciting that, the cause standing ready for hearing, and having been argued and submitted upon the bill, answer, pleadings and other proceedings and evidence in the cause, and decreeing payment by the bank to the complainant of the amount of the fund claimed, with interest. From this decree the bank prosecutes this appeal.

The contention of the appellant in opposition to the decree below, upon the merits, is that the account of A. H. Dillon, Jr., general agent, with the bank, was an individual account with him as a depositor, which created the relation of debtor and creditor between them, and to which no other party was or could be privy; that the style in which it was kept, of general agent, was merely a *descriptio personæ*, and furnished no indication that the money deposited belonged to the depositor in any fiduciary capacity; that it described merely the business in which he was engaged as that of a general agency for whomsoever might employ him; that in point of fact the account embraced deposits from various sources, and was used as a medium for payments of every description, according to the will of the depositor; that the bank had no notice of any equitable claim of the complainant, nor of the facts on which its claim rests; that, consequently, it had the right to treat the account as a dealing with Dillon individually, in which, so far as the bank was concerned, no one else had any interest, legally or equitably, and subject to its lien as a banker for any overdue obligation of the depositor. It is claimed further, in support of the bank's position, that the discount of the note afterwards charged to this account was made originally upon the faith and credit that the latter was Dillon's individual property. But this we find to be distinctly and fully negatived by the circumstances in proof. There was a considerable balance to the credit of this account when the original debt was contracted and at each time when it was renewed, but at no time does it appear that the suggestion was made that it should be applied, in whole or in part, to pay or reduce the indebtedness. The debt was first charged in the account kept in the name of Mrs. Dillon, and

never appeared in the other till it was finally charged up for payment. In the original conversation that resulted in the agreement for the loan, O'Connor, the president of the bank, demanded security, and was satisfied with the responsibility of Mrs. Dillon, as the supposed owner of their residence in Baltimore, and it was not until after O'Connor learned that this had been conveyed to another that he conceived the idea of charging the note, when it should become due, if it remained unpaid, to the account of Dillon as general agent. The existence of this account as a profitable one to the bank was alleged as a reason by Dillon why he should have the accommodation, but it was not pledged for the payment of the loan, either in express terms or by any acts or conduct from which such an intention can be inferred. And no such claim is made by the directors of the bank, either in their resolution of November 29, 1873, authorizing the discount of the last six-months note, or that of June 11, 1874, justifying the act of the cashier in finally charging it up to the account of Dillon, as general agent.

We find it also to be fully proven that the bank knew that Dillon was the agent for the insurance company; that it was his business and duty to collect and remit to it the premiums on policies of life insurance as they accrued; that the bank account in his name as general agent was opened in that way to be used for that purpose; that in point of fact such premiums were collected and deposited for accumulation to be remitted, and were remitted by checks on that account, and that they constituted much the larger part of the fund which entered into it.

§ 172. *A banker lending money on securities which he has notice are trust funds is liable for the value of the property converted.*

It will be observed that the question arising here is not what the rights of the parties would be if the note had been taken up by Dillon's check upon that account, the bank having no knowledge of its character, except what might be inferred from the use of the words "general agent" at its head. Here the attempt is made, with the actual knowledge which we find imputable to the bank, and without Dillon's assent, to pay itself his overdue note out of a fund for which, as agent of the insurance company, he was bound to account to it. In the case of *Duncan v. Jaudon*, 15 Wall., 165, this court decided that a banker lending money to a person, for his private use, on the security of stocks, the certificates of which showed that he held them as trustee for another, was chargeable, as a party to the breach of trust, for the value of the trust property converted, and cited with approbation the similar decision in *Shaw v. Spencer*, 100 Mass., 382, where the certificates were in the name of "A. B., trustee," without naming a *cestui que trust*. In that case it was held that the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, does so at his peril.

§ 173. *The relation between a bank and a depositor is that of debtor and creditor, but trust funds do not change their character by being deposited in a bank. The bank is affected with notice of the trust.*

A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor as *trustee*, differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the

latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation.

§ 174. *What is notice to the bank of the trust.*

In such circumstances it is merely an application of the principle of set-off, and is illustrated by the case of *Bailey v. Finch*, Law Rep., 7 Q. B., 34. There the plaintiff, as trustee of a bankrupt banking firm, sought to recover a balance of a banking account which had been overdrawn. The defendant sought to set off a balance due to him as executor of A., in which name he had another account, and proved that as residuary legatee he was beneficially entitled to this balance, the legatees being otherwise satisfied. It was held that the effect of the account being in the name of the executor was to affect the bank with notice, if there were any equities attaching to the fund, but that under the circumstances there were no such equities as to prevent the defendant from treating the balance as a fund to which he was beneficially as well as legally entitled, and that consequently he was entitled to set it against the plaintiff's claim. Cockburn, C. J., said: "There can be no doubt that in point of law the estate and effects of the deceased testatrix passed to the defendant as executor. And although it may be for his convenience to open an account in his own name as executor instead of in his own name as private customer, the whole effect of that is, I apprehend, to affect the bank with the knowledge of the character in which he holds the money. Therefore, if there were persons beneficially interested in that fund, the bank might be liable to be restrained by proceedings in equity from dealing with the fund as if it were one in which their customer, the defendant, were beneficially interested, absolutely without reference to any trust or beneficial interest to which it was subject." In the same case Blackburn, J., said that opening the account as executor operated "as a notice to them, as a statement to the bank—'This account which I am opening is not my own unlimited property, but it is money which belongs to the estate which I am administering as executor; consequently there may be persons who have equitable claims upon it.' The bank would have been bound by any equity which did exist of which they had notice at the time the bank became bankrupt."

In the case of *Pannell v. Hurley*, 2 Col. C. C., 241, the depositor, having two accounts, one in trust, the other in his own name, drew his check as trustee to pay his private debt to the banker. The vice chancellor, Knight Bruce, put the case thus: "Money is due from A. to B., in trust for C. B. is indebted to A. on his own account. A., with knowledge of the trust, concurs with B. in setting one debt against the other, which is done without C.'s consent. Can it be a question in equity whether such a transaction stand?"

In *Bodenham v. Hoskyns*, 2 DeG., M. & G., 903, the principle was stated to be one, acted upon daily by courts of equity, "according to which a person who knows another to have in his hands or under his control moneys belonging to a third person cannot deal with those moneys for his own private benefit when the effect of that transaction is the commission of a fraud upon the owner." In the case of *Ex parte Kingston, In re Gross*, Law Rep., 6 Ch. App.,

632, a county treasurer had two bank accounts, one headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The checks which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the bank treated the accounts as one account, and the interest on the balance in his favor was carried to the credit of his private account. The manager of the bank knew he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. He absconded, his private account being overdrawn and the police account being in credit. It was held that the bank was not entitled to set off the one account against the other, but that the county magistrates could recover the balance standing to the credit of the police account. Sir W. M. James, L. J., said: "In my mind, this case is infinitely stronger than those referred to during the argument, in which a similar claim on the part of bankers was disallowed; for in those cases the bankers relied on checks drawn by the customers; and if a banker receives from a customer holding a trust account a check drawn on that account, he is not in general bound to inquire whether that check was properly drawn. Here the customer has drawn no check, and the bankers are seeking to set off the balance on his private account against the balance in his favor on what they knew to be a trust account."

§ 175. *Jurisdiction of a court of equity as between the cestui que trust and the bank holding the trust fund on deposit.*

It is objected that the remedy of the complainant below, if any existed, is at law and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by this court in *National Bank v. Insurance Company*, 103 U. S., 783; and, conversely, for the balance due from the bank, no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, To whom in equity does it beneficially belong? If the money deposited belonged to a third person and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account. In the case of *Pennell v. Deffell*, 4 DeG., M. & G., 372, 388, Lord Justice Turner said: "It is, I apprehend, an undoubted principle of this court, that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." In the same case, Lord Justice Knight Bruce said (p. 383): "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done,

had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors, and the general creditors after his death on one hand, and the trust on the other." He added (p. 384): "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own."

§ 176. *As long as trust property can be traced and followed, it remains subject to the trust. - Where trust funds and individual funds have been mixed, it is all primarily liable to the trust.*

Vice-Chancellor Sir W. Page Wood, in *Frith v. Cartland*, 2 Hem. & M., 417, 420, said that *Pennell v. Deffell* rested upon and illustrated two established doctrines. One was that "so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust;" the second is, "that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own." The case of *Pennell v. Deffell*, *supra*, was the subject of comment by Fry, J., in *In re West of England & South Wales District Bank, Ex parte Dale & Co.*, 11 Ch. D., 772. Strongly approving the decision in principle, he felt bound, nevertheless, by what he considered the weight of authority, not to apply it in the circumstances of the case before him, where there had been a mingling of trust money with individual money. He said, however: "Does it make any difference that, instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in which, if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own."

The whole subject of this discussion was very elaborately and with much learning reviewed by the court of appeal in England, in the very recent case of *Knatchbull v. Hallett, In re Hallett's Estate*, 13 Ch. D., 696. It was there decided that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, although it was mixed with his own moneys; and in that particular the court overruled the opinion in *Ex parte Dale & Co.*, *supra*. It was also held that the rule in *Clayton's Case*, 1 Mer., 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular *Pennell v. Deffell* was not followed. The master of the rolls, Sir George Jessel, showed that the modern doctrine of equity as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; that there is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is

no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account. He adopts the principle of Lord Ellenborough's statement in *Taylor v. Plumer*, 3 M. & S., 562, that "it makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, 1 Salk., 161; for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." But he dissents from the application of the rule made by Lord Ellenborough, when the latter added, "which is the case when the subject is turned into money and confounded in a general mass of the same description," for equity will follow the money even if put into a bag or an undistinguishable mass by taking out the same quantity. And the doctrine that money has no ear-mark must be taken as subject to the application of this rule. The court of appeals had previously applied the very rule as here stated in the case of *Birt v. Burt*, reported in a note to *Ex parte Dale & Co.*, 11 Ch. D., 773.

The principle is illustrated by many cases in this country. In *Farmers' & Mechanics' National Bank v. King*, 57 Pa. St., 202, a collector of rents deposited moneys of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership was given by the principal. It was held that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could. The law of the case was stated by Judge Strong in the following language: "It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability extinguished, in the absence of interference by his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its repayment, and gave notice to the bank of their ownership and of their unwillingness that the money should be paid to the agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor." The same doctrine was strongly maintained by the New York court of appeals in the case of *Van Alen v. American National Bank*, 52 N. Y., 1. In that case it was decided that when an agent deposits in a bank to his own account the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. In the course of the opinion *Church, C. J.*, said: "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank

might have prevented any transfer or the creation of a lien by the depositor or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important." This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court. *Oliver v. Piatt*, 3 How., 333; *May v. LeClaire*, 11 Wall., 217; *Duncan v. Jaudon*, 15 id., 165; *Bayne v. United States*, 93 U. S., 642; *United States v. State Bank*, 96 id., 30.

The relation of Dillon to the insurance company was one of confidence and trust. He was its agent for the collection of premiums, which belonged to it no less when in his hands than before their receipt by him. He was to account for them, under its directions, and in his entire dealing with them was bound to obey its orders. He was not merely its debtor for the amount in his hands. He held the fund for the use and as the property of the company. *Foley v. Hill*, 2 H. of L. Cas., 28. In a direct suit between them, *Dillon v. Connecticut Mutual Life Insurance Co.*, 44 Md., 386, it was so expressly ruled, the Maryland court of appeals saying: "Dillon not only held the fiduciary relation to the company of its agent, but was acting, in respect to this and all the money he collected while such agent, under specific directions as to what he should do with it, directions which the company had the right, for its own protection and that of its policy holders, to have specifically performed. . . . He must, we think, be regarded and treated as a trustee, and the fund thus in his hands must be considered as so far impressed with a trust as to give a court of equity jurisdiction of the case on that ground, if on no other." Evidently the bank has no better right than Dillon, unless it can obtain it through its banker's lien. Ordinarily that attaches in favor of the bank upon the securities and moneys of the customer, deposited in the usual course of business for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive.

In the present case, in addition to the circumstance that the account was opened and kept by Dillon in his name, as general agent, and all the presumptions properly arising upon it, we have found that other facts, proven on the hearing, justify and require the conclusion that the bank had full knowledge of the sources of the deposits made by Dillon in this account, and of his duty to remit and account for them as agent of the insurance company. It is consequently chargeable with notice of the equities of the appellee.

In our opinion, the equity of the case, upon the merits, was manifestly with the appellee. But the appellant has assigned other errors upon the decree which remain to be considered. It is claimed that the suit, while in the circuit court, abated by reason of the dissolution of the defendant below as a corporate body.

§ 177. *A national bank in voluntary liquidation is not dissolved, but may sue and be sued.*

The Central National Bank was organized January 16, 1871, under the act of June 3, 1864, c. 106 (13 Stat., 99), and the amendments thereto. Its articles

of association provided that "this association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act." On July 15, 1874, three days before the complainant's bill was filed, at a meeting of the stockholders of the bank held pursuant to law, "it was voted by the stockholders of said association owning more than two-thirds of its stock, that said association go into liquidation and be closed." It is certified by the comptroller of the currency "that the Central National Bank of Baltimore went into voluntary liquidation on July 15, 1874, under sections 5220 and 5221 of the Revised Statutes of the United States, and on January 8, 1875, deposited legal tender notes with the treasurer of the United States for the full amount of its outstanding circulation, as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department." It further appears that the bank ceased to do any new banking business after resolving to go into liquidation; paid its depositors and other creditors, so far as their claims were admitted; reduced its assets to cash and distributed the money among the shareholders, paying them back their capital in full, with an accumulation of two per cent. premium. The bank's lease of its banking house expired March 1, 1875, when its doors were closed, its clerks discharged, and afterwards its furniture removed and disposed of, and its signs taken down. On February 1, 1875, a special authority was issued by the board of directors, authorizing the president and acting cashier to act for and do all legal acts that might become necessary in the liquidation of the business of the bank. It is claimed that these facts show a dissolution of the corporation.

It is provided by section 5136 of the Revised Statutes that every national bank, duly incorporated, shall "have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law." By section 5220 it is also provided that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." Section 5221 requires that whenever a vote is taken to go into liquidation, notice of the fact shall be given to the comptroller of the currency, and publication made in newspapers, that the association is closing up its affairs, and notifying its creditors to present their claims for payment. Six months thereafter is given by section 5222, in which the association is required to deposit with the treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. Section 5224 further provides that when that deposit has been made, the bonds deposited to secure payment of its notes shall be reassigned to it. "And thereafter the association and its shareholders shall stand discharged from all liabilities upon its circulating notes, and their notes shall be redeemed at the treasury of the United States." In connection with the provision of the articles of association of the Central National Bank, already noticed, these are all the provisions of law that are supposed to affect the question.

It is to be observed that the sections under which the proceedings took place

which, it is claimed, put an end to the corporate existence of the bank, do not refer, in terms, to a dissolution of the corporation, and there is nothing in the language which suggests it, in the technical sense in which it is used here as a defense. The association goes into liquidation and is closed. It is required to give notice that it is closing up its affairs, and in order to do so completely and effectually, to notify its creditors to present their claims for payment. And the redemption of its bonds given to secure the payment of its circulating notes, by the required deposit of money in the treasury, is limited in its effect to a discharge of the association and its shareholders from all liability upon its circulating notes. The very purpose of the liquidation provided for is to pay the debts of the corporation, that the remainder of the assets, being reduced to money, may be distributed among the stockholders. That distribution cannot take place, with any show of justice, and according to the intent of the law, until all liabilities to creditors have been honestly met and paid. If there are claims made which the directors of the association are not willing to acknowledge as just debts, there is nothing in the statute which is inconsistent with the right of the claimant to obtain a judicial determination of the controversy by process against the association, nor with that of the association to collect by suit debts due to it. It is clearly, we think, the intention of the law that it should continue to exist, as a person in law, capable of suing and being sued, until its affairs and business are completely settled. The proceeding prescribed by the law seems to resemble, not the technical dissolution of a corporation, without any saving as to the common law consequences, but rather that of the dissolution of a copartnership, which, nevertheless, continues to subsist for the purpose of liquidation and winding up its business.

In the case of *Bank of Bethel v. Pabquique Bank*, 14 Wall., 383 (§§ 252-256, *infra*), the same question was made in reference to a national bank which, having become insolvent, by a refusal to pay its circulating notes, was put into liquidation by the comptroller of the currency, by the appointment of a receiver under other provisions of the bank act. It was there claimed, for the purpose of defeating a suit brought against the bank by name, that the appointment of the receiver, who had refused to admit and pay the plaintiff's claim, was a dissolution of the corporation. Mr. Justice Clifford, delivering the opinion of the court, recited the provisions of the law upon the subject, and said: "None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered, and the balance, if any, is paid to the owners of the stock or their legal representatives." p. 398. "Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly, if not entirely, upon the construction of the act of congress; and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs, under the provisions of the act which authorized its formation." p. 400.

In that case it was argued, as in this, that as the only constitutional warrant for the existence of a national bank was its connection with the government as a fiscal agent, the severance of that connection *ipso facto* deprived it of vitality. The same argument would render it incapable of returning to its stockholders their capital and accumulated profits. If it was a reasonable incident to its

living that it should contract debts, it is equally a reasonable incident to its dissolution that it should pay them. We see no constitutional impediment that prevents it. The same conclusion was reached by the court of appeals of Maryland in the case of *Ordway v. Central National Bank*, 47 Md., 217.

The second section of the act of June 30, 1876, c. 156, authorizing the appointment of receivers of national banks and for other purposes (19 Stat., 63), provides that when any national banking association shall have gone into liquidation under the provisions of section 5220 of the Revised Statutes, the individual liability of the stockholders, provided for by section 5151 of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

§ 178. *The filing of a creditor's bill to enforce the individual liability of stockholders does not preclude a remedy in equity against the bank itself.*

It appears that the appellee filed, January 8, 1878, in the circuit court of the United States for the district of Maryland, its bill of complaint against the appellant and the persons who were shareholders in the bank at the time it resolved to go into liquidation, under the provisions of that section. It is urged that the act of 1876 is itself evidence that the bank was dissolved as a corporation by the proceedings in liquidation, and that the pendency of the bill authorized by it was a bar to any further proceeding in the present suit. We see nothing in the act inconsistent with the continued existence of the bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have in the meantime been otherwise applied or shown to have been insufficient. It is a cumulative remedy and against other persons, and cannot be considered as an objection to the rendition of the present decree.

§ 179. *When a plea in equity may be disregarded.*

It is also assigned for error that the appellee failed to set down for argument or traverse the pleas of the defendant, as required by the thirty-eighth equity rule; but the pleas in this case were irregularly filed and defective, under the thirty-first rule, for lack of the affidavit of the defendant that they were not interposed for delay, and of the certificate of counsel that they were, in his opinion, well founded in point of law, and may well have been disregarded on that account. Besides, the second and third pleas were such only in form, as they merely alleged matters of law and not of fact. "The office of a plea," said Lord Eldon, in *Rowe v. Teed*, 15 Ves. Jr., 372, "generally, is not to deny the equity, but to bring forward a fact which, if true, displaces it." The first plea is open to the same objection; for, although it appears to negative the averment of a matter of fact essential to the complainant's case,—that he was a creditor of the defendant,—yet really it merely denies the conclusion of law, to be drawn from the whole of the case as stated in the bill. Every matter, therefore, covered by the pleas was necessarily embraced in the hearing upon the bill, answer and proofs. There was no issue tendered on matter of fact that was left undecided, and no matter of law affecting the merits that was not adjudged.

§ 180. *The want of a replication cannot be assigned for error on appeal, when the cause has been heard on bill, answer and proofs.*

It is also assigned for error that the complainant failed to file a replication to the answer. Leave to do so was granted by the court, on the complainant's motion; and although the transcript does not show that it was done, the parties went to the hearing as if it had been done, submitting the case upon the proofs which had been taken, as though a formal issue had been perfected. The same objection was made in the cases of *Clements v. Moore*, 6 Wall., 299, and *Laber v. Cooper*, 7 id., 565, under circumstances not distinguishable from the present, and for the reasons there stated it is overruled.

The absence of an answer by Dillon, and the want of an issue upon it, is also assigned for error. The transcript shows that an answer had been filed by Dillon, but had been lost or mislaid. This fact having been called to the attention of the court below, before the hearing, the circuit judge announced that he would not proceed with the hearing without the answer, if the respondent's solicitor, then present, objected to the hearing for that reason. No objection was made, and the hearing properly proceeded. For aught that appears, Dillon's answer may have been a confession of the truth of the allegations of the bill. We find no error in the record.

Decree affirmed.

SELIGMAN & CO. v. CHARLOTTESVILLE NATIONAL BANK.

(Circuit Court for Virginia: 3 Hughes, 647-651. 1879.)

Opinion by BOND, J.

STATEMENT OF FACTS.—The declaration in this cause sets out that J. & W. Seligman & Co., of New York, are bankers; that on the 14th day of May, 1875, B. C. Flanagan & Son made a proposition to the Charlottesville National Bank, in writing, to this effect: In consideration of the guaranty of a letter of credit to the extent say of (£5,000) five thousand pounds sterling, to be issued by J. & W. Seligman & Co., of New York, we propose to deposit with the Charlottesville National Bank business paper to the extent of \$35,000. For such amounts of said letter of credit as we may use we propose the bank shall discount of said paper at nine per cent. a sufficient amount to cover the amount used by us, holding the balance as collateral security for same; the bank to receive the money under the letter of credit which is used in the discount aforesaid. It is further agreed that we will take the risk as to any fluctuations in gold, so that the difference in rate of interest between that charged us and that paid by the bank shall not be less than at the rate of two per cent. per annum in favor of the bank, the bank having the benefit of any fluctuations which may increase their profit.

This proposition was accepted by the bank by the following resolution of its board: *Resolved*, That the president and cashier be and they are hereby authorized, in accordance with the proposition submitted by B. C. Flanagan & Son, to guaranty to Messrs. J. & W. Seligman & Co. drafts drawn under their letter of credit, in favor of B. C. Flanagan & Son to the extent of £5,000, on the deposit with the bank of business paper by Flanagan & Son as collateral security to the extent of \$35,000.

The plaintiffs aver that in consideration of this acceptance of Flanagan &

Son's proposition by the bank, they gave to Flanagan & Son a letter of credit for £5,000, as follows:

No. 1023.

NEW YORK, May 25, 1875.

MESSRS. SELIGMAN BROS., London.

Sirs: We herewith beg to open with you a credit in favor of Messrs. B. C. Flanagan & Son, of Charlottesville, Va., for £5,000, of which they will avail themselves either in their own drafts or the drafts of such parties as they may accredit with you at four months after sight. You will please honor said drafts to the above amount, advising us promptly of maturity

J. & W. SELIGMAN & Co.

Flanagan & Son deposited the \$35,000 business paper with the bank, and the bank gave its written guaranty to Messrs. J. & W. Seligman & Co., as follows:

In consideration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we guaranty to Messrs. J. & W. Seligman & Co. the prompt and punctual payment of all sums and amounts due them under their letter of credit No. 1023, for five thousand pounds sterling on the part of Messrs. Flanagan & Son, and we hereby hold ourselves liable for the prompt and complete payment of all amounts that may so become due to them, and for the exact fulfilment of all the conditions mentioned in the annexed receipt:

"NEW YORK, May 25, 1875.

"Bills receivable amounting to \$35,089.14 have been deposited with the Charlottesville National Bank by B. C. Flanagan & Son as collateral security for the within mentioned credit, in accordance with the resolution of the board of directors adopted in full board on 14th May, 1875."

Which guaranty and receipt are signed by the president and cashier of the bank. And the resolution further shows that Flanagan & Son gave plaintiffs the following receipt:

NEW YORK, May 25, '75.

GENTLEMEN: We have received to-day your letter of credit for £5,000 on London in our favor, dated to-day, and in consideration thereof we hereby agree that whenever advised of a draft having been drawn under said credit we will receipt your draft or reimburse you upon your notifying us of the date when due, for the amount of said bills, payable in New York, twenty-one days before the maturity of the bills in London, or their equivalent in cash. We will allow you two per cent. banker's commission on the amount of drafts made under the above credit, together with bill stamps, postage, etc., and deposit with you the following collateral, which we authorize you to dispose of at your discretion, in the event of our non-compliance with the above terms.

We further authorize you to cancel this letter of credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user.

B. C. FLANAGAN & SON.

Drafts were drawn against the letter of credit, in accordance with the agreement, which were ultimately paid by plaintiffs, Flanagan having failed to accept and pay the twenty-one day drafts spoken of in the receipt. The bank failed and was placed in the hands of a receiver by the comptroller of the treasury, and the plaintiffs allege that it is liable upon its above written guaranty for the amount of Flanagan & Son's draft remaining unpaid and held by them. To this declaration there is a demurrer; all errors in pleading are waived, and the question presented is whether, upon the facts above set forth, the plaintiffs are entitled to recover. The case is free from many difficulties that have arisen in like cases. It is not a contest against the corporation itself

pleading a want of power to make a contract from which it has derived no benefit, but which caused loss to others, such a defense having been justly held by many courts to be as odious as the plea of the statute of limitations on the part of an individual debtor; but it is a contest between creditors claiming the same funds where each party has the just right to contest the claim of the other in every legal manner.

§ 181. *A national bank, upon the deposit of collaterals, has no power to guaranty the obligations of the party making such deposit.*

Nor is there any question of notice to parties, upon which many decisions in the bank cases depend. Here the transaction is in writing chiefly, and stands between the original parties to-day as it did the day it was made. Under these circumstances we are to determine whether or not a national bank is authorized by the statute creating it to guaranty the paper of a customer for his accommodation; for this is the real transaction set forth in the declaration. We will admit for the sake of the argument what plaintiffs' counsel have urged at bar, that a bank may borrow money to aid its customers; but here the bank got no money; none of the money procured by the letter of credit was to go to it. All the bank had to expect was the profit it was to make from the discount it received from the collaterals placed in its hands to secure it from loss by reason of the pledge of its credit to plaintiffs. The Flanagans were to give their own drafts to take up those drawn against the letter. They agreed what commissions the plaintiffs were to charge. The bank had nothing to do with the transaction except to see, in the event of the failure of the Flanagans, that the plaintiffs were secure against loss. What a national bank is authorized to do is defined by the statute of which it is the creature. The section of the statute applicable here is 5136 of the Revised Statutes. By that section it is authorized to exercise all such powers as are incidental to banking, by discounting and negotiating promissory notes, bills of exchange and other evidences of debt. But certainly there is no discounting of promissory notes set forth in the declaration.

§ 182. *A national bank may lend money on personal security, but cannot lend its credit. (a)*

The cause of action is the written guaranty of the bank. To discount a note is to deduct the interest *in presenti* and pay over in money the face value of the note to the holder. Here the bank parted with no money. To negotiate a promissory note is either to buy or sell it, and so with a bill of exchange. Here the bank neither bought or sold any bills of exchange. It agreed to guaranty Flanagan's purchase of them from plaintiffs. By the same section the bank is allowed to lend money upon personal security; but it must be money that it loans, not its credit. Upon the deposit of the collaterals with the defendant by Flanagan, it loaned its credit to him to be used with plaintiffs. It is alleged, however, that the bank by reason of the powers granted to it incidental to banking could enter into this contract. But the incidental powers given are not the incidental powers given generally to all banking institutions, but only such as are incidental to banks allowed to do such things as are prescribed by the statute—such acts as are incidental to discounting and negotiating promissory notes and bills of exchange, and the loan of money on personal security, and the other acts of banking mentioned in the statute.

(a) The same point is decided in *Johnston v. Charlottesville National Bank*,* 3 Hughes, 637. It is also held that where a national bank issues drafts for the accommodation of a customer, a party taking such drafts as collateral security, with knowledge of the facts, cannot recover against the bank in the hands of a receiver.

We cannot see how this transaction can be brought within the powers of the bank granted by statute, and the demurrer must be sustained.

SHOEMAKER v. NATIONAL MECHANICS' BANK.

(Circuit Court for Maryland: 1 Hughes, 101-106; 2 Abbott, 416-424. 1839.)

Opinion by GILES, J.

STATEMENT OF FACTS.— This bill is not filed to have the charter of defendant as a national bank declared void for the causes mentioned in the fifty-third section of the act, to provide a national currency, etc., passed June 3, 1864. This would not be the appropriate proceeding for such a purpose. That could only be accomplished by a suit instituted by the comptroller of the currency. But this is a bill filed by one of the stockholders in the National Mechanics' Bank of this city, to restrain the president and directors of the said bank from pursuing a course which, he alleges, is a violation of the requirements of their charter under the said act, and by which they are wasting the assets of said bank, to the loss and injury of the complainant and its other stockholders.

§ 183. *Where an answer denies the equity of a bill, an injunction will be refused.*

The motion for this injunction has been heard on bill and answer. The principle now almost universally recognized is, that, where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse the writ of injunction. Such being the object of the bill, if its allegations were admitted by the answer, or proved on final hearing to the satisfaction of the court, it would be its duty to restrain the officers of the said bank from any further misapplication of its funds, which might result from any act not warranted by its charter, or which would amount to a breach of trust. This is clear from the decision of the supreme court in the case of *Dodge v. Woolsey*, 18 How., 341. In that case the court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust."

It becomes necessary, therefore, to carefully examine the bill and answer. The bill, that we may learn what are the facts which it sets forth, and on which it claims the equitable interference of the court; and the answer, that we may see if these facts are admitted or denied. Now, there are many things stated in the bill and replied to in the answer with which we have nothing to do on this motion. Whether the loan to Bayne, by the defendant, was made under such circumstances as will render the officers who made it responsible to the stockholders for any loss the bank may incur therefrom, can only be answered when this case comes before the court on final hearing. And it may be doubtful whether such question could even be decided on the pleadings in this case; it would seem to require a bill to be filed against the officers who made the loan individually. This is a bill against the bank in its corporate capacity. The allegations on which the preliminary injunction is asked are the following: "That in violation of said express prohibition, and in violation of the trust as

aforesaid confided to its officers, the said bank and its officers lent to Bayne and Bayne & Co., of the funds or capital of said bank, from time to time, divers sums of money, in the whole largely exceeding one-tenth of the capital stock of said bank actually paid in, and that for many months the amount of money so loaned exceeded \$300,000." And it is further alleged that said loans were made upon collateral security of stock, etc., some of which were spurious, and that among these were one thousand two hundred and fifty shares purporting to be the stock of the Washington, Georgetown & Alexandria Railroad Company, a corporation which the bill charged never had any legal existence, etc. And that said bank is joining in the prosecution of, or has been made party to, certain suits, touching or concerning the interests of said railroad company. It also charges that the said defendant, by its officers and agents, hath offered to pay into the circuit court of the United States for the eastern district of Virginia, the sum of \$20,000 of the funds of said bank in a cause therein pending, in which the said bank has no interest whatever, and to which it is not a party, and did actually pay in said cause \$200 fees to commissioners, and did actually pay \$100 to trustees of Bayne & Co. upon some illegal and unauthorized agreement as to said securities taken by them from Bayne, and that they are negotiating for and offering to expend the money and funds of said bank in and about the repairs and reconstruction of the bridge of the said railroad company across the Potomac river, in which said bank has no sort of interest, and cannot legally have any; said bridge, it is estimated, will cost over \$100,000 to repair. And it concludes with a prayer that the said bank, its officers, agents and attorneys, may be restrained from further prosecuting or defending any one or more of said suits at the cost or charge, or in the name, of said bank.

The answer admits that Bayne & Co. did pledge with its cashier, early in the month of February, 1866, as collateral security for its money loaned and advanced to said firm, one thousand two hundred and fifty shares of the capital stock of said railroad company of the par value of \$100 each, and that the trustees of Bayne & Co. did, subsequently, for \$100, assign all the equity of redemption to said stock to the cashier of this defendant. It also admits that, as a holder of stock of the said railroad company, it did agree, with certain stockholders of said company, to advance a portion of the sum of \$20,000, which was offered to be paid into the circuit court of the United States for the eastern district of Virginia, in a cause in which the said railroad company and others were defendants, and Adams Express Company was complainant, to abide the decision of said cause, with the purpose of preventing the said railroad from passing into the hands of a receiver, to be appointed by the said court; but said offer was refused by said court, and no money was paid on account thereof, and that this defendant was to have been adequately secured if said money had been actually advanced, and that it did advance about \$40, part of defendant's commissioners' fees in said cause. And this defendant denies that it is negotiating or offering to expend its money or funds in the repair and reconstruction of the railroad bridge across the Potomac. It also denies that it or any other of its officers, at the time stock was issued in the name of its cashier, or previous thereto, had any knowledge or good reason to believe that the said railroad company had no legal existence, or that the certificates were fraudulently issued, but that as late as May, 1866, the stock of the said railroad company was held and esteemed as a valuable stock at par, or over par, and that as late as the middle of May, 1866, large loans were effected upon the pledge of its certificates of stock at or about par. Now the only fact

admitted in the answer pertinent to the present inquiry is, that the said defendant did receive from Bayne & Co. a pledge of the railroad stock as *collateral security* for loans made to said firm, and that said bank is now, in company with other stockholders of said railroad, engaged in suits, upon whose final decision depend the very existence of said road and the value of its stock. Will these facts warrant the granting of a preliminary injunction? Now the granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. It is one of the highest powers confided to a court of equity, and its exercise ought, therefore, to be guarded with extreme caution, and the remedy applied only in very clear cases.

§ 184. *A loan by a national bank exceeding one-tenth of its capital stock is not void. (a)*

As to the first charge in this bill against the defendant, in reference to the amount loaned to Bayne & Co., in violation of the twenty-ninth section of the act of congress, passed June 3, 1864 (under which act the defendant became a national bank), I would only say that the loan made under such circumstances is not void; it can be enforced as any other loan made by the bank. This, I apprehend, is clear from the fact that section 29 provides no penalty for its violation, and section 53 of the same act, for all violations of the provisions of the same act, provides two penalties; first, a forfeiture of the privileges and franchises of the said bank derived from the said act, to be adjudged in a suit brought for that purpose in the federal court; and second, a personal liability by every officer of a bank who participated in or assented to such violation for all damages which the bank may sustain in consequence thereof. Indeed, this clause was not pressed in the very able argument of the learned counsel who closed on behalf of complainant. The point so forcibly made by him was that the defendant was prohibited by its charter from making this loan on a pledge of stock, and if so, no title to this stock passed from Bayne & Co. to the defendant. Clearly if the defendant's title to this stock depended on a purchase as an investment by it, such purchase would be beyond its corporate powers, and void. The learned counsel, however, contended that, by the true construction of the eighth section, this loan was not embraced among the enumerated powers of the bank, "that no loans are valid except those on personal security." The language of that section is, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of this act."

§ 185. *A national bank may loan its money on negotiable paper secured by collaterals.*

I understand that the language I have quoted contains five distinct grants of power, and that no one grant is a limitation on any other. By the first, the bank is authorized to discount promissory notes, drafts, bills of exchange and other evidences of debt; second, to receive deposits; third, to buy and sell exchange, coin and bullion; fourth, to loan money on personal property (I understand by this, or any other personal security than is mentioned in the first grant); fifth, to obtain, issue and circulate the national currency. If I am right in this construction, then the loan to Bayne & Co. was authorized by the said section, as the charge in the bill is that the loans to Bayne & Co. were

(a) The same ruling is made in *Stewart v. National Union Bank*, * 2 Abb., 424.

made upon paper evidences of debt upon bonds, notes, checks, etc., and upon collateral security of stocks, etc., and the answer states that the stock in said railroad was pledged with its cashier as collateral security for its money loaned. If collateral security, then collateral to the personal responsibility of Bayne & Co. on the notes, checks and bills of exchange cashed for said firm by this defendant; collateral security in bank phraseology means some security additional to the personal obligation of the borrower. But admit that this construction is doubtful, it is not so doubtful as that construction which would limit the banks to the power of loaning money only on personal security, and deny to them the power of taking a pledge of stock as collateral security for notes or bills of exchange cashed by them. As I said before, a court of equity should never grant a preliminary injunction in a doubtful case. However, I have no doubt that the taking this collateral security from Bayne & Co. was a valid transaction, and whether it will ever avail the defendant anything will depend upon the decision of those tribunals before whom is now pending the question of the validity of the charter of the said railroad company and the character of its stock. The preliminary injunction asked for in this case is refused. For authorities to sustain the view I have taken of the law governing this case, I refer to the following cases: *Bates & Hines v. Bank of the State of Alabama*, 2 Ala., 462; *Magruder v. State Bank*, 18 Ark., 9; *Bank of Middleburg v. Bingham*, 33 Vt., 636; *Farmers' Bank v. Burchard*, 33 Vt., 348; and *Rock River Bank v. Sherwood*, 10 Wis., 230.

GOLD MINING COMPANY v. NATIONAL BANK.

(6 Otto, 640-645. 1877.)

ERROR to the Supreme Court of Colorado.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This was an action by the Rocky Mountain National Bank against the Union Gold Mining Company of Colorado to recover a balance of overdraft due upon the account kept at the bank in the name of the company. The balance of overdraft, exceeding \$20,000, was created by drafts or checks drawn by one Sabin, who, claiming to be the authorized agent of the company, acted in its name, and made deposits from time to time to its credit. The jury rendered a verdict in favor of the bank for the amount of the overdraft with interest (\$30,358.32), and from the judgment entered upon that verdict the present writ of error is brought. The defendant presented formal requests to charge to the number of forty, one of which was subdivided into three parts. It asked for a new trial upon ten grounds severally set forth, and the assignment of errors below discloses one hundred and thirty-three allegations of error. There was but a single question in the case, to wit, were the acts of Sabin the acts of the gold mining company, either by original authority or by ratification? As it was finally put to the jury, was there a ratification of his acts by the company? We shall consider the objections most seriously urged and having the greater plausibility.

§ 186. *A borrower from a bank is not permitted to plead in bar of a suit on his debt that the bank exceeded its powers in lending him the money.*

The first objection to the recovery arises from the amount of the debt. The plaintiff is a national bank organized under the act of congress of June 3, 1864, with a capital stock of \$50,000. 13 Stat., 99. By the twenty-ninth section of that act it is provided as follows: "The total liabilities to any association of

any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." R. S., sec. 5200. After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris v. Runnels*, 12 How., 79, where the defendant sued upon a note set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into the state without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase money. Mr. Justice Wayne said that the rule was allowed, not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy. In *O'Hare v. Second National Bank of Titusville*, 77 Pa. St., 96, the question was made upon the statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void. See, also, *Pangborn v. Westlake*, 36 Ia., 546; *Vining v. Bricker*, 14 Ohio St., 331. We do not think that public policy requires or that congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders and all who have an interest in the safety and prosperity of the bank. We are of the opinion that this objection is not well taken.

§ 187. *A person is competent as a juror who has conversed with parties about the cause.*

It is contended that there was error in admitting Perrin to sit as a juror in the cause. It appears that he had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them. He expressed an entire willingness as well as an ability to accept the facts as they should be developed by the evidence, and to render a verdict in accordance with them. He was evidently an intelligent man, and well qualified to act as a juror in such a case. When his name was called he was sworn to answer truly to such questions as should be put to him touching his competency to sit as a juror in the case. Questions were put to him by the respective counsel, and were answered by him, the result of which was as above stated. At the close of his examination the record states as follows, viz.: "By the court: Well, I think he is competent. Here the defendant challenged the juror Perrin for cause. The court denied the challenge, and the defendant then and there excepted to the ruling of the court." It is not so stated in words, but it is assumed that thereupon Perrin took his seat as a juror; and acted as such during the trial. The facts as stated by the juror do not justify a challenge for cause in a civil action. *Rogers v. Rogers*, 14 Wend. (N. Y.), 131; *Jackson v. The Commonwealth*, 23 Gratt. (Va.), 919; *Freeman v. The People*, 4 Den. (N. Y.), 9; *Lowenberg v. People*, 5 Park. Cr. (N. Y.), 414; *Sanchez v. The People*, 22 N. Y., 147. The decision of the challenge was

submitted to the judge, and we see no just cause of complaint in his decision.

Numerous objections were made to the admission and rejection of evidence, which do not require consideration. We refer only to the objection to the statements or admissions of Becker, the president of the mining company. These were made at various times at Colorado and at New York. The defendant was a mining company organized under the laws of the state of New York, but whose mines and whose business (so far as it had any) were in Colorado. Sabin leased a part of their mines, and professed to carry on another portion of them on account of the company, and to borrow the money for its use in that business. Becker spent much time in Colorado in attending to the company's business there; and, omitting the questionable position of Sabin, he was the only representative in that region. The effort of the plaintiff on the trial was to show an original authority in Sabin to draw checks in the name of the company, and, failing in that, to establish a ratification of his acts by which the company would be chargeable. To this end the knowledge of Becker of what was done by Sabin, and his action in relation thereto, were given in evidence. The effect of this evidence and of the objections thereto is much diminished by the charge given by the judge that the jury might assume that, prior to the 16th of December, 1868, Sabin had no authority to borrow money in its name, but that it was competent for the defendant to ratify the acts and assume the indebtedness created in its name. He further charged them that if Sabin was its agent, and borrowed money in its name which was expended in the defendant's business, and the payment thereof was demanded of the defendant, they were to consider whether the defendant, with knowledge of the fact, assented to such demand, and approved the act of Sabin in obtaining the money; that if acts have been done by an agent in excess of his authority, and the principal on being informed of them fails to disavow them in a reasonable time, his silence may be considered as an acquiescence in and an assent to the acts done.

§ 188. *Where a principal, after notice of debts incurred by his alleged agent, and demand made of payment, fails for a reasonable time to disavow the acts of the agent, he is held to ratify such acts.*

On the 16th of December, 1868, Becker, the president, closed up the accounts of the company with Sabin, and paid him the balance due to him. Sabin's books and the bank books were then present, and Becker knew the amount of the indebtedness which had then been incurred by Sabin to the bank in the name of the company. This settlement was in the presence of the cashier of the bank, and made by his aid. This was clear and distinct notice to Becker of the action of this agent of his company in its name. Becker, as president of the company, was the suitable man to receive the information; and what he said and did about it, and what action repudiating the doings of Sabin was taken by the company, or whether there was no disavowal, might well be learned from its chief officer. Potter and Kountze were officers of the bank, and their conversations with Becker were of a similar character. The court expressly informed the jury that these conversations were allowed for the purpose of showing Becker's knowledge of the indebtedness and the demand upon him for its payment, and not for the purpose of showing a promise on the part of the defendant. We see no error in this branch of the case.

The judge's charge on the subject of the ratification by the company of the acts of Sabin contained all that it was necessary to say to the jury. It was,

in substance, that if Sabin was the agent of the company in working its mines in Colorado in 1867 and 1868, without authority to borrow money in its name, but did in fact borrow large sums of the plaintiff in its name; if, on the 16th of December, 1868, the president of the company was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if, within a reasonable time thereafter, the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name. We consider this charge entirely correct. *Vianna v. Barclay*, 3 Cow. (N. Y.), 281; *Hazard v. Spears*, 4 Keyes (N. Y.), 469; *Cairnes v. Bleecker*, 12 Johns. (N. Y.), 300.

Judgment affirmed.

§ 189. *Tender of note in payment of check.*—If a loan be made to a bank, and a note be given therefor in the name of the cashier of the bank, a tender of such note in payment of a check drawn on the lender in favor of the borrowing bank is good. *Bank v. Kennedy*, 17 Wall., 27.

§ 190. *Collaterals.*—Where collaterals are deposited with a bank with full power to sell, and after default and due notice the bank sells to its directors for more than the market value of the collaterals, the bailor, especially after a long delay, is entitled to no remedy against the bank. *Hayward v. National Bank*, 6 Otto, 615.

§ 191. National banks may take a pledge of bonds and other personal chattels as security for money loaned. *Pittsburg, etc., Car Works v. State Nat. Bank*, * 2 Cent. L. J., 692; 8 Ch. Leg. News, 41. They may take the stock of another bank as collateral. *National Bank v. Case*, 9 Otto, 628. See the case, §§ 82-85.

§ 192. On a creditor's bill filed to reach certain stocks of a judgment debtor which had been pledged to a national bank as security for a loan, the bank having made an assignment of all its assets for the benefit of creditors prior to the passage of the bankrupt act of 1867, it was held that the stocks had passed to the trustee under the assignment, and could not be reached in this proceeding, although the loan by the bank for which the stocks were pledged might be void. *Stewart v. National Union Bank*, * 2 Abb., 424.

VI. INTEREST AND USURY.

SUMMARY—*Rate of interest allowed*, §§ 193, 194.—*Penalty for usury*, §§ 194, 197.—*State laws do not apply*, § 195.—*Exchange in addition to interest*, § 196.—*Usurious interest cannot be applied as a set-off*, § 198.—*Disabilities not applicable to natural persons*, § 199.—*Discounts*, §§ 200, 201.—*Loan to corporation*, § 202.

§ 193. A national bank may charge interest at the highest rates allowed by the law of the state in which it is located, either to natural persons or to corporations. *Tiffany v. National Bank*, §§ 203, 204.

§ 194. Discussion of the banking act of 1864, so far as concerns the rate of interest allowed to be exacted by national banks. Under the act the only penalty for the taking of usurious interest is the forfeiture of all interest reserved, received or charged, and, where the interest has been paid, the recovery back of twice the amount of such interest. *Farmers' & Mechanics' National Bank v. Dearing*, §§ 205-210. See § 224.

§ 195. National banks were created in aid of the government. Of the necessity for their creation congress is the sole judge. The states cannot interfere with them except so far as congress may see proper to permit. State laws in regard to the penalty for usury do not apply to national banks. *Ibid.*

§ 196. A national bank has the right under the act to charge and receive the current rate of exchange for sight drafts in addition to interest at legal rates. *Wheeler v. National Bank*, §§ 211, 212.

§ 197. The only penalty for knowingly charging usurious interest is the loss of all interest. Where the illegal interest has been paid, twice that sum can be recovered in a penal action. Such provisions are exclusive, and no other penalty can be enforced. *Barnet v. National Bank*, §§ 213-215.

§ 198. Usurious interest paid to a national bank on the renewal of a series of notes cannot be applied as a set-off towards the satisfaction of the principal of the last note. *Driesbach v. National Bank*, § 216. See § 227.

§ 199. The sole particular in which national banks are placed upon an equality with natural persons in the matter of loans and discounts is as to the rate of interest allowed, and not as to the character of the contract. Although natural persons may discount commercial paper at a rate exceeding that prescribed by the general law of the state, national banks are prohibited from so doing. *National Bank v. Johnson*, §§ 217-219.

§ 200. Where a bank discounts a note at a usurious rate, it forfeits all interest accruing after the maturity of the note. *First National Bank v. Stauffer*, § 230.

§ 201. Rule where a bank discounts a note at a usurious rate, and the note is renewed for the same amount, the borrower paying usurious interest out of his pocket. *National Bank of Madison v. Davis*, §§ 221, 222.

§ 202. Where a bank makes a loan to a corporation at a rate of interest which, by the laws of the state, would be usurious as against an individual, it forfeits all interest, though by the laws of the state the corporation is not allowed to plead usury. *In re Wild*, § 223.

[NOTES.— See §§ 224-228.]

TIFFANY v. NATIONAL BANK OF MISSOURI.

(18 Wallace, 409-418. 1873.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.— This was a suit by Tiffany, trustee of a bankrupt, to recover of a national bank twice the amount of interest reserved by the bank in a loan to Darby, the bankrupt. The rate reserved was nine per cent.

§ 203. *In a suit to recover a penalty, the statute must be literally construed.*

Opinion by MR. JUSTICE STRONG.

In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal, construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it. The question, therefore, is whether the thirtieth section of the act of congress of June 3, 1864, relative to national banking associations, clearly prohibits such associations in the state of Missouri from reserving and taking a greater rate of interest than eight per cent., the rate limited by the laws of that state to be charged by the banks of issue organized under its laws. It is only in case a greater rate of interest has been paid than the national banking associations are allowed to receive that they are made liable to pay twice the interest. The act of congress enacts that every such association "may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more; except that where, by the laws of any state, a different rate is limited for banks of issue, organized under state laws, the rate so limited shall be allowed for associations organized in any such state under the act." What, then, were the rates of interest allowed in Missouri when the loans were made by the defendants that are alleged to have been usurious? It is admitted to have been ten per cent. per annum, allowed to all persons, except banks of issue organized under the laws of the state, and they were allowed to charge and receive only eight per cent.

§ 204. *National banks are allowed to charge interest at the highest rates allowed by the laws of the state in which they are located, either to natural persons or corporations.*

The position of the plaintiff is, that the general provision of the act of congress, that national banking associations may charge and receive interest at the rate allowed by the laws of the state where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of that state, that is, to eight per cent. This, we

think, cannot be maintained. The act of congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where state banks of issue are not allowed a greater. There are three provisions in section 30, each of them enabling. If no rate of interest is defined by state laws, seven per cent. is allowed to be charged. If there is a rate of interest fixed by state laws for lenders generally, the banks are allowed to charge that rate, but no more, except that if state banks of issue are allowed to reserve more, the same privilege is allowed to national banking associations. Such, we think, is the fair construction of the act of congress, entirely consistent with its words and with its spirit. It speaks of allowances to national banks and limitations upon state banks, but it does not declare that the rate limited to state banks shall be the maximum rate allowed to national banks. There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than ten per cent. national banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words "no more" than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than state banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more," as they were added to the preceding clause of the section. The absence, of those words, or words equivalent, is significant. Coupled with the general spirit of the act, and of all the legislation respecting national banks, it is controlling. It cannot be doubted, in view of the purpose of congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, if state statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, national banking associations could not compete with them unless allowed the same.

On the other hand, if such associations were restricted to the rates allowed by the statutes of the state to banks which might be authorized by the state laws, unfriendly legislation might make their existence in the state impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, congress adopted. It was to allow to national associations the rate allowed by the state to natural persons generally, and a higher rate, if state banks of issue were authorized to charge a higher rate. This construction accords with the purpose of congress, and carries it out. It accords with the spirit of all the legislation of congress. National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks. On the contrary, much has been done to insure their taking the place of state banks. The latter have been substantially

taxed out of existence. A duty has been imposed upon their issues so large as to manifest a purpose to compel a withdrawal of all such issues from circulation. In harmony with this policy is the construction we think should be given to the thirtieth section of the act of congress we have been considering. It gives advantages to national banks over their state competitors. It allows such banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons.

The result of this is that the defendants, in receiving nine per cent. interest upon the loans made by them, have not transgressed the act of congress; consequently they are under no liability to the plaintiff.

Judgment affirmed.

FARMERS' & MECHANICS' NATIONAL BANK v. DEARING.

(1 Otto, 29-37. 1875.)

ERROR to the Court of Appeals of New York.

§ 205. *Section 30 of the banking act of June 3, 1864, discussed.*

Opinion by MR. JUSTICE SWAYNE.

The question presented for our determination involves the construction of the provisions of the national bank act of congress of the 3d of June, 1864 (13 Stat., 99), upon the subject of the interest to be taken by the institutions organized under that act. The plaintiff in error is one of those institutions. The thirtieth section of the act declares "that every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rates so limited shall be allowed for associations organized in any such state under this act. And, when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt, has to run. And the knowingly taking, receiving, reserving or charging a rate of interest *greater than aforesaid* shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

STATEMENT OF FACTS.—The facts of the case are few and simple. On the 2d of September, 1874, it was agreed between the parties that Dearing should make his promissory note to one Deitman for \$2,000, payable one month from date, and that the bank should discount the note for Dearing at the rate of interest of ten per cent. per annum. This agreement was carried out. The bank received the note, and paid to Dearing the sum of \$1,981.67. The discount reserved and taken was \$18.33. The rate of interest which the bank was

legally authorized to take was seven per cent. per annum. The excess reserved over that rate was \$5.50. Dearing failed to pay the note at maturity. The bank thereupon sued him in the superior court of Buffalo. He answered that the agreement touching the discount was usurious, corrupt and illegal; that it avoided the note; and that he was in no wise liable to the plaintiff. The court sustained this defense, and gave judgment for the defendant. At a general term of that court the judgment was affirmed, and the judgment of affirmance was subsequently affirmed by the court of appeals.

§ 206. *The only penalty for usury is the loss of the entire interest charged; or, the recovery back of twice the interest actually paid. State usury laws do not apply.*

No searching analysis is necessary to eliminate the several provisions of the section to be considered to develop the true meaning of each, and to draw the proper conclusions from all of them taken together. (1) The rate of interest chargeable by each bank is to be that allowed by the law of the state or territory where the bank is situated. (2) When, by the laws of the state or territory, a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks. (3) Where no rate of interest is fixed by the laws of the state or territory, the national banks may charge at a rate not exceeding seven per cent. per annum. (4) Such interest may be reserved or taken in advance. (5) Knowingly reserving, receiving or charging "a rate of interest *greater than aforesaid* shall be held and adjudged a forfeiture of the interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon." (6) If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred. (7) The purchase, discount or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

These clauses, examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject. But it is contended that the phrase, "a rate of interest greater than aforesaid," as it stands in the context, has reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law; and that hence it leaves the consequences of usury, where such rate is fixed, to be governed wholly by the local law upon the subject. This, in the state of New York, would, in all such cases, render the contract a nullity and forfeit the debt. Such the court of appeals held to be the law of this case, and adjudged accordingly. Neither of these views can be maintained. The collocation of the terms in question does not grammatically require such a construction. Viewed in this light, the phrase is as much applicable to both the foregoing clauses as to the next preceding one. The point to be sought is the intent of the law-making power. The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess; while in New York, under a contract precisely

the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice. A purpose to produce or permit such a state of things ought not to be imputed to congress, unless the circumstances are so cogent as to render that result inevitable. We find nothing within the scope of the subject of that character.

§ 207. *Congress creates and has sole control of national banks. The state cannot interfere.*

The second proposition — that the state law, including its penalties, would apply if the first proposition be sound — is equally untenable. If the construction contended for were correct, the state law would have no bearing whatever upon the case. The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch v. Maryland*, 4 Wheat., 316, and in *Osborn v. Bank of United States*, 9 id., 738, therefore applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single state cannot give." Against the national will "the states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *Bank of the United States v. McCulloch*, *supra*; *Weston v. Charleston*, 2 Pet., 466; *Brown v. Maryland*, 12 Wheat., 419; *Dobbins v. Erie County*, 16 Pet., 435.

§ 208. *The power to create carries with it the power to preserve.*

The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the general government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

Those which belong exclusively to the states.

Those which belong exclusively to the national government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the states, but only with the consent, express or implied, of congress.

Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires, and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman v. Philadelphia*, 3 Wall., 713; *Ex parte McNeil*, 13 id., 240. The power of the states to tax the existing national banks lies within the category last mentioned.

It must always be borne in mind that the constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land" (Const., art. 6), and that this law is as much a part of the law of each state, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section, the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the state where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one state, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of congress.

§ 209. *Penalty for taking illegal interest. Rules of construction.*

Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel v. Firman*, 22 Wall., 170; *Turner v. Calvert*, 12 Serg. & R., 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall v. Vicksburg*, 15 Wall., 146. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. *Vattel*, 20th Rule of Construction. Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford v. Ingersoll*, 3 Hill, 38; *First National Bank of Whitehall v. Lamb*, 57 Barb., 429. The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which congress had in view in enacting it. *Gray v. Bennet*, 3 Met., 522. The forty-sixth section of the banking act of February 25, 1863 (12 Stat., 679), declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand." In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid. In the Revised Statutes of the United States of the 22d of June 1874, 1011, the provisions of the thirtieth section of the act of 1864 are divided into two sections, and the language is so changed as to render impossible in that case the same construction as that of the thirtieth section contended for by the counsel of the defendant in error in this case. In the "act to amend the usury laws of the District of Columbia" of the 22d of April, 1870 (16 Stat., 91), it is provided that six per cent. per annum shall be the lawful rate of interest, but that parties may contract for ten per cent.; and that, if more than ten per cent. be contracted for, the entire interest shall be forfeited, and that only the principal debt shall be recoverable. It is further declared that, if the unlawful interest has been paid, it may be recovered back, provided it be sued for within a year. It is declared in the last section that this act shall not affect the banking act of 1864. This later legislation shows the spirit by which congress was animated in passing the thirtieth section of the act here under consideration, and is not without value as affording light whereby to ascertain the true meaning of that section, if there could otherwise be any doubt upon the subject.

§ 210. *Authorities cited.*

This section has been elaborately considered by the highest court of Massa-

chusetts, of Pennsylvania, of Ohio, and of Indiana. *Davis v. Randall*, 115 Mass., 547; *Central Nat. Bank v. Pratt*, id., 539; *Brown v. Second Nat. Bank of Erie*, 72 Penn., 209; *First Nat. Bank of Columbus v. Gurlinghouse*, 22 Ohio St., 492; *Wiley v. Starbuck*, 44 Ind., 293. In all these cases views were expressed in conflict with those maintained in the *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y., 100. This adjudication controlled the result of the litigation between these parties.

Upon reason and authority, we have no hesitation in coming to the conclusion that there is error in the case before us. The plaintiff below was entitled to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved. Whether he was entitled to recover interest upon the amount of the principal so reduced, after the maturity of the note, is a point which has not been argued, and upon which we express no opinion.

The judgment of the court of appeals is reversed, and the case will be remanded, with directions to proceed in conformity with this opinion.

WHEELER v. NATIONAL BANK.

(6 Otto, 268-270. 1877.)

ERROR to the Superior Court of the City of New York.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—The controlling question presented in this case for our determination involves the construction of the national currency act of June 3, 1864 (13 Stat., 108), which declares that "the knowingly taking, receiving, reserving or charging a rate of interest greater" than that "allowed by the laws of the state or territory where the bank is located," shall be "held and adjudged a forfeiture of the entire interest which the bill, note or other evidence of debt carries with it, or which has been agreed to be paid thereon." The same section also declares: "But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Wheeler, the plaintiff in error, was sued as indorser upon two bills of exchange, drawn at Brady's Bend, Pa., payable sixty days after date at the American Exchange Bank, in New York, and discounted by the Union National Bank of Pittsburg for the benefit of the Brady's Bend Iron Company, a corporation created under the laws of Pennsylvania. Wheeler claims that the bank, under the provisions of the statute, forfeited the entire interest which the bills carried, or which was agreed to be paid. This claim was denied; first, in the superior court for the city and county of New York, where this action was commenced; and, subsequently, in the court of appeals of that state.

§ 211. *It is not usury for a national bank to receive the current rate of exchange, as well as legal interest, on the discounting of a draft.*

No question having been raised as to the *bona fide* character of the bills, the bank had, by the express words of the statute, the right to charge and receive the current rate of exchange for sight drafts, in addition to interest at the rate of six per cent. per annum, which is the rate fixed by general statute in the state of Pennsylvania. But, upon examining the special finding of facts upon which the state court based its judgment, we discover no evidence of the current rate of exchange at the date of discount. That exchange was, in fact,

charged cannot be gainsaid by Wheeler, since he avers, in his answer, that the bills were discounted under an usurious agreement that the bank should receive, in addition to certain interest in excess of the statutory rate, commissions or exchange of one quarter of one per cent. No such agreement was, however, proven. Indeed, the record furnishes no evidence of any distinct agreement, either as to the amount of interest or exchange to be reserved by the bank upon discounting the bills. Nothing seems to have been said at the time of discount as to the amount to be reserved by way of interest or upon the subject of exchange, and the court refused, upon the request of Wheeler, to find it as a fact in the case, that "no exchange was charged." While it may be inferred that exchange was charged by the bank, we are uninformed by the record whether it exceeded the current rate for sight drafts.

· § 212. *A forfeiture is not declared unless the facts upon which it must rest are clearly established.*

The statute should be liberally construed to effect the ends for which it was passed; but a forfeiture under its provisions should not be declared, unless the facts upon which it must rest are clearly established. It should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest, and the current exchange for sight drafts. There is no proof of the rate of exchange; and, since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declaration should be held to make convincing proof of every fact essential to forfeiture.

It is unnecessary to consider any other question in the case.

Judgment affirmed.

BARNET v. NATIONAL BANK.

(8 Otto, 555-559. 1878.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The bank brought this suit upon a bill of exchange, dated November 18, 1873, for \$4,000, drawn by David Barnett upon Barnets & Whiteside, in favor of Robert Marshall, and payable ninety days from date at the Second National Bank of Cincinnati, Ohio. It was accepted by the drawees, indorsed by the payee, and discounted by the Muncie National Bank of Indiana. Before the maturity of the bill the acceptors made an assignment to David Barnett and Isaac E. Craig, the plaintiffs in error. The suit was commenced in the court of common pleas of Preble county, Ohio, against all the parties to the bill. The assignees intervened and made themselves parties. After the pleadings were made up, the case was removed by the bank to the circuit court of the United States for that district. There new pleadings were filed on both sides. The assignees set up three defenses: 1. That Barnets & Whiteside were borrowers from the bank as early as January 11, 1866; that the indebtedness was continuous and unbroken from April 8, 1866; that it was at no time less than \$4,000, and amounted at one time to \$36,000; that at the time of the assignment it was \$28,000, upon bills of exchange which represented it; that the bank had taken not less than \$5,000 in excess of the legal rate of interest; that for evasion the bills were arranged in series, and that each series was terminated from time to time by refusing to renew and the discounting of a new bill, the proceeds of which were applied in payment of the prior terminating one; that the bank had received satisfaction of all the bills

but the one in suit, and that there was nothing due from the defendants. 2. That the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of \$1,116, which it was claimed should be applied as a payment upon the bill in question. 3. That fifty-one bills of exchange of \$4,000 each, having ninety days to run, were discounted by the bank for the assignors, the first bearing date March 27, 1872, and the last July 27, 1873 (the date of each one is given); that illegal interest was taken upon these bills to the amount of \$6,324; and that the assignees are entitled to recover double this sum from the bank, to wit, \$12,648. There is a prayer for judgment accordingly, and for other proper relief.

Marshall, the payee and indorser of the bills, also filed an answer; but as the record discloses no question raised by him, it need not be more particularly adverted to. The bank demurred to the several defenses set up by the assignees. To the first and third the demurrer was sustained and overruled as to the second. Upon the latter the plaintiff took issue and the case was tried by a jury. The jury rendered a verdict in favor of the bank for \$4,080.31, and judgment was given accordingly. It does not appear that any thing done by the court touching this trial was objected to by the plaintiffs in error. There is no bill of exceptions in the record.

But one point has been insisted upon by the plaintiffs in error in this court, and it is that the circuit court erred in sustaining the demurrers to their first and third defenses. That is the only subject before us for examination. All questions arising under the second defense have been disposed of by the verdict and judgment. How the jury reached their conclusion it is not easy to see, but this is not material, as nothing relating to that part of the case is open to inquiry.

The national currency act of congress of June 3, 1864 (13 Stat., 99, sec. 30), after prescribing the rate of interest to be taken by the banks created under it, declares:

"And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same: *provided*, that such action is commenced within two years from the time the usurious transaction occurred."

Two categories are thus defined and the consequences denounced: 1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank brought by the persons paying the same or their legal representatives.

§ 213. *Statutes creating new right or offense.*

The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case. Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U. S., 29. (See §§ 205-210, *supra*.) The procedure in the case after it reached the circuit court, as well as before, was governed by the Ohio Code of Practice. *Indianapolis, etc., Railroad Co. v. Horst*, 93 U. S., 291.

§ 214. *Rules of pleading; trial of frivolous issues.*

The ground of demurrer specified as to both the defenses in question is, that the assignees had no legal capacity to defend or prosecute by counterclaim in the case. But this does not take from the plaintiff the right to insist that the facts set forth were insufficient to bar the action. Swan, Plead. & Prac., 234; 1 Nash. Plead. & Prac., 161. Under the New York code, from which the Ohio code is largely copied, it has been held that a demurrer to an answer may be sustained upon a ground not adverted to in the argument by the counsel upon either side. Xenia Branch of State Bk. of Ohio v. Lee, 2 Bosw. (N. Y.), 694. The demurrer was a waiver of every objection not specified, except the substantial and fatal insufficiency of the pleading to which it related with respect to the facts alleged. An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it. If a frivolous issue is left in the record it does not therefore follow that it is to be seriously treated.

§ 215. *Where a statute prescribes a penal suit as a remedy no other is applicable.*

In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute, we have seen that this could not be done. Nothing more need be said upon the subject.

In the third defense as set forth the like payment is alleged, and there is a claim to recover double the amount paid by way of counterclaim in the pending suit on the bill. This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

While the plaintiff, in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose,—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case and mislead the jury to the prejudice of either party. The point specified in the demurrer we have had no occasion to consider. Both defenses as they appear in the record are perhaps liable to other objections; but in examining the case we have not gone beyond the points we have discussed, and we decide nothing else.

Judgment affirmed.

DRIESBACH v. NATIONAL BANK.

(14 Otto, 52-54. 1881.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

STATEMENT OF FACTS.—A national bank had discounted a number of notes for Driesbach, and received usurious interest at each renewal. When the last note was sued on Driesbach offered to set off the interest he had paid against the principal.

§ 216. *Usurious interest paid on the renewal of a series of notes cannot be applied as a set-off in a suit on the notes.*

Opinion by WAITE, C. J.

The object of the plaintiffs in error in these suits is to have usurious interest paid a national bank on renewing a series of notes, of which those now in

suit are the last, applied in satisfaction of the principal of the debt. The claim is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been *paid* as interest to the discharge of principal. This we held in *Barnet v. National Bank*, 98 U. S., 555, could not be done; and in *First National Bank of Clarion v. Gruber*, 8 Weekly Notes of Cases, 119, and *National Bank of Fayette County v. Dushane*, 9 id., 472, the supreme court of Pennsylvania followed that case, overruling its former decisions on the same question in *Lucas v. Government National Bank*, 78 Pa. St., 228, and *Overholt v. National Bank of Mt. Pleasant*, 82 id., 490. If, therefore, we reverse the judgments for the specific errors now complained of, it would serve no useful purpose, for on the facts admitted the same general result must follow another trial. Without, therefore, considering at all the question on which the cases seem to have turned below, the judgments are affirmed.

NATIONAL BANK v. JOHNSON.

(14 Otto, 271-279. 1881.)

ERROR to the Supreme Court of New York.

STATEMENT OF FACTS.—This action was brought by Johnson to recover penalties for taking illegal interest. The bank discounted negotiable notes owned by Johnson, at the rate of twelve per cent. per annum. Some of the paper was accommodation paper, but this fact was not known to the bank. Johnson recovered a judgment for twice the amount of the excess of seven per cent.

Opinion by MR. JUSTICE MATTHEWS.

It is contended, on behalf of the plaintiff in error, that the sections of the Revised Statutes in question were intended only to prevent national banks from violating the usury laws of the state in which they were severally organized and established; and that while, by the law of New York, it is usurious to loan or advance money to a party upon his own paper, or upon paper made for his accommodation, at a greater rate of interest or discount than seven per cent. per annum, it is not usurious or illegal in that state for natural persons to acquire business paper, that is, paper valid in the hands of the holder, so that he might maintain an action thereon against the prior parties, at any rate of discount agreed upon between the parties to the negotiation, without limit in excess of seven per cent. per annum. It is assigned for error that the court of appeals negatived this proposition.

The rate of interest upon the loan or forbearance of money, established and in force by the laws of New York, was, at the time of the transactions in question, seven per cent. per annum. Pt. 2, c. 4, tit. 3, 3 R. S. N. Y., 72, sec. 1. By section 5 of the same act it is provided that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatever (except bottomry and respondentia bonds and contracts), etc., whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of money, etc., than is above prescribed, shall be void. It is, and long has been, the law in New York, as decided in *Cram v. Hendricks*, 7 Wend. (N. Y.), 569, that the transfer by the payee of a valid available note, upon which when due he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not an usurious transaction, although the payee on such transfer indorses the note; and on non-payment by the maker the indorsee may maintain an action against the indorser; but the sum which

the indorsee in such case is entitled to recover of the indorser is the amount of the advance made by him, together with the interest thereon at the legal rate; while in an action against the maker the indorsee is entitled to the whole amount of the note.

This proceeds upon the idea that the original note is founded upon a valid consideration, free from usury in its inception; and that the indorsement and delivery contains two contracts: one, executed, which transferred the title, as upon a sale, as if indorsed without recourse; the other, executory, upon which the indorser is liable to the indorsee, to pay upon the default of the maker, after demand, and due notice thereof; although in the latter case, it will be observed, the recovery is limited by the New York decisions to the actual consideration paid, with lawful interest thereon. The transaction is treated as a sale of the note, and no limits are fixed by law upon the price of the article sold; but so far as the liability of the vendor is concerned, in order to avoid the consequences of treating the advance of money, which constituted the consideration, as a loan, it is limited to a return thereof with lawful interest.

The question we have now to determine is whether, in transactions of this description, in which a national banking association is the transferee, the same view can be taken of the relations and rights of the parties, in the present case, the court of appeals having decided that the same rule does not apply. *Johnson v. National Bank of Gloversville*, 74 N. Y., 329. The very point had been previously raised and decided by that court in *Nash v. White's Bank of Buffalo*, 68 id., 396, which was an action to recover penalties under the state law of 1870, in reference to banking institutions, for discounting paper at a greater rate of interest than seven per cent. per annum. That act, being chapter 163 of the Laws of New York of 1870, corresponds almost exactly with sections 5197, 5198, of the Revised Statutes of the United States, now under consideration, and its declared intent is to place the banking associations of the state on an equality, in the particulars specified, with national banks under the sections referred to. It was held that the fact that the paper discounted was business paper, purchased by the defendant, did not constitute a defense; for the question was not whether it was an illegal transaction under the general statutes against usury, but whether it was within the terms of the prohibition which forbade banks from charging on any discount a rate greater than seven per cent. per annum.

§ 217. *What is a "discount."*

And in *Atlantic State Bank v. Savery*, 82 N. Y., 291, it was decided that the purchase of a promissory note for a sum less than its face is a discount thereof, within the meaning of the provision of the banking act of that state (sec. 18, c. 260, Laws of 1888) which authorizes associations organized under it to discount bills and notes. And in support of that definition of the terms, the court cites the authority of *MacLeod on Banking*, 43, where the author says, "The difference between the price of the debt and the amount of the debt is called discount," and "to buy or purchase a debt is always in commerce termed to discount it." In *Fleckner v. Bank of the United States*, 8 Wheat., 338, 350, Mr. Justice Story said: "Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank;" and he added, that, if the transaction could properly be called a sale, "it is a purchase by way of discount." Dis-

count, as we have seen, is the difference between the price and the amount of the debt, the evidence of which is transferred. That difference represents interest charged, being at some rate, according to which the price paid, if invested until the maturity of the debt, will just produce its amount. And the advance, therefore, upon every note discounted, without reference to its character as business or accommodation paper, is properly denominated a loan, for interest is predicable only of loans, being the price paid for the use of money. The specific power given to national banks (R. S., sec. 5136) is "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt." So that the discount of negotiable paper is the form according to which they are authorized to make their loans, and the terms "loans" and "discounts" are synonyms. It was so said in *Talmage v. Pell*, 7 N. Y., 328; and in *Niagara County Bank v. Baker*, 15 Ohio St., 68, the very point decided was that "to discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance." But whether loans and discounts are identical, in the sense of section 5197, or not, is quite immaterial, for both are expressly made subject to the same rate of interest. And unquestionably the transfer of the notes, which forms the basis of this controversy, if not a loan, was a discount.

§ 218. *The sole particular in which national banks are placed on an equality with natural persons in the matter of loans and discounts is as to the rate of interest allowed, and not in the character of the contract.*

The contention of the plaintiff in error, that under this section whatever by the law of the state is lawful to natural persons in acquiring title to negotiable paper by discount is lawful for national banks, cannot be sustained, and derives no countenance, as is argued, from the decision in *Tiffany v. National Bank of Missouri*, 18 Wall., 409. (See §§ 203, 204, *supra*.) All that was said in that case related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a state in which a national bank was located one rate of interest was lawful for natural persons and a different one to state banks, the national bank was authorized to charge on its loans the higher of the two. The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them. It is not intimated or implied that if, in any state, a natural person may discount paper, without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the state law.

§ 219. *Although natural persons may discount commercial paper at a rate exceeding that prescribed by the general law of the state, national banks are prohibited from so doing.*

If it be said that the rate is allowed by the law of the state, when it permits the parties to reserve and receive whatever they may agree upon, then the section furnishes the conclusive answer that "when no rate is fixed by the laws of the state, etc., the bank may take, receive, reserve or charge a rate not exceeding seven per centum." So that the transaction in question, in either aspect, is within the prohibition of the statute, and subjects the bank to the penalties sued for. The conclusion is confirmed by the provision which declares

that "the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." Here the purchase, discount and sale of bills of exchange are classed as one, and subject to the same rule and rate of interest. In section 5198 the forbidden transaction for which the penalties are prescribed is spoken of as usurious; but this reference is to the prohibitions of the preceding section, and not to the laws of the state. In the present case, the paper was transferred by an indorsement, imposing the ordinary liability upon the indorser. It may, perhaps, be distinguished from cases where the title to the paper is transferred by an indorsement without recourse, or by mere delivery. The advance in such cases, to the previous holder, of the agreed consideration can hardly be considered a loan, for the relation of debtor and creditor as between them is not created by the transaction, if made, as supposed, in good faith, and not as a cover for usury. Whether it be a discount within the meaning of the sections we have considered, and therefore subject to the same rule as to the rate of interest at which it may be discounted, which we have decided to be applicable to the transactions described in the present case; and if not, but is to be treated as a purchase of the paper, lawful at any proportion which the price paid bears to the amount ultimately payable by the parties to it, whether, in that case, national banks are authorized by the law of their organization to acquire title to it in that way, are questions which do not arise in this case, and upon which we express no opinion.

Judgment affirmed.

FIRST NATIONAL BANK v. STAUFFER.

(Circuit Court for Pennsylvania: 1 Federal Reporter, 187-189. 1880.)

Opinion by McKENNAN, J.

STATEMENT OF FACTS.—This case was tried before the late Judge Ketcham, and under his instructions a verdict was rendered in favor of the plaintiff for the amount of the note in suit, with interest from its maturity to the date of the verdict. A motion for a new trial was made by the defendant, for the reason that, under the circumstances, no interest was recoverable upon the note, and that it was error in the judge to instruct the jury otherwise. It is admitted that more than the legal rate of interest was charged and received by the plaintiff for the period which elapsed between the date and maturity of the note, and the question is whether this subjects the plaintiff to a forfeiture of the interest which accrued afterwards. The national currency act furnishes a clear answer to this question. After fixing the rate of interest to be taken by national banks at that allowed by the local law, the thirtieth section of that act (R. S., § 5198) enacts: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the *entire* interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon;" and it is further provided that, where excessive interest has been paid, *twice* the amount may be recovered by an action commenced within two years.

§ 220. *Discounting note at usurious rate forfeits interest after maturity.*

The "*entire*" interest which the note "carries with it" is forfeited; and if this means *all* the interest which accrues upon it, as I think it clearly does, it is difficult to understand how any part of it is recoverable. By the operation

of the act an usurious contract is inherently vicious, so that it cannot "carry" any interest "with it;" hence it would inadequately effectuate the intent of the act to hold that such a contract is purged of its taint and is invested with a capacity denied to it before by the failure of the debtor to pay the debt, evidenced by it at maturity. This view of the effect of the act of congress is not inconsistent with the opinion of the court in *Barnet v. The Nat. Bank*, 8 Otto, 555 (§§ 213-215, *supra*), as was urged in the argument, but is in entire harmony with it. There it was sought to set off usurious interest paid upon a series of renewed bills, and also twice the amount of such interest; and it was held that the only remedy of the debtor was a penal action, as provided by the last clause of section 30. In expounding this section the court say: "Two categories are thus defined, and the consequences denounced: "1. Where illegal interest has been knowingly stipulated for, but not paid, then only the sum lent, without interest, can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, in a penal action of debt or suit in the nature of such action against the offending bank. . . ."

It is thus declared that the effect of a mere stipulation for illegal interest by a national bank is to deprive it of the right to recover more than "the sum lent, without interest;" but surely the "receiving" of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing. It will undoubtedly preclude the recovery, by the debtor, of the penalty for an usurious payment, by way of set-off against his debt, but it cannot invest the creditor with a right to recover what the law declares he shall forfeit by reason of his unlawful agreement. In this case it was agreed that usurious interest should be paid, and was paid, to the plaintiff, and the jury should have been instructed that this worked a forfeiture of all the interest upon the note, and that the plaintiff was entitled to recover only its face amount. A new trial will, therefore, be ordered, unless the plaintiff, within ten days, shall remit the excess of the amount found by the jury on the principal of the debt. Upon the entry of such remitter judgment will be entered on the verdict for the amount so rendered.

NATIONAL BANK OF MADISON *v.* DAVIS.

(Circuit Court for Indiana: 8 Bissell, 100-103. 1877.)

STATEMENT OF FACTS.—Suit on renewal notes. Defense of usury. The notes had been renewed from time to time, and a part of the principal had been paid.

Opinion by GRESHAM, J.

Section 30 of the national bank act (13 Stat. at Large, 108), approved June 3, 1864, reads as follows:

"SECTION 30. And be it further enacted that every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in ad-

vance, reckoning the days for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of the interest thus paid, from the association taking or receiving the same: *provided*, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at any other place than the place of such purchase, discount or sale, at no more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

§ 221. *Forfeiture for taking usurious interest on the renewal of a note.*

If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note less the entire interest taken out, received or reserved, and no more. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendant may recoup double the amount of the entire interest actually paid on renewal, or in an independent action of debt he may recover from the bank double the amount of the entire interest thus paid. In either case the punishment of the bank is the same. In the latter case the bank forfeits double the amount of the interest paid, and yet recovers the amount it actually paid out, for it will be remembered the note sued on includes the amount of interest originally reserved. True, if the note be renewed in the same manner more than once, and the borrower be allowed to recoup, or in an independent action recover double the amount of usurious interest paid, the bank will lose part of the principal as well as all of the interest. But forfeiture of double the entire interest paid is barred after the lapse of two years. If, instead of paying the usurious interest at each renewal of the loan, the same be added to the principal and included in the renewal notes, the bank, if the usury be pleaded, will recover the amount it originally paid to the borrower; that is to say, it will recover the amount of the last of the renewal series sued on, less all interest included in it.

Usury forfeited the entire loan or debt under the banking act of February 25, 1863. This, congress thought, was too severe, and the act of 1864, with the exception already noticed, limits the forfeiture to the interest only. In the case of *Farmers', etc., National Bank v. Dearing*, 1 Otto, 29 (§§ 205-210, *supra*), the court say: "In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount when the interest had been actually paid." The only forfeitures visited upon national banks, when they stipulate for or receive illegal interest, are those found in the banking act. They are not subject to any penalties or forfeitures contained in state statutes. *Farmers', etc., National Bank v. Dearing*, 1 Otto, 29. It is a familiar principle that forfeitures are never favored.

§ 222. *Statute of limitations as to usury.*

All actual payments in excess of the legal rate were made more than two years before the defendant's plea of usury was filed, and, in fact, more than two years before this suit was brought. The plaintiff is entitled to recover the amount of the note in suit, with interest, less \$128.50, the interest reserved on the original discount, which is to be credited as of the date of the reservation, all other interest having been actually paid.

DRUMMOND, J., concurring.

IN RE WILD.

(Circuit Court for New York: 11 Blatchford, 243-254. 1873.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—On the 13th of February, 1871, the bankrupt, Alfred Wild, without consideration, and as mere surety, became the indorser of two promissory notes made by the Portage Lake and Lake Superior Canal Company, one for \$73,902.51, and the other for \$35,111.49, which, on that day, were delivered to the Ocean National Bank, and were made payable with interest. These notes were given in renewal of a number of other notes then unpaid, which had been also given in renewal of prior notes held by the bank, and which were taken from the canal company for a loan of two sums of \$75,000 each, made on and after the 7th of January, 1867, by the said bank. One of the sums was agreed, on the 5th of January aforesaid, to be loaned in form to the said canal company, and the other was at the same time agreed to be loaned to P. J. Avery, but is proved by the testimony, and was found by the referee in the district court, to have been in fact for the benefit of the canal company, who, in the accounts kept of the transaction, was treated as the actual debtor for both amounts. The reason assigned for giving to the transaction the form of two loans, one to the canal company and the other to P. J. Avery, was, that the national banking law prohibits an indebtedness by any one party, as borrower, to associations formed thereunder, to an amount greater than one-tenth of the capital of the association making the loan. There is inconsistency in permitting the bank, or its receiver, to make such a transaction, and avoid the charge of violating the banking act by making it a loan in part to Avery and in part only to the canal company, and, on the other hand, to avoid the statutes against usury of the state of New York, by declaring the whole to be a loan to the canal company, a corporation. It would be no injustice to the bank to hold the form given to the transaction in order to save the bank from a violation, or from an apparent violation, of the banking act, conclusive; and circumstances might, I think, be suggested in which the bank would be estopped by it to aver that the transaction was other than it appeared on its face, and in the written instruments by which it was agreed that the loan should be made, and in the form of the notes actually given to the bank by Avery therefor. For the purposes of the case before me, I have concluded to treat the transaction in the aspect most favorable to the bank, and in accordance with the claim made in its behalf, as a loan to the canal company, a corporation of the state of Michigan.

The above-mentioned note for \$73,902.51 was, on the 18th of September, 1871, renewed for the amount of \$70,000, and a new note for the last-named sum, payable with interest thereon, was given, by the same corporation, under

a new name, "Lake Superior Ship Canal Railroad and Iron Company," indorsed by the bankrupt, Wild, and others. The two notes, one dated September 18, 1871, for \$70,000 and interest, the other, dated February 13, 1871, for \$35,111.49 and interest, constitute the claim made by the receiver of the bank against the estate of the bankrupt, Wild, who indorsed them; and it is the allowance of that claim by the district court which is appealed from by the assignee to this court. The loan originally made by the bank was further secured by the delivery to the bank of coupon bonds of the canal company, secured by mortgage, to the amount of \$200,000, and it was made a condition of the loan that the canal company should purchase and receive from the bank certain bonds, amounting on their face to \$237,000, of a Georgia railroad corporation, whose road had been stripped of its rails and furniture, whose track had grown up with trees and bushes, which had not been used for many years, on whose bonds no interest had been for a long time paid, and whose bonds had no market value; and their want of intrinsic value was more fully shown by a foreclosure soon after effected, on which the road, the mortgage security for the entire issue of bonds, \$924,600, of which these were a part, was sold at public auction, to the highest bidder, for \$1,500. It is true, that the purchaser of the road, who seems to have acted for the canal company, states that, after obtaining an act of the legislature of Georgia, incorporating a new company, and an act authorizing the state to guaranty another large issue of bonds, to enable the new company to reconstruct the railroad, he received a like amount of stock in the new company, \$237,000, and succeeded in selling that for \$47,000, which sum he paid to the canal company, as and for the proceeds of the purchase which they made from the bank, and of his exertions to obtain a new charter and the pledge of state aid, without which the stock would seem to be of little, if any, value.

Recurring to the transaction between the Ocean National Bank and the canal company, it was made a condition of the loan of the \$150,000 by the bank to the canal company, that, besides paying interest at seven per cent. per annum, and securing the same by \$200,000 of their mortgage bonds, with power to the bank, *at any time*, to sell such bonds at any price not less than ninety cents on the dollar, towards the repayment of the loan (which might, therefore, not continue for more than a very brief term), the canal company should also purchase from the bank the before-mentioned nearly worthless bonds of the Georgia railroad company, and should pay therefor the sum of \$100,000, securing such payment by a like amount of their mortgage coupon bonds. There was also a further requirement, to wit, that the trustee to whom the mortgage securing the canal company's coupon bonds was executed should be removed or should resign his trust, that the president of the bank should be substituted in his place, and that the moneys loaned by the bank should only be drawn by the canal company from the bank by checks countersigned by the president of the bank as such trustee. Their president was active in the negotiations with the company, and in settling the terms of the loan; and he required of the canal company, professedly for his own benefit, \$50,000 of their mortgage coupon bonds, as compensation for acting as trustee. I shall place no special stress upon that payment to the president, as affecting the question of the liability of the bankrupt in this case. It, however, belongs to the history of the transaction.

The canal company having received the proceeds of the discounts of the various notes given for the loan, subsequently paid considerable sums, by paying the interest coupons attached to the bonds, held by the bank as collateral

security, and other considerable sums derived otherwise; and it seems conceded that the two notes indorsed by the bankrupt, Wild, and the subject of controversy here, constitute the residue of the claim of the bank arising out of the said loan, assuming its entire validity and their title to the same, with interest.

The assignee of Wild (the appellant here) insists that the loan was usurious, and that there is, on that ground, no valid claim against Wild as indorser; that, under the national banking act, the loan being made by the bank reserving a compensation exceeding seven per cent. interest per annum, all interest on the loan was forfeited, and the payments made by the canal company amount to satisfaction of the principal debt; and that the notes, therefore, which are here presented bearing the indorsement of the bankrupt are without consideration and constitute no valid claim against his estate. In the court below the transaction was assumed to be such that, had the loan been made to an individual instead of a corporation, it was a violation of the statutes of New York regulating the subject of interest, and the securities or notes given therefor would have been void for usury. In that view of the subject I most fully concur, and must find as a fact, upon the evidence, that the conditions of the loan reserved to the bank, in money, more than seven per cent. per annum. No one unaffected by interest, bias or prejudice can, I think, read the testimony without being satisfied that the bank, in prescribing the terms of the loan, made it an occasion for extorting from the canal company most onerous conditions greatly exceeding lawful interest, and that the form of a sale of Georgia railroad bonds for a price far above their either real or market value (if, indeed, they had any value, which is very doubtful) was only a cover and means of securing in money the excessive and illegal compensation the bank reserved and secured for making this loan. It was, however, held below that, under the laws of the state of New York, which forbid a corporation to interpose the defense of usury, the transaction must be deemed, between the bank and the canal company, a legal transaction, the notes given by the canal company to the bank legal and binding notes, and, therefore, the indorsement thereof by the bankrupt, as surety for the canal company, a legal and binding indorsement; and, further, that the provisions of the national banking law relating to the interest which national banks may receive, and imposing penalties for charging more, do not affect the transaction, because they only apply to states which have no laws fixing the rate of interest.

It was not the intention of congress, when enacting the national banking law, to authorize national banks, in respect to exacting interest, to violate the laws of the states within which they might be organized, nor, as I think, to relieve them from the consequences of such violation prescribed by the state laws, if they were guilty thereof. This is the result of the decision of the court of appeals of the state of New York, in *First Nat. Bk. of Whitehall v. Lamb*, 50 N. Y., 95. Without adopting the reasoning of the opinion in that case, I deem the conclusion as above stated correct.

§ 223. *A bank taking usurious interest from a corporation forfeits all interest, though by the laws of the state a corporation cannot plead usury.*

On the other hand, it was entirely competent for congress, when providing for the organization of national banks, to place them under such restrictions in respect to the rate of interest which they might charge or receive as congress might see fit. As creatures of their own creation, they could be subjected to such inhibitions as were deemed expedient, even though the privileges were far short of those enjoyed by state banks or by individuals within the several states. This

would involve no conflict with state laws nor be an attempt to regulate private and domestic affairs within the states beyond the powers of the federal government. It would be merely defining the powers and regulating the conduct of the organizations which existed only by force of federal enactment, possessed the powers congress chose to confer upon them, and exercised them subject to the restrictions and conditions of the law giving them existence. Indeed, the acceptance of the organization under the law, and the enjoyment of its privileges, are necessarily subordinate to the conditions upon which the powers and privileges are conferred. Hence, had congress seen fit to say that no national bank should contract for, reserve or receive more than at the rate of five *per cent. per annum* for a loan of money, or for or upon the discounting of a note, bill or other security, it would have been a perfectly valid limitation of their powers. It would be in no conflict with any law of a state which permitted the making of loans in general at a higher rate of interest; and if congress could do this, congress could also declare the forfeiture or penalty incurred by the national bank for violating the prohibition. Such bank would still be left subject to the operation of the state law imposing, it might be, a different penalty for the violation of its own state laws, as was held by the New York court of appeals in the case above referred to. It follows that transactions may not be condemned by the state laws applied to individuals or to corporations in general, and may, under such state laws, be legal and valid, which, nevertheless, national banks may not make, and for which, if made, they may be liable to penalties or forfeitures prescribed by the law of their being. It may be that, in reference to the conduct of merely private or domestic affairs within the states, having no connection with or relation to their functions as agents of the government, congress cannot authorize national banks to do what is forbidden by state laws, nor relieve them from the forfeitures or penalties prescribed by state laws for doing what is so forbidden. But this concession would be far short of admitting that, within the range of what the state laws do permit, congress may not restrict national banks as is seen fit, or may not impose such penalties and forfeitures for a violation of those restrictions as congress thinks lawful. These latter propositions are unquestionable.

How, then, do the laws of the state of New York and the national banking law bear upon the case under consideration? The thirtieth section of the national banking act of June 3, 1864 (13 U. S. Stat. at Large, 108), provides that "every association may take, receive, reserve and charge, on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve or charge a rate not exceeding seven *per centum*, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the asso-

ciation taking or receiving the same: *provided*, that such action is commenced within two years from the time the usurious transaction occurred."

The state of New York has statutes which prohibit the taking, receiving or reserving of interest for the loan or forbearance of money, etc., at a greater rate than seven *per cent. per annum*, and making any note or bill, or other contract whereon or whereby any great rate is reserved, void. But the state has a further statute (Laws of 1850, chap. 172, p. 334) which enacts that no corporation shall interpose the defense of usury in any action. Such was the state of the law in New York when the national banking act was passed. The force and effect of this last-named statute has been declared by the courts of the state of New York in numerous cases. Those cases are collected, carried to what is deemed their legitimate conclusion by the court of appeals, and distinctly affirmed in *Rosa v. Butterfield*, 33 N. Y., 665. The doctrine of that case is, that the dealings of a corporation, as a borrower, and its contracts or obligations for loans, are unaffected by any laws of the state of New York regulating interest; that, as to them, such laws theretofore existing are repealed; that therefore the rate of interest which corporations may agree to pay is not fixed or limited, but they may agree to pay any rate they see fit, and their contract will be valid; and, also, that one who becomes surety, guarantor or indorser of such contract is legally bound to its performance — in short, that, as to contracts made by corporations, whether foreign or domestic, whether made in the state of New York or elsewhere, they stand in the state of New York as if no usury law existed. See, also, *Belmont Bank v. Hoge*, 35 N. Y., 65. In respect to contracts made within the state of New York, or entered into under or with reference to the laws of the state, I may accept the exposition thus given of the state of the law of New York; and it follows that there is no law in New York fixing the rate of interest which any one may take upon the loan of money to a corporation, or, in other words, any rate of interest is allowed to which the parties may agree. As to dealings with corporations, national banks in the state of New York are, therefore, within the case described in the national banking law above cited, to wit, "when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve or charge a rate not exceeding seven *per centum*," etc. This is a necessary and logical result. If the rate were fixed by the laws of New York, then her usury laws would apply. If the limitations in her statutes relating to interest do not apply, then no rate is fixed by her laws. Hereupon the restriction, contained in the section of the national banking law, comes into effect, without any interference or conflict with state laws, that is to say, a national bank "may take, receive or charge a rate not exceeding seven *per centum*, and such interest may be taken in advance," etc., "and the knowingly taking, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: *provided*, that such action is commenced within two years from the time the usurious transaction occurred." It is not necessary that I should express an opinion upon the question whether this forfeiture and right to recover back can, in any circumstances, be applicable to the case mentioned in the previous clause of the section, to wit, where the national bank reserves or receives

a greater rate of interest than is allowed by the laws of a state in which a rate is fixed and limited by the state laws. It is sufficient for the purposes of the present case that it does apply to a case in which no rate is thus fixed and limited. By the laws of the state of New York, as expounded by her highest court, no rate of interest upon loans to a corporation is fixed or limited. It follows that the transaction in question was within the prohibition of the national banking law, and that the bank, *eo instanti* it made the loan, upon the terms exacted, incurred the forfeiture of the entire interest which the notes received carried with them, or which was agreed to be paid thereon. Discounting the notes did not render it less true that the notes themselves carried with them the principal loaned, and the interest agreed to be paid, which, with the bonds also given, necessarily included all the pecuniary benefit agreed to be paid as compensation for the loan, whatever form the transaction was made colorably to assume.

The bankrupt, as mere accommodation indorser or surety, is, upon familiar principles of equity, entitled to all the protection which his principal (the canal company) would have if the notes in question were sought to be enforced against it. I do not say that he can recover back money paid by the canal company, but he has a right to inquire whether, in view of the forfeiture of the entire interest by the bank, there is anything due to the bank upon the notes which he indorsed, and thereby to ascertain whether, and to what extent, the two notes now in question are without consideration. It is claimed, by the assignee of the bankrupt, that, treating the entire interest as forfeited, the bank have already been paid the whole of the principal of the loan. I am not fully satisfied that a small sum, part of such principal, is not still due. Upon the proofs taken, the account would seem to stand thus:

Dr. Loan	\$150,000 00	
Less the interest or discount included in the notes given there- for from time to time.....	27,117 26	\$122,882 74
Cr. Cash payment by Canal Co.....	\$98,750 00	
Coupons paid by Canal Co	58,476 67	
Note paid.....	12,798 90	
Cash paid on giving the note for \$73,902.51, which, according to the testimony, made up the whole amount, \$76,532.19....	2,629 68	
Cash paid on renewal of the note for \$73,902.51, when the \$70,000 note, now in question, was given.....	3,902 51	
	\$166,557 76	
From which are to be deducted sundry charges to which these pay- ments appear to have been in part applied, viz.:		
Another note for \$25,000, and interest.....	\$25,452 80	
Another note for \$12,500, and interest.....	12,726 40	
Interest on these notes after maturity.....	678 00	
Coupons paid by the bank for the company.....	8,068 12	
Interest thereon	113 25	47,088 57
		119,519 19
Leaving a balance of principal due when the notes in question were in- dorsed by the bankrupt		\$3,363 55

To this extent, of \$3,363.55, without interest, it would seem the claim of the receiver should be allowed, but the estate of the bankrupt is entitled to have the collateral security held by the receiver of the bank, or the proceeds thereof, applied to this balance, in exoneration of the estate of the bankrupt, on a sale of a portion of which, by order of the district court, it appears, by the order appealed from \$23,663.30 has been already realized.

I by no means make this statement of the account as a final and conclusive statement. The proofs on the part of the bank do not appear to have been put in with a view to the statement of an account upon the principles affirmed in this opinion. The value of the collateral security held by the receiver, or the proceeds of that portion thereof which appears to have been deposited in the trust company, under the order of the district court (\$23,663.30), may be, and probably are, so clearly greater than any balance which a more accurate statement of the account would show to be due, upon the principles of this opinion, that any further expense of taking proofs and stating the account would be improvident and wasteful. But, if insisted upon, a reference may be had to state such account. The order appealed from must be modified to conform to the foregoing opinion.

§ 224. *Contract not void.*—The penalty prescribed by the act for the taking of usury by the bank is exclusive. The taking of unlawful interest does not invalidate the principal debt. Discounting a note at an illegal rate of interest does not invalidate the contract on the ground of *ultra vires*. *Nat. Exchange Bank v. Moore*,* 2 Bond, 170; *Nat. Bank of Madison v. Davis*, 8 Biss., 102. See § 194.

§ 225. *A contract tainted with usurious interest is not made void by the banking act.* The law denounces no penalty other than the forfeiture of the interest which the note or bill carries, giving to the creditor the right to sue for and recover twice the amount of interest paid. *Oates v. National Bank*, 10 Otto, 239; *Crocker v. National Bank*,* 4 Dill., 358; *In re Moore*,* 1 N. B. R., 123.

§ 226. *Assignee in bankruptcy may sue.*—Where a party has paid illegal interest to a national bank, his assignee in bankruptcy may sue to recover it back. *Crocker v. National Bank*,* 4 Dill., 359; *Wright v. First National Bank*,* 8 Biss., 243; *In re Wild*, 11 Blatch., 243. See § 223. See INTEREST.

§ 227. *Set-off.*—Usurious interest exacted by a national bank cannot be set off in payment of the principal debt. But such interest, even though incorporated in renewal notes, cannot be recovered by the bank. Nor can interest be recovered on the renewal notes from the date at which a legal rate was fixed. *Farmers' and Mechanics' Bank v. Hoagland*,* 7 Fed. R., 159.

§ 228. *When interest begins.*—Interest begins to run upon the balance of a deposit account from the date of the appointment of a receiver. No demand is necessary. *Chemical National Bank v. Bailey*, 12 Blatch., 480. See the case, §§ 148-150.

VII. REAL ESTATE SECURITY.

SUMMARY—*Valid mortgage*, § 229.—*Who may object to form of security*, § 230.

§ 229. *The national banking act as to real estate cited and considered.* A deed securing the payment of a promissory note is not within the letter or meaning of the prohibitions of the act. Such a security is not declared void. A mortgage taken to secure a loan, in the regular course of banking business, is valid. *National Bank v. Matthews*, §§ 231-236.

§ 230. *National banks may enforce mortgages executed by their debtors to secure existing liabilities and future advances.* The objection to a national bank taking real estate security for after-contracted debts can be made by the United States only. *National Bank v. Whitney*, §§ 237-241.

[NOTES.—See §§ 242-244.]

NATIONAL BANK v. MATTHEWS.

(8 Otto, 621-630. 1878.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.—Logan and Mrs. Matthews executed a joint and several note, which was secured by a deed of trust on lands, executed by Mrs. Matthews. The Union National Bank received the note by assignment. On the maturity of the note the bank directed the trustee to sell the land. The

sale was enjoined by the state court, and the supreme court of the state made the injunction perpetual.

Opinion by MR. JUSTICE SWAYNE.

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance. Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

§ 231. *The national banking law as to real estate.*

The statutory provisions which bear upon the subject are as follows:

"SEC. 5136." Every national banking association is authorized "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.

"SEC. 5137. A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth*, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years." R. S., 1999; 13 Stat., 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust, but that has not yet occurred, and never may. Section 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

§ 232. *A deed of trust securing the payment of a note is an incident of the contract.*

Section 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat* that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

§ 233. *A forfeiture of a security in a collateral proceeding is not authorized by the national banking act.*

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce, to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were,

in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. In *First National Bank of Fort Dodge v. Haire*, 36 Ia., 443, the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point, the supreme court of the state said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 Johns. Ch. R., 370."

§ 234. *The national banking act, in forbidding national banks to make loans on real estate security, does not declare such security void.*

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage,—with respect to a party entitled to the benefit of the security,—and authorities are cited in support of the proposition. The opinion of the supreme court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined. In *Harris v. Runnels*, 12 How., 79, this court said that "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase money of slaves, taken into Mississippi contrary to a statute of the state, was held to be valid. Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7 Mass., 48; *Parton v. Hervey*, 1 Gray (Mass.), 119; *King v. Birmingham*, 8 Barn. & Cress., 29. Where a bank is limited by its charter to a specified rate of interest, but no penal

consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *Planters' Bank v. Sharp*, 12 Miss., 75; *Grand Gulf Bank v. Archer*, 16 id., 151; *Rock River Bank v. Sherwood*, 10 Wis., 230. The charter of a savings institution required that its funds should be "invested in, or loaned on, public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counterclaim adjudged that he should pay the amount of the loan with interest. *Mott v. United States Trust Co.*, 19 Barb. (N. Y.), 568. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.), 313; *Goundie v. Northampton Water Co.*, 7 Pa. St., 233; *Runyon v. Coster*, 14 Pet., 122; *The Banks v. Poitiaux*, 3 Rand. (Va.), 136; *McIndoe v. City of St. Louis*, 10 Mo., 577. See, also, *Gold Mining Company v. National Bank*, 96 U. S., 640. The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax v. Hunter*, 7 Cranch, 604.

§ 235. *A mortgage taken to secure a loan, advanced bona fide as a loan in the regular course of banking, is not within the prohibition of the national banking law.*

In *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.), 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter state. The answer set up as a defense "that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract." . . . "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition." It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See, also, *Baird v. Bank of Washington*, 11 Serg. & R. (Pa.), 411. *Sedgwick* (Stat. and Const. Constr., 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government. The decree of the supreme court of Missouri will be reversed, and the cause remanded with directions to dismiss the bill; and it is so ordered.

§ 236. *A mortgage securing a loan made by a national bank is void.*

Dissenting opinion by MR. JUSTICE MILLER.

I am of opinion that the national banking act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands. The contract to pay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall. In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract the state court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more. Its judgment in that matter ought, in my opinion, to be affirmed.

NATIONAL BANK v. WHITNEY.

(18 Otto, 99-104. 1880.)

ERROR to the Supreme Court of New York.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—It appears from the record that the defendant Whitney, some time previously to 1871, executed to Maria Crocker a mortgage upon certain real property situated in the county of Genesee, in the state of New York, to secure an indebtedness to her; that in a suit brought for that purpose the mortgage was foreclosed and a decree entered for the sale of the premises; that such sale was had, and the amount received satisfied the debt and left a surplus of over \$3,800, which was paid into court. The present controversy is between subsequent mortgagees and judgment creditors for this surplus. On the 12th of January, 1871, Whitney executed a mortgage upon the same premises to the National Bank of Genesee, providing in terms for the payment of \$5,000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared from an examination of the accounts between the parties that his indebtedness at the date of the mortgage was \$3,200, and that this was paid before September 16, 1872.

On this last day Whitney executed two other mortgages upon the same property, one to Homer Bostwick and the other to Edward McCormick. The one to Bostwick was executed as security for the payment of liabilities and indebtedness which already had been or might thereafter be incurred by him on

account of Whitney, either by indorsement or otherwise, to an amount not exceeding \$2,500. This mortgage was recorded at noon on the day of its execution. The amount of the liability subsequently incurred by Whitney to Bostwick exceeded the sum named. The mortgage to McCormick was executed as security for similar liabilities and indebtedness which might be incurred by him for Whitney, to an amount not exceeding \$1,500, and was recorded at forty-five minutes past one of the day of its execution. The amount of liabilities incurred by McCormick for Whitney exceeded the sum named. It is unnecessary to give the particulars of other subsequent incumbrances, as under no circumstances could any of the surplus be applied to their discharge. In any view that can be taken of the mortgages mentioned, the surplus in controversy will be exhausted by them.

§ 237. *National banks may enforce mortgages executed by their debtors to secure existing liabilities and others that may be thereafter contracted.*

The principal question for our determination relates to the validity of the mortgage of Whitney to the national bank, so far as it applies to future advances to him. His indebtedness existing at the execution of the mortgage has been satisfied. His indebtedness subsequently incurred amounted at the sale of the premises to \$5,160. If the mortgage for the future indebtedness can be sustained as a valid instrument for that purpose, the entire surplus will be absorbed for its payment, excepting such portion as may be first payable to McCormick, by reason of the fact that he took his mortgage without notice of the one to the bank. It is contended that the mortgage to the bank, so far as it applies to future advances, is invalid, because a mortgage of that character is prohibited by the national banking law. That law, after in terms authorizing every national banking association to loan money on personal security, declares that it "may purchase, hold and convey real estate for the following purposes, and for no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it."

The question presented is not an open one in this court. It was determined in the case of *National Bank v. Matthews*, at the October term of 1878 (8 Otto, 621; §§ 231-236, *supra*). It there appeared that Matthews and another person had given their joint note to a mercantile company for \$15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterwards the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at its maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, and obtained a decree for a perpetual injunction, upon the ground that the loan was made upon real security, which was forbidden by the statute. The supreme court of the state affirmed the decree, and the case was brought here, where the decree was reversed and the cause remanded, with directions to the court below to dismiss the bill. In coming to this conclusion this court considered the transaction in two aspects: first, as not being within the letter of the statute, because the deed of trust was not executed to the bank; and, second, as a loan upon real estate security. Viewed in the first aspect, the court held that as a mortgage

the deed of trust was merely an incident to the note, and a right to its benefit, whether it was delivered or not with the note, passed with the transfer of the latter. If the loan had been made upon the note alone, the benefit of the deed as a mortgage would have inured to the bank by operation of law. Of course that which the law would give independently of a direct transfer by the mortgagee, the statute did not intend to defeat because such transfer was made.

§ 238. *The objection to a national bank's taking real estate security for after-contracted debts can only be made by the United States.*

Viewed in the second aspect, as a loan upon real estate security, the court observed that, so treating it, the consequence insisted upon did not follow; that the statute did not declare such security void, but was silent on the subject; that had congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. And after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the government against them, the court held that the prohibitory clause of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the government. "The impending danger," said the court, "of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The construction of the act of congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future. The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of statute, the objection can only be urged by the government. *Fleckner v. United States Bank*, 8 Wheat., 338-355.

§ 239. *A junior mortgage first recorded (in New York) has priority over an elder mortgage, unless the junior mortgagee has notice of the prior mortgage.*

But it appears from the record that the mortgage to McCormick was taken by him without notice of the prior mortgage to the bank, which had not then been registered. He has, therefore, a right as against the bank to prior payment of the \$1,500 and interest, for which amount his mortgage was a lien upon the premises.

Bostwick took his mortgage with notice of the one to the bank. He cannot, therefore, claim any of the surplus until the debt of the bank is paid. The sur-

plus should, therefore, be first applied to McCormick's claim, and the balance to the claim of the bank.

It follows that the decree of the supreme court of New York must be reversed, and the case remanded with directions to enter a decree in conformity with this opinion.

JUSTICES MILLER and HARLAN dissented.

ON PETITION FOR A REHEARING.

§ 240. *Relative priority of mortgages settled.*

Opinion by MR. JUSTICE FIELD.

By the decision in this case we held that, in the distribution of the surplus moneys in court, the claim of McCormick should be paid before that of the bank. He took his mortgage without notice of the one to the bank, which had not been registered. The bank now asks a rehearing of the case on this point, contending that, under the decisions of the New York courts, the priority of its mortgage cannot be displaced. It cites the statute of the state to show that the recording act gives priority only to the mortgage first recorded, when that is executed for a valuable consideration, which, according to those decisions, means some new consideration advanced at the time; and that a mortgage for a pre-existing indebtedness is not protected by a prior record, against a non-recorded mortgage for value. Here the mortgage to McCormick was given to secure—to the extent of \$1,500—a previous liability and indebtedness, and such as might be subsequently incurred. The previous indebtedness at the time equalled the whole amount of the intended security. There would be force in the position of the bank if its own mortgage stood in any better condition. When the McCormick mortgage was executed—September 16, 1872—the indebtedness of Whitney to the bank was paid, and his mortgage remained in force only for any future indebtedness which he might incur. For such future indebtedness it could not cut out the mortgage to McCormick, executed for an existing indebtedness, and of which mortgage the bank had notice. For advances afterwards made, the mortgage to the bank was a subsequent incumbrance. As between two mortgages,—one for a past indebtedness, and one for an indebtedness to be subsequently incurred,—the one for the past indebtedness must have precedence, if first recorded. The petition for a rehearing by the bank must, therefore, be denied.

§ 241. *Rule as to costs.*

The petition of McCormick to be allowed costs out of the fund in court must, according to the usual practice of the court in such cases, be also denied. His costs are chargeable against the bank which contested his right to be paid out of the proceeds in court. If paid out of the fund, they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney.

Petition denied.

§ 242. *Real estate.*—A national bank may take the note and real estate mortgage of a third person as collateral security, and may, in order to make the debt, foreclose the mortgage. *Merchants' National Bank v. Mears*, * 8 Biss., 158.

§ 243. A national bank cannot take real estate security for present or future advances. *Kansas Valley Bank v. Rowell*, * 2 Dill., 371. (This case is not now the law. See § 234.)

§ 244. *Mortgage for a loan in name of president is illegal.*—It seems that where the president of a national bank takes a real estate mortgage in his own name for a loan made by the bank at his instance, such act is a violation on the part of the bank of a clause in the national banking law forbidding the bank to take mortgage security on real estate. *Ripley v. Harris*, 8 Biss., 202.

VIII. SUITS.

SUMMARY — *Where bank may be sued*, § 245. — *Appointment of receiver, suits by creditors*, § 246. — *Venue of local actions*, § 247. — *Provisions for winding up*, § 248. — *Suit abates by decree of dissolution*, § 249. — *Attachment discharged by appointment of receiver*, §§ 250, 251.

§ 245. A national bank may be sued in any federal court held within the district in which the bank is located, or in any state, county or municipal court in which it is located, in all cases where such latter courts have jurisdiction in similar cases. *Bank of Bethel v. Pahquioque Bank*, §§ 252-256.

§ 246. The appointment of a receiver does not work a complete dissolution of the bank, but for many purposes the bank continues to exist. Claims of creditors may be established by suit against the bank in a court of competent jurisdiction, even though a receiver has been appointed. Claims put in judgment are not a lien upon the property of the bank, nor do they have preference over those proved before the receiver. *Ibid.*

§ 247. In local actions the bank may be sued in a county other than that in which its principal office is situate. *Casey v. Adams*, § 257.

§ 248. The provisions of the act for winding up banks are not exclusive. Courts of equity can appoint receivers of insolvent national banks upon judgment creditors' bills. *Wright v. Merchants' National Bank*, §§ 258-260.

§ 249. A suit pending against a bank is abated by a decree dissolving the bank and forfeiting its rights and franchises. *National Bank v. Colby*, §§ 261-265.

§ 250. The property of a national bank attached at the suit of an individual creditor after the bank has become insolvent cannot be subjected to sale for the payment of his demand against the claim for the property by a receiver of the bank subsequently appointed. *Ibid.*; *Harvey v. Allen*, §§ 266-268.

§ 251. On the insolvency of a national bank, A. commenced a suit by attachment in a state court, and levied on money of the bank on deposit in another bank. Subsequently a receiver was appointed by the comptroller, and he applied to the state court to dissolve the attachment, but without becoming a party to the suit. The application was refused, and the receiver promptly commenced a suit in the federal court against A. and the bank holding the deposit. After service of process in this suit, A. recovered a judgment in the state court and collected it by execution against the money attached. The federal court decreed that A. should pay the money so collected to the plaintiff, and that the bank in which the money was deposited should pay, if the money could not be collected from A. *Harvey v. Allen*, §§ 266-268.

[NOTES.—See §§ 269-287.]

BANK OF BETHEL v. PAHQUIQUE BANK.

(14 Wallace, 383-402. 1871.)

ERROR to the Supreme Court of Connecticut.

§ 252. *Nature and organization of national banking associations; protest of notes.*

Opinion by MR. JUSTICE CLIFFORD.

Associations for banking, formed pursuant to the act to provide a national currency, and duly authorized by the comptroller of the currency to commence the business of banking, become bodies corporate and have a succession for the period of twenty years from their organization, unless sooner dissolved according to the provisions of their articles of association, or by the act of the shareholders owning two-thirds of the stock, or unless the franchise shall be forfeited by a violation of the act under which the association was formed. Such an association is allowed to select, subject to certain conditions and the approval of the comptroller of the currency, another such association at which it will redeem its circulating notes at par, but the provision is that nothing in that section shall relieve any such association from its liability to redeem its notes in circulation at its own counter, at par, in lawful money, on demand; and in case of failure so to do, the holder may cause the same to be protested in one

package by a notary public, unless the president or cashier of the association which issued the notes, or the president or cashier of the association designated as the place for redeeming the same, will waive demand and notice of protest and execute an admission in writing stating the amount demanded and the fact of non-payment, and it is made the duty of the notary forthwith to forward the admission or notice of protest, as the case may be, to the comptroller of the currency for his information and action in the premises.

STATEMENT OF FACTS.—Notes to a large amount, issued by the corporation defendants for circulation, were held by the corporation plaintiffs, and the plaintiffs presented the same to the defendants for redemption, and the defendants failing to redeem the same, the plaintiffs offered the notes for protest, but the defendants having waived demand and notice of protest, and having tendered an admission in writing stating the amount demanded and the fact of non-payment, the plaintiffs accepted the written admission, and the notary forwarded the same to the comptroller of the currency as required under such circumstances. Pursuant to the requirement of law the comptroller of the currency appointed a special agent to ascertain whether the facts set forth in the protest were true, and the agent so appointed having reported that the defendants had failed to redeem in lawful money their circulating notes when payment thereof was duly and lawfully demanded, he, the comptroller of the currency, appointed a receiver of the delinquent association, with all the powers, duties and responsibilities given to or imposed upon such an appointee in such case made and provided, and the record shows that the receiver entered upon the duties of his office and took possession of all the books, records and assets, real and personal, of the association, and that he has ever since had the exclusive possession of the same, to be disposed of according to law. Before the commencement of the suit the comptroller of the currency caused notice to be published requiring all claimants to present and make proof of their claims against the delinquent association, and the record also shows that the plaintiffs presented the claim in controversy to the receiver for allowance, and that the receiver having disallowed the same, the plaintiffs instituted the present suit in the state court to recover the amount. Appropriate proceedings followed, as in an action of *assumpsit*, and the parties having been heard, the subordinate court where the suit was brought made a finding of facts, but reserved the question whether the case ought to be dismissed for want of jurisdiction, and if not, what judgment ought to be rendered in the case, and all questions of law arising upon the facts found, for the opinion and advice of the supreme court of errors. Proper measures were adopted to obtain the opinion and advice of the appellate tribunal, and they were duly received, and thereupon the subordinate court rendered judgment in favor of the plaintiffs for the whole amount claimed in the declaration. Proceedings in the nature of a writ of error were instituted by the defendants, by which the cause was removed into the supreme court of errors, where the parties were again heard, and the decision of the court of errors was that the judgment should be in all things affirmed. Final judgment having been rendered in the state court, the defendants sued out a writ of error under the twenty-fifth section of the judiciary act and removed the cause into this court.

Four only of the errors assigned will be examined, as the others, in the view of the case taken by the court, either involve substantially the same considerations or present questions not re-examinable in this court under a writ of error to a state court. Briefly stated the errors assigned to be examined are as

follows: (1) That the state court had no jurisdiction of the case or of the parties at the time the suit was commenced. (2) That the defendant association prior to the institution of the suit had forfeited its franchise by a violation of the act under which it was formed and had been dissolved by the action of the comptroller of the currency. (3) That the defendant association could not be impleaded at the time the action was commenced, as prior to that time the association was prohibited by the act of congress from paying or satisfying any of its creditors. (4) That the decision of the receiver disallowing the claim of the plaintiffs was final and was not subject to review in the state court.

§ 253. *A national bank may be sued in any state court having jurisdiction of similar causes.*

Support to the first proposition is supposed to be derived from the conceded fact that such associations are created by an act of congress and that they are instruments of the national government intrusted with the power of carrying on the business of banking and of employing and circulating treasury notes as a national currency, subject to the supervision and direction of the comptroller of the currency and of the secretary of the treasury. Banking associations, it is said, were established as instruments by which the government may perform the trust of furnishing and regulating the national paper currency, and the argument is that inasmuch as they are instruments of the government to carry into effect a national purpose they cannot be impleaded in a state court. Confirmation of that view is also attempted to be drawn from the fact that such associations are controlled by the treasury department, that all the notes which they circulate as money are received from the comptroller of the currency, and that they cannot issue any instrument for circulation or use as money except the notes intrusted to them by the comptroller of the currency, as authorized by the act of congress. Beyond all doubt such associations are created by an act of congress and for the purposes assumed by the defendants, but the conclusion attempted to be drawn from those facts cannot be sustained, as express provision is made by the fifty-seventh section of the act that suits, actions and proceedings against any such association may be had "in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Commenced as the action was in the proper court of the state where the association is located and in a court having jurisdiction in similar cases, which is not denied, it is quite clear that the objection to the jurisdiction of the court, founded upon the character of the association as an instrument of the national government, must be overruled. Jurisdiction in such suits is unquestionably vested in any circuit, district or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the act of congress gives authority to creditors to prosecute such controversies in "any state, county or municipal court in which said association is located," in all cases where it appears that such courts have jurisdiction under the state laws in similar controversies. Proceedings to enjoin the comptroller of the currency under that act must, it is true, be instituted and prosecuted in a circuit, district or territorial court of the United States, but the act allows creditors to sue in the proper state courts in all suits actions and proceedings against the association as specifically provided in the fifty-seventh section of the act. Authorities to support the proposition are not necessary, as it rests upon an express provision in the act of congress. 13 Stats. at Large, 116.

§ 254. *The appointment of a receiver does not work a complete dissolution of the bank.*

II. Associations of the kind have a succession for the period of twenty years from their organization, unless sooner dissolved in some one of the modes pointed out in the act under which such associations are formed, and throughout that period, unless sooner dissolved, they may make contracts in the name designated in their organization certificate, and may sue and be sued, or complain and defend, in any court of law or equity as fully as natural persons. Such corporate franchises cease to exist when the term for which they were granted expires, and the association may at any time go into liquidation and be closed by the vote of its shareholders owning two-thirds of the stock; but it is not necessary to remark upon those topics, as it is not pretended that the defendant association has ceased to exist or been dissolved in either of those modes. All such associations are bound to redeem their circulating notes either at their own counter or at such other similar association as they are allowed to select for that purpose, and the provision is that if any association shall fail either to make the selection or to redeem its notes as required, the comptroller of the currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided in the act, to wind up its affairs. Holders of the circulating notes of such an association may demand payment thereof at the office of such association, or at its place of redemption designated as aforesaid, and if the association fail to redeem the same in lawful money they may cause the same to be protested, as before explained, and the notary, on making such protest or upon receiving such admission, shall forthwith forward the same to the comptroller of the currency for his information and action in the premises. Being informed of the default of the association in that mode, it is made the duty of the comptroller to make an examination into the facts, and, if satisfied that the default has been committed, to give notice to the association; and the same section provides that from that time it shall not be lawful for the association suffering the default to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits. On receiving such notice the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a special agent to examine into the facts of the case, and if satisfied from the protest or the report of the special agent that the charge of default as made is true, he shall, within thirty days, declare the bonds and securities pledged by the association forfeited, and give notice to the holders of the circulating notes to present the same for payment at the treasury, and the provision is that in that event he may in his discretion cause an amount of the bonds pledged, equal at current rates to the amount paid to redeem the outstanding notes of the association, or he may cause such an amount of the bonds pledged as may be necessary to redeem the outstanding notes, to be sold at public auction; or, if he shall be of the opinion that the public interest will be best promoted thereby, he may sell at private sale any of the bonds so pledged, and receive therefor either money or the circulating notes of such failing association. Power is also conferred upon the comptroller of the currency in such a case forthwith to appoint a receiver to take possession of the books, records and assets of every description of the association, and to collect all debts due and claims belonging to it, and upon the order of a court of record of competent jurisdiction he may sell or compound all bad or doubtful debts and may

sell all the real and personal property of the association on such terms as the court shall direct, and may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders, as enacted by the twelfth section of the act. All moneys so made by the receiver he is to pay over to the treasurer of the United States subject to the order of the comptroller of the currency, and he is also to make report to that officer of all his acts and proceedings. Receivers may also be appointed for other causes than those already mentioned; as, for example, in case the money reserve which the association is required to have on hand shall fall below the prescribed amount, and when notified to make it good the association shall fail for thirty days to comply with the requirement, or shall fail for thirty days to increase the capital stock of the association to the minimum amount required, where the same has been reduced below that amount by the delinquency of the shareholders and consequent sale and reduction of the stock; or, in case any such association which is required to keep undiminished the twenty per centum surplus mentioned in the twelfth section of this act, shall fail to keep it good, in which event the provision is that the comptroller of the currency may compel said banking association to close up its business and wind up its affairs, as provided in the act under which it was organized. Whenever a receiver is appointed the comptroller is required to give notice of the fact, requesting all persons having claims against the association to present the same and to make legal proof thereof. Provision is first to be made by the comptroller for refunding to the United States any such deficiency in redeeming the notes of the association as is mentioned in the act, and having refunded that amount, the comptroller is required in the next place to make a ratable dividend of the money paid over to him by the receiver on all such claims as may have been proved to his satisfaction *or adjudicated in a court of competent jurisdiction*. Claims proved to the satisfaction of the comptroller are to be included in the list, and he is also to include in the list all claims adjudicated in a court of competent jurisdiction, which shows conclusively that claims disallowed by the comptroller may be prosecuted in a court having jurisdiction in such cases. *Kennedy v. Gibson*, 8 Wall., 506 (§§ 6-12, *supra*.) Where the whole assets are not collected and distributed in the first dividend further dividends on claims proved and adjudicated may be made as the proceeds of the assets are collected and paid to the treasurer, and the remainder, if any, shall be paid to the shareholders.

None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered and the balance, if any, is paid to the owners of the stock or their legal representatives. Delinquent associations whose notes have been protested, and whose officers have been notified by the comptroller that proceedings for liquidation under the act have been instituted, cannot lawfully pay out any of their notes or discount any notes or bills or otherwise prosecute the business of banking except to receive and safely keep money belonging to the association, and to deliver special deposits, which of itself refutes the theory that the association at that stage of the proceedings has ceased to exist. Evidence to refute that theory is also found in the proviso to the fiftieth section of the act, which empowers the association, if they deny having failed to redeem their circulating notes, to apply, within ten days after being so notified by the comptroller that such proceedings have been commenced, to the nearest circuit or district or territorial court of the United States to enjoin further proceedings in the premises, and those courts are in-

vested with full jurisdiction to hear and determine the matters put in issue by such an application.

Such associations are authorized to elect or appoint directors, and the directors are empowered to exercise all such incidental powers as shall be necessary to carry on the business of banking. They may make by-laws, discount and negotiate promissory notes, drafts, bills of exchange or other evidences of debt; receive deposits, buy and sell exchange, coin and bullion; loan money on personal security, and obtain, issue and circulate notes, according to the provisions of the act to provide a national currency. Throughout they are enjoined to conform to the regulations of that act, and the provision is that if they knowingly violate any of its provision or knowingly permit them to be violated, all the rights, privileges and franchises of the association derived from the act shall be thereby forfeited; but the further provision is that such violation, before the association shall be declared dissolved, shall be determined and adjudged by a proper circuit, district or territorial court of the United States, which shows conclusively that the act of the comptroller in appointing a receiver does not work a complete dissolution of the association, as is supposed by the defendants. *Frost v. Coal Company*, 24 How., 283; *Angell & Ames on Corporations*, 9th ed., 777; *Abbott's Digest*, title "Corporation," 338; *Grant on Corporations*, 295.

III. Express power to sue and be sued, complain and defend, in any court of law and equity, is conferred on such associations by the eighth section of the act providing for their organization, and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for that purpose by virtue of the appointment of a receiver or by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is anywhere in terms conferred upon the receiver, nor upon the comptroller of the currency in any case except when he institutes a suit to forfeit the rights, privileges and franchises of the association, and in that case the provision is express that the suit shall be in his own name. *Case v. Terrell*, 11 Wall., 201. Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners.

Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly, if not entirely, upon the construction of the act of congress, and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation. Suits and proceedings under the act in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a

receiver, are to be conducted by the district attorney under the direction of the solicitor of the treasury, and no doubt is entertained that the directors, from the time a receiver is appointed, cease to have any power in respect to such matters, and that the control and supervision of the same are vested in the proper officers of the United States.

§ 255. *Claims of creditors may be established by suit against the bank, although a receiver has been appointed.*

Claims presented by creditors may be proved before the comptroller or may be established by a suit against the association in any court of competent jurisdiction. *Kennedy v. Gibson*, 8 Wall., 506. Creditors, say the court in that case, must seek their remedy through the comptroller, in the mode prescribed in the act of congress, and cannot proceed directly in their own names against the stockholders or debtors of the corporation. Suits may be brought by the receiver, both at law or in equity, and the express decision there is that he may sue in his own name or in the name of the association *for his use*, and no reason is perceived to doubt the correctness of the rule adopted in that case, though the act of congress does not in terms give him authority to sue in his own name. *Booth v. Clark*, 17 How., 322.

IV. Enough has already been remarked to show that the fourth proposition of the defendants cannot be sustained, as the act of congress provides that the receiver, in making the basis for a dividend, shall include in the list not only claims proved before him to his satisfaction, but claims also adjudicated in a court of competent jurisdiction.

§ 256. *Claims put in judgment do not constitute a lien on the property of the bank or a preference over the claims proven before its receiver.*

Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a construction is not warranted either by the language employed, or the subject matter to which it relates, or the purpose to be accomplished, or by the analogies of the law or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criterions the court is of the opinion that the construction assumed by the defendants is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the comptroller of the currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of congress in such case made and provided.

Nothing further need be remarked in respect to the other errors assigned, as it is clear that the conclusions announced dispose of all the questions in the case which are examinable under a writ of error to a state court.

Judgment affirmed.

CASEY v. ADAMS.

(12 Otto, 66-68. 1880.)

ERROR to the Supreme Court of Louisiana.

§ 257. *In local actions a national bank may be sued in a county or city other than that in which the bank is located.*

Opinion by WAITE, C. J.

The federal question in this case is whether a national bank can be sued in a state court in a local action in any other county or city than that where the bank is located. By section 5198, Revised Statutes, it is provided that "suits, actions and proceedings against any association under this title [The National Banks] may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the banking act any evidence of an intention on the part of congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act of congress the construction now contended for would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by congress.

The proceeding in this case was clearly local in its nature. It related to property in the parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until "a conflict of privileges" arising between creditors was settled. No personal claim was made against the bank. Nothing was wanted except to "class the privilege" of the bank on the property seized "according to its rank." Whether, under the laws of Louisiana, the form of proceeding instituted for that purpose was appropriate, is not a question for us. The decision of the supreme court of the state as to that matter is conclusive.

Judgment affirmed.

WRIGHT v. MERCHANTS' NATIONAL BANK.

(Circuit Court for Tennessee: 1 Flippin, 568-574. 1876.)

§ 258. *Power of courts of equity and of the comptroller of the currency to appoint receivers of national banks.*

Opinion by BROWN, J.

The power and duty of a court of equity to appoint a receiver upon the application of a judgment creditor is too well established to admit of doubt.

Edwards on Receivers, 396; Hadden v. Spader, 20 Johns., 554; Taylor v. Jones, 2 Atk., 600; Edgell v. Haywood, 3 id., 352; Candler v. Pettit, 1 Paige, 168; Weed v. Pierce, 9 Cow., 722; Lewis v. Zouch, 2 Sim., 388; Bloodgood v. Clark, 4 Paige, 574; Ogilvie v. Knox Insurance Co., 22 How., 380; Parkhurst v. Kinsman, 2 Blatch., 78. There is no allegation in the bill that execution has been issued and returned **unsatisfied**, but as no demurrer is interposed upon that ground, and as the point was not made upon the argument, I shall notice it no further. Indeed, it was practically conceded that a case for a receiver was made out, unless the power of appointing receivers of national banks was exclusively vested in the comptroller of the currency. Title 62 of the Revised Statutes, relating to the organization of banks, provides for the appointment of a receiver by the comptroller of the currency to wind up their affairs only in the following cases: First, for not keeping good its surplus. Sec. 5151. Second, for not keeping stock at minimum. Sec. 5141. Third, for not keeping good its reserve. Sec. 5191. Fourth, for not selecting a place for the redemption of its notes. Sec. 5195. Fifth, for holding its own stock over six months. Sec. 5201. Sixth, for non-payment of its circulating notes. Sec. 5234. Seventh, for improperly certifying a check. Sec. 5208. Eighth, for failing to pay up capital stock, and to allow the same to become and to remain impaired by losses. Sec. 5205.

§ 259. *The provisions in the banking law for winding up banks are not exclusive. Courts of equity can appoint receivers of insolvent national banks.*

If a judgment creditor may not invoke the aid of a court of equity he is powerless to enforce his claim, unless he can persuade the comptroller of currency to interfere in his behalf. Section 5242 provides that a "transfer of notes, bills of exchange, bonds or other evidences of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." No method, however, is provided of winding up a bank guilty of any of the acts mentioned in this section, nor is the power given to the comptroller of currency apparently designed to reach these cases. It is at least doubtful whether he would have power, upon the application made by this bill, to interfere and appoint a receiver. That the winding-up provisions of the act were not designed to be exclusive, it seems to me, is fairly to be inferred from section 5241, which provides that "no association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice." There is certainly an implication here that the courts may exercise a visitorial power, and as this power is usually, if not always, exerted through the agency of a receiver, I should regard the language of this section as justifying the appointment of one. But even if the power had been given to the comptroller of the currency to appoint a receiver in cases like the present, in the absence of restrictive language, it is at least doubtful whether it should be regarded as forestalling the jurisdiction of the courts.

§ 260. *Doctrine of the election of remedies.*

The general rule with regard to the election of remedies is stated in Sedgwick

on Statutory Law, pages 93-401. "Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law or to proceed upon the statute; the statutory remedy is merely cumulative." A clause in a railroad act authorizing the directors to exact a forfeiture of the stock and previous payments, as a penalty for non-payment of instalments, does not, before forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law. *Northern Railroad Co. v. Miller*, 10 Barb., 260. These principles have been applied to the winding-up act of English corporations, and have uniformly been held as not exclusive of the ordinary remedies provided by law. *Lindlay on Partnership*, 861. In *Jones v. Charlemont*, 16 Sim., 271, a bill was filed for the purpose of winding up the affairs of a railway company. The defendant demurred upon the ground that plaintiffs might have obtained their object under the special act of 9 and 10 Vic., to facilitate the dissolution of railway companies, and that that act had ousted the court of its jurisdiction in cases clearly within its operation. The vice-chancellor, however, declined to hear counsel for the complainant, and overruled the demurrer. The same question again came before the court in the case of *Clements v. Bowes*, 17 Sim., 167, which was a bill by a shareholder in a company, on behalf of himself and others, praying an account of receipts and payments of defendants on behalf of the company. Defendants were members of a finance committee who were alleged to have exclusive control over the money affairs of the corporation. They demurred on the ground that the legislature having provided a method of winding up and dealing with the affairs of a railway company, the court ought to refuse a party the right of coming in to have the accounts taken. The court observes: "To oust the jurisdiction of a court of chancery in such a case, the legislature should have so declared. It is plain where a court of equity has jurisdiction in such a case, an act of giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court." Similar views were expressed by the court of chancery in 1853, in the case of *Fripp v. Chard Railway Co.*, 21 Eng. Law and Eq., 53, which was an application by a mortgagee for the appointment of a receiver. A provision in the act that any mortgagee whose interest was in arrear for twenty-one days might have a receiver appointed, upon application to two justices, was held to oust the jurisdiction of the court to appoint a receiver with the usual powers. Counsel for defendant cited to the court upon the argument the case of *Smith v. Manufacturers' Bank*, 9 N. B. R., 122, in which Judge Blodgett, of the northern district of Illinois, held that the bankrupt act was not intended to apply to national banks and that the provision made by congress for their winding up, when insolvent, was exclusive. Although the two cases are not exactly analogous, the reasoning of the court in that case undoubtedly applies to the one at bar. Having intimated an opinion upon the argument before this case was cited, that the winding-up provisions were not exclusive, I felt bound on hearing the case, in deference to the views of the learned judge, to withhold my decision until I had made a more careful examination of the law. From correspondence with him I am informed that he has modified, to some extent, the views expressed in that opinion, and that in the subsequent case of *James Iron v. The Manufacturers' National Bank* (§§ 13-17, *supra*), not reported, he appointed a receiver of the same bank upon the application of a judgment creditor. He there observes: "It would seem that the comptroller only has

the right to appoint a receiver upon the existence of the facts which clothe him with that power, and that he rightfully declines to act in this case. I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is, under an act of congress for certain specified purposes, does not come within the general provision of the law regulating the remedies of creditors the same as any other corporation, except where there are specific provisions to the contrary."

It is not intended in this case to decide whether the court would be authorized to appoint a receiver upon the happening of the contingencies authorizing such appointment by the comptroller of the currency. I am clearly of the opinion, however, that when the act does not provide for the introduction of the comptroller, a judgment creditor is entitled to the aid of a court of equity. I see nothing in the case of *Gibson v. Kennedy*, 8 Wall., 498 (§§ 6-12, *supra*), which conflicts with these views. Nothing was decided in that case, except that it is for the comptroller to determine when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether a whole or part, and, if a part, how much, shall be collected. It is true there are certain *dicta* in the opinion which, literally construed, would indicate that creditors must, in all cases, seek their remedy through the comptroller in the mode prescribed by statute, but I am satisfied the court did not intend that language to be of universal application, and that it should be limited to the facts of the case before it. Nor is there any force in the objection that a receiver appointed by this court would be powerless to obtain possession of the surplus of bonds on deposit in Washington for the redemption of its circulating notes. I cannot assume that the comptroller of the currency would refuse to comply with the order of a court having jurisdiction of the case.

On the whole, I am of the opinion that, in the absence of action on the part of the comptroller of the currency, this court has the power to appoint a receiver upon the application of a judgment creditor, subject, possibly, to his being superseded by the action of the comptroller. The demurrer must be overruled.

NATIONAL BANK v. COLBY.

(21 Wallace, 609-616. 1874.)

ERROR to the Supreme Court of Alabama.

STATEMENT OF FACTS.—A draft was presented to the bank on April 15, 1867, and payment refused. On the following day the bank did not open its doors, and possession was taken by the military authorities under instructions from the secretary of the treasury. The president absconded on the 17th, and on the same day Colby levied an attachment on property belonging to the bank. A receiver was appointed by the comptroller on April 30th. An information was filed by the comptroller on the 28th of May, and a summons was issued to the directors to appear. On June 1st a decree, *pro confesso*, was entered, adjudging a dissolution. When the attachment suit came on for trial the receiver appeared and moved to dissolve the attachment and abate the suit. Motion overruled.

§ 261. *An attachment of the property of an insolvent bank cannot be maintained against the claim of a receiver subsequently appointed.*

Opinion by MR. JUSTICE FIELD.

Two questions are presented in this case for our determination: 1st, whether the property of a national bank organized under the act of congress of June

3, 1864 (13 Stats. at Large, 99), attached at the suit of an individual creditor, after the bank has become insolvent, can be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed; and 2d, whether a suit against a national bank to enforce the collection of a demand is abated by a decree dissolving the corporation and forfeiting its rights and franchises. To the first question the act of congress furnishes an answer in the negative; to the second, the general law respecting corporations gives one in the affirmative. The act of congress prescribes the conditions upon which national banks shall be created; the powers they shall possess, and the consequences of their failure to meet their obligations. All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated. The object of the act, as its title imports, was to create a national currency secured by a pledge of the bonds of the United States. And to that end it requires security in government bonds for all notes issued; and in case any bank fails to redeem its notes on demand, it provides for their payment on presentation at the treasury of the United States. To make good any deficiency which may exist in the proceeds of the bonds to meet the amount expended in paying the notes of a bank, the act declares that "the United States shall have a first and paramount lien upon all the assets" of the association. Whatever disposition, therefore, may be made of the property of an insolvent bank, the lien of the United States thereon must exist until the government is fully reimbursed.

§ 262. *The act secures equality among creditors.*

As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. The fiftieth section provides for the appointment of a receiver of an insolvent bank, who shall take possession of its assets, collect its debts, and, upon the order of a court of record, sell its real and personal property and pay over the money to the treasury of the United States, subject to the order of the comptroller of the currency; that the comptroller shall then advertise for creditors to present their claims against the association, and after making provision for refunding to the United States any deficiency in redeeming its notes, shall make a ratable dividend of the money on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction. The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or "with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void." There is in these provisions a clear manifestation of a design on the part of congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and 2d, to secure the assets of the bank for ratable distribution among its general creditors. This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors, so studiously provided for in the act, would in that case be lost. As justly observed by counsel, if preference was left to the race of diligence, creditors living remote from the location of the bank would

always be distanced in the contest, and the equality promised to them by the act would be a mere mockery.

§ 263: *Objections in matters of form to modes of procedure in the lower court cannot be urged for the first time on appeal.*

It is too late for counsel to question in this court the right of the receiver to appear in the state court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceeding, it was waived by the silence of the parties. Objections in matters of form to modes of procedure in the court below cannot be urged here for the first time.

§ 264. *Right of receiver to move to abate an attachment.*

But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him, and the production of his appointment and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and in our judgment, it was error for the court to refuse to discharge it on his application.

§ 265. *A suit against a national bank is abated by a decree dissolving the corporation.*

But, in addition to this, the suit had abated by the decree of the district court of the United States forfeiting the rights, privileges and franchises of the corporation, and adjudging its dissolution. The act of congress provides for such forfeiture whenever the directors themselves violate, or knowingly permit any officers, servants or agents of the association to violate, any of the provisions of the act. The information filed against the bank by the comptroller of the currency disclosed several gross violations of the act by the directors; and the justice and validity of the decree were not questioned in the state court. With the forfeiture of its rights, privileges and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. No such enactment is found in the act of congress authorizing the creation of national banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time. "I cannot distinguish," says Story, in *Greeley v. Smith*, 3 Story, 658 (see, also, *Farmers' & Mechanics' Bank v. Little*, 8 Watts & Serg., 207, and *Mumma v. Potomac Co.*, 8 Pet., 281), "between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor,

indeed, could exist without reviving the corporation *pro hac vice*, and, therefore, any suit pending against it at its death abates by mere operation of law."

Some criticism is made upon the fact that the decree of dissolution was entered on the 1st of June, when the summons cited the directors before the court on a different day. It is a sufficient answer to this criticism that no objection of the kind was made to the decree in the court below, nor was its validity questioned. The presumption is, in the absence of such objection, that an answer existed which would have been made had the objection been taken. The decree was admitted in evidence, and the decision of the court was placed on the ground that the provisions of the act of congress did not interfere with proceedings by attachment in the state court, nor affect the liability of an insolvent corporation to be thus sued, and "that matter of abatement could not be given in evidence on an issue upon the merits, a default or a failure to plead;" the court apparently considering the abatement of the attachment, and not the abatement of the suit, as the object sought by the production of the decree.

Judgment reversed and the cause remanded, with directions to discharge the attachment levied on the property of the bank.

HARVEY v. ALLEN.

(Circuit Court for New York: 16 Blatchford, 29-47. 1879.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The Scandinavian National Bank of Chicago was a bank organized under the national banking act, and subject to its provisions. It was located at Chicago, Illinois. On the 10th of December, 1872, it failed to redeem a circulating note of the denomination of \$5, issued by it, when payment thereof was legally demanded at its office in Chicago, during the usual hours of business. On the same day a notary public duly protested said note for non-payment, and served a written notice of the protest on the president of the bank, and it stopped doing business, and a United States bank examiner took possession of all of its books and assets. Section 46 of the act of June 3, 1864 (13 U. S. Stat. at Large, 113), provides that if any national bank shall fail to redeem in lawful money any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at its office, they may be protested by a notary public. The notary is required to give notice of the protest to the president or cashier of the bank, and to forward notice of the protest to the comptroller of the currency. Section 50 authorizes the comptroller, on becoming satisfied, as above specified, that any bank has so refused to pay its circulating notes and is in default, to forthwith appoint a receiver, who, under the direction of the comptroller, shall take possession of the books, records and assets of the bank, and collect its debts. Provision is made for the receiver to turn the assets into money and pay such money to the treasurer of the United States, and for the comptroller to distribute such money *pro rata* among the creditors of the bank. Section 52 is in these words: "All transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this

act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." On the 18th of December, 1872, the comptroller, by an instrument in writing reciting the necessary preliminary facts, appointed the plaintiff in this suit to be receiver of said bank, with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of said act. At the time the Scandinavian Bank failed, the National Broadway Bank, another national bank, located in the city of New York, and one of the defendants in this suit, had on deposit moneys belonging to the Scandinavian Bank, subject to its draft. On the 9th of December, 1872, the defendants Allen, Stephens and Blennerhassett, composing the firm of Allen, Stephens & Co., held a sight draft drawn by the Scandinavian Bank on the Broadway Bank for \$650. On that day they presented the same for payment to the latter bank, but it was not paid, and thereupon it was duly protested and notice given to the former bank.

On the 12th of December a warrant of attachment was issued out of the supreme court of New York, on the application of Allen, Stephens & Co., in an action in said court by them against the Scandinavian Bank to recover \$650, with interest from December 9th, and on the ground that said bank was a foreign corporation organized under said act of 1864, commanding the sheriff of the city and county of New York to attach and safely keep all the property of said bank within his county, or so much thereof as might be sufficient to satisfy the said demand, together with costs and expenses. On the 13th of December this attachment was levied by the defendant Brennan, as such sheriff, on the moneys of the Scandinavian Bank in the possession of the Broadway Bank. A summons was issued in said action, dated December 12th, demanding judgment for \$650, with interest from December 9th, and costs. A complaint, setting forth the cause of action, was verified December 18th. On the 19th of December, in accordance with the state practice, an order was made by the state court that the summons be served by publication in two newspapers, and that a copy of the summons and complaint be deposited in the postoffice, directed to the Scandinavian Bank, as defendant. On the same day the summons and complaint were filed in the state court. On the 8th of February, 1873, the attorney of the United States for this district caused an affidavit to be made by Mr. Tremain, entitled in the suit in the state court, reciting the proceedings therein, and setting forth that the Scandinavian Bank had suspended and become insolvent December 9, 1872; that Mr. Harvey had been appointed its receiver by the comptroller, under said act; that he, said attorney, had "been instructed to act for said receiver in and about the matters and proceedings appertaining to the claim of" Allen, Stephens & Co.; and that, upon the facts so stated, and all the proceedings in said suit, and upon the ground, among others, that the state court had no jurisdiction, and that the continuance of the proceedings in said action, and of said attachment, was in violation of said act of congress, and that said attachment was issued after the commission of an act of insolvency by the Scandinavian Bank, and with a view to prevent the application of its assets, as prescribed in said act, and to prefer Allen, Stephens & Co., by securing to them their claim in full from such assets in preference to other creditors, or the ratable proportion of said assets that might be found due to them under said act, the said attorney desired to move, in behalf of the defendant, to vacate said order of publication and warrant of attachment, and to stay the proceedings in said action. On said affidavits, and on an affidavit by said attorney that one of the circulating notes

of the bank was protested on December 10th, for non-payment and non-redemption, and that such fact was duly certified to the comptroller of the currency, a motion to the above effect was made before the state court, on the part of the defendant, by counsel who appeared for it for the purpose of the motion. The court on the 5th of March, 1873, denied the motion, at special term, holding that, so far as the defendant was concerned, the attachment was properly granted, and that, in accordance with the decision of the court of appeals of New York, in *Tracy v. First National Bank of Selma*, 37 N. Y., 523, it must be held that the receiver had no *status* in the action to make a motion to vacate the attachment, but must assert his title in some other manner. The point of the decision in the Tracy case was, that the receiver, not being a party to the suit, could not make any motion in it. The Scandinavian Bank then, by the said attorney who appeared for it for that purpose, took an appeal to the general term of the state court from the order denying such motion. On the 16th of May, 1873, the general term affirmed the order appealed from.

The receiver did not make himself a party to the suit in the state court, but, in May, 1873, he filed the bill in this suit. An amended bill was filed in June, 1873. It sets forth the substance of the matters above stated. It alleges that, when the Scandinavian Bank became insolvent, the Broadway Bank had in its possession "certain assets" of the former bank, "and, among the same, the sum of about \$1,500, more or less, in currency, or otherwise," which the plaintiff, as receiver, and in behalf of himself and said comptroller, was entitled to demand and receive from the latter bank, and that the same has been demanded, but the latter bank has refused to deliver the same to the plaintiff or to said comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the treasury of the United States. It alleges that the claim made under said attachment is contrary to law. It prays that an injunction may be issued, restraining the Broadway Bank from paying over said moneys to any one but the plaintiff; that Allen, Stephens & Co. and said sheriff be enjoined from proceeding on said attachment, or entering any judgment or order in said suit, or on their said claim, save in the way of presenting the same to the plaintiff as receiver, as claims entitled to no preference over those of general creditors of the Scandinavian Bank; that the Broadway Bank pay to the plaintiff, to be by him paid into the treasury of the United States, the said sum of \$1,500, "be the same more or less," with interest; and that a receiver of said moneys, during the pendency of this suit, be appointed.

Allen, Stephens & Co. answered, in October, 1873, setting up their claim, and said attachment and the proceedings in said suit in the state court. Their answer also set forth, that, on the 13th of September, 1873, a judgment was recovered in said suit, against the Scandinavian Bank, for \$829.84; that, on the same day, an execution was issued on said judgment to said sheriff; that said sheriff collected on said execution, and under said attachment, from said Broadway Bank, and paid to Allen, Stephens & Co., on the 20th of September, 1873, \$820, in full satisfaction of said judgment and of all claim of theirs under said attachment; and that Allen, Stephens & Co. claim no interest in any indebtedness of the Broadway Bank to the Scandinavian Bank or in any of the assets of the latter bank. The sheriff answered, in October, 1873, setting up the proceedings in the suit in the state court and the attachment and its levy, and the judgment and execution, and the collection of the money and of fees and expenses from the attached property. The Broadway Bank answered, in October, 1873, setting up the attachment and the proceedings in the suit in the

state court, and the judgment and execution, and the taking by the sheriff from the attached moneys in the hands of the Broadway Bank of sufficient to satisfy the execution; that said bank has in its possession \$568.51 of said deposits of the Scandinavian Bank, and no more, subject to the order of the bank, or its legal representatives or assigns; and that said bank has not refused to pay any of said deposits to the plaintiff, except such as were so attached by the sheriff, amounting to \$876.94.

On the 9th of January, 1873, the plaintiff directed the Broadway Bank to credit itself in account with \$153.20, for a collection made by the Scandinavian Bank. On the 17th of January, 1873, the plaintiff wrote to the Broadway Bank as follows: "Your favor of 14th inst., inclosing acc't current, received. I have had it compared with the books of this bank and find it correct. You will please send me your check for balance, less amount of the two attachments and sufficient to cover costs, say about \$100 in each case. The U. S. Dist. Atty. in New York has been instructed from Washington to defend these suits, and, until decided, of course you will retain sufficient to indemnify you." On the 18th of January, 1873, the comptroller of the currency wrote to the Broadway Bank as follows: "I am informed that you have on deposit, to the credit of the Scandinavian National Bank of Chicago, \$2,669.35 in gold, and \$2,461.14 in currency, and that suits of attachment have been brought against the bank — one for \$650 and the other for \$441.95. This bank having been placed in the hands of a receiver, you will, on the receipt of this letter, forward the balance due the Scandinavian National Bank, less the amount which has been attached, to this office, which amount will be deposited with the treasurer, in trust, subject to my order, for the benefit of its creditors, as provided by the national currency act." On the 21st of January, 1873, the comptroller wrote to the Broadway Bank as follows: "I have received your letter of the 20th, inclosing your certificate of deposit for \$2,664.35 gold, being balance of coin account of the Scandinavian National Bank; also your certificate of deposit for \$1,015.69, being balance of currency account, less the sum of \$1,445.45, retained to abide the result of two attachments and probable costs thereon. Please inform me of the amount of those attachments and the amount retained for costs." The \$1,445.45 was the balance of account made up with interest to December 9, 1872, but not later. The amount paid to the sheriff by the Broadway Bank, September 20, 1873, was \$876.94. The second attachment referred to in the correspondence was one by McKim, Brothers & Co. The record does not show how it was disposed of, but it is not set up by any of the defendants. McKim, Brothers & Co. were originally made parties defendant to this suit, but the suit was discontinued as to them. The Broadway Bank and the sheriff appeared in this suit on the 5th of July, 1873, and Allen, Stephens & Co. appeared on the 7th of July, 1873. A motion was made, on notice to all the defendants, for an injunction to restrain the Broadway Bank from paying over to any person but the plaintiff the moneys mentioned in the bill, and for the appointment of a receiver to hold said moneys until the final determination of this suit, and for an injunction to restrain all the defendants from interfering with such disposition of said moneys pending the determination of this suit, but such motion was denied by this court by an order filed September 18, 1873.

The case has now been brought to final hearing on pleadings and proofs. It is contended for the Broadway Bank that the proceedings in the suit in the state court are binding on the plaintiff, and are a bar to the relief asked by the

bill in this suit; that the state court had jurisdiction of the suit brought in it, and properly issued the attachment; that the bringing of this suit did not divest the state court of the jurisdiction it so acquired; that that court had authority to proceed in such action, and render and enforce judgment therein, so long as no defense was interposed, and so long as the insolvency of the Scandinavian Bank was not brought to the knowledge of that court in any manner of which it could take cognizance; that the plaintiff, on motion to the state court, could have been substituted as defendant in such action, and could then have moved to vacate the attachment, or could have defended the action; that, as the plaintiff did not intervene in that action, but allowed it to proceed to judgment, and allowed the judgment to be enforced against the attached property, he cannot maintain this suit and obtain relief which could have been obtained by him in that action, especially when the effect of such relief will be to nullify the judgment in that action and the proceedings under it; that the sheriff was required by the state law to execute the attachment and the execution; and that the Broadway Bank could not resist the processes.

The argument on behalf of Allen, Stephens & Co. is addressed principally to a questioning of the correctness of the decision of this court in *Cadle v. Tracy*, 11 Blatch., 101, to the effect that a state court has no jurisdiction of a suit against a national bank, where the bank is not located in such state, such jurisdiction being forbidden by section 57 of the act of June 3, 1864 (13 U. S. Stat. at Large, 116, 117). It is also contended for them that, if the state court had jurisdiction to render the judgment which it did render, this court cannot, in this suit, re-examine the matters settled by that judgment.

§ 266. *The receiver of a national bank is entitled to its assets as against a creditor who attaches after the bank has become insolvent, although subsequently appointed.*

The decision of the supreme court of the United States in *National Bank v. Colby*, 21 Wall., 609 (§§ 261-265, *supra*), disposes of the main question in this case. In the Colby case, the First National Bank of Selma refused payment, on the 15th of April, of a treasury draft of the United States. The bank did not open for business on the 16th, and on that day the military authorities of the United States, under instructions from the secretary of the treasury, took possession of the property of the bank. On the 17th its president absconded. On that day Colby sued out an attachment, in a state court of Alabama, against the bank, on a contract debt, which was levied on its property. An examination into the affairs of the bank, on that day, showed a deficiency in its cash account of \$200,000, and on the 30th of April a receiver of the bank was appointed by the comptroller of the currency. On the 22d of May, Colby filed a declaration in the suit. On the 1st of June, the bank was dissolved by a decree of the district court of the United States. In March, 1869, the suit in the state court was tried. The receiver did not make himself a party on the record to that suit, but he appeared by counsel, on the trial, and was allowed, without objection, to make proof of said facts, and to produce his appointment as receiver and the decree of dissolution. He thereupon moved the state court to dissolve the attachment and discharge the levy and that the suit abate. The motion was overruled. The receiver then, without objection, offered the same evidence to the jury, and requested the court to instruct them that, if they believed the evidence, the suit could not be maintained, and they must find for the defendant. The instruction was refused, and there was a verdict for the plaintiff and a judgment for \$5,632.33 and costs. The case was then taken by

appeal to the supreme court of Alabama, and it (46 Ala., 435) affirmed the judgment. It is stated in the opinion of that court that "the record does not show that the defendant, said bank, pleaded any plea in defense of said action." A part of the judgment which was affirmed authorized the issue of a *venditioni exponas* to sell the property levied on under the attachment. The supreme court of Alabama held that the insolvency of the bank did not dissolve its liability to be sued by attachment. The case was then taken by a writ of error to the supreme court of the United States, and is the case so reported in 21 Wall., 609. That court reversed the judgment and remanded the cause to the state court, with directions to discharge the attachment levied on the property of the bank. The supreme court held that the suit in the state court abated by the decree dissolving the bank. But it further held that the property of a national bank, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property, of the receiver of the bank, subsequently appointed. In the opinion of the court, comment is made on sections 50 and 52 of the act of June 3, 1864, and it is said that they manifest a clear design, on the part of congress, to secure the assets of the insolvent bank for ratable distribution among its general creditors, and that no preference in the application of its assets can be obtained by adversary proceedings, so as to defeat such design. It is further said that all objection to the right of the receiver to appear in the state court and move for the discharge of the attachment and the abatement of the suit, or to contest the case at the trial, was waived, because such right was not objected to at the time. The court add: "But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him and the production of his appointment and the decree dissolving the injunction. Invested with the rights of the bank to the possession of the property, by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and, in our judgment, it was error for the court to refuse to discharge it on his application."

In the present case, the receiver applied to the state court to vacate the attachment, and his application was refused, on the ground that he had no *status* in the action to make such an application. He was told that he must assert his title in some other manner. Two ways were open. One was to be made a party defendant to the suit, in place of the bank. The other was to bring this suit. He brought this suit promptly, the bill being filed five days after the order of the general term was made, affirming the order denying the motion to vacate the attachment. In the Colby case, the receiver was treated by the state court and by the supreme court of the United States as if he were a party to the suit, and his rights as against those of the attaching creditor were adjudicated directly in the suit brought by the attaching creditor. In the present case, the receiver, before anything of substance had been done in the suit in the state court towards a judgment, except to issue and serve the attachment and publish the summons, filed the bill in this suit, making all parties interested defendants, setting up all the facts, and praying proper relief. The bill seeks a determination of the conflicting claims. It presents a case of equitable cognizance. On the facts set forth, the plaintiff was entitled on final decree to the relief prayed, except in respect of the injunctions asked for. It must be assumed that the application for a preliminary injunction and for a re-

ceiver was refused because it was not shown that the fund was in peril, as respected the Broadway Bank, and because the court felt itself restrained by positive statute from enjoining the proceedings of Allen, Stephens & Co. in the state court. The answers do not set up that there is a plain, adequate and complete remedy at law. The plaintiff was not a party to the suit in the state court. The answers do not set up the pendency of the suit in the state court in bar of this suit. The rights of the plaintiff must be adjudicated as they stood when this suit was brought. The defendants, when served with process in this suit, were notified of the plaintiff's claim. Such process was served on Allen, Stephens & Co. and the Broadway Bank on the 22d of May, 1873. The original bill contained, in substance, the allegations found in the amended bill, except that it did not contain a prayer for an injunction against the Broadway Bank, nor any prayer for the appointment of a receiver. The amended bill prays "that the conflicting claim to said moneys, set up by the several defendants herein, may be forever foreclosed and determined by the decree herein, and that complainant may be adjudged entitled to said moneys, to the use of his said office." That prayer in that form is not found in the original bill. The original bill made McKim, Brothers & Co. parties, with proper averments as to their attachment, but the amended bill drops them as parties and omits such averments.

The plaintiff did not, in any manner, submit himself to the jurisdiction of the state court, in such wise as to be bound by the judgment in the attachment suit, nor did he submit his rights to the adjudication of that court. When he applied to that court to vacate the attachment he was told that he had no standing to so apply, and that he must make himself a party to the suit, and submit his rights to adjudication therein, before he could be heard therein. He then came into this forum, before anything more was done in the suit in the state court, and brought into this court all the parties to the controversy. He took the proper step to establish his trust as respected the fund in the hands of the Broadway Bank, by coming into this court of equity. The principle of the case of *Eyster v. Gaff*, 1 Otto, 521, has no application to a case like the present. The attachment levy being void as against the receiver's claim to the fund, and the state court having erroneously refused, on his application, to vacate the attachment, and having refused to adopt views such as are asserted in *National Bank v. Colby*, the receiver was under no obligation to become a party to the suit in the state court, even though he might ultimately have the adverse judgment of the highest state court reversed by the supreme court of the United States, as was done in *National Bank v. Colby*. The moment he came into this court with the other parties to the controversy, there could no longer be any pretense that anything afterwards done in the suit in the state court could affect his rights. From that time the defendants went on at their peril, in disposing of the fund in the Broadway Bank, and the plaintiff is entitled to an adjudication of his rights here, as of the time he brought the defendants into this court, even though there was no preliminary injunction granted nor any receiver appointed.

It is contended for the Broadway Bank that, if it be held that the plaintiff is entitled to the relief he asks for in this suit, the court should proceed and adjust the equities between that bank and Allen, Stephens & Co., and that such adjustment should be an adjustment of all matters contained in the pleadings and the testimony, without regard to whether such matters occurred before or after the commencement of this suit; that the proceedings which were subse-

quent to the commencement of this suit are set forth in the three answers, and there is no dispute about those facts; that the defendants cannot object to an adjudication being had upon facts which they themselves plead; that at the commencement of this suit, the Broadway Bank was a mere stakeholder; that the payment to the sheriff was made under the pressure of legal process, and cannot be deemed a voluntary payment; that if the court should decide in favor of the plaintiff, it should decree that Allen, Stephens & Co. pay to the plaintiff the amount which the Broadway Bank paid to the sheriff, and that the Broadway Bank pay to the plaintiff the \$568.51, or, if a decree be given against the Broadway Bank for the full amount in its hands at the commencement of this suit, there should also be a decree in favor of said bank against Allen, Stephens & Co. for the \$876.94; and that the satisfaction of the judgment of Allen, Stephens & Co. against the Scandinavian Bank should be canceled, and the plaintiff, as receiver, be ordered to pay the proper dividend on such judgment to Allen, Stephens & Co., or to the Broadway Bank, whichever may appear, according to the other provisions of the decree, to be entitled to such dividend.

On behalf of Allen, Stephens & Co., it is contended that no decree can be made in this suit compelling Allen, Stephens & Co. to refund any part of the money which was paid to them under the judgment; that the identical money attached did not belong to the Scandinavian Bank; that the co-defendants of Allen, Stephens & Co. do not, in their answers, make any claim for affirmative relief against Allen, Stephens & Co.; that, if the Broadway Bank was merely a stakeholder, it could have gone into a court of equity, have filed a bill of interpleader, have paid the money into court, and thus have relieved itself from all liability in the matter; that having failed to do so, it cannot now, as against Allen, Stephens & Co., and to their prejudice, claim any relief; and that the payment to the sheriff by the Broadway Bank was a voluntary payment, made without protest or objection, and, at most, under a mistake of law and not of fact.

The bill in this case sets forth a case of equitable cognizance arising out of trust. It alleges that the comptroller of the currency, on the insolvency of the Scandinavian Bank, and the seizure of its assets, and the protest of its circulating note, became vested in trust with such assets, for the creditors and others interested under the provisions of the act of congress, and as an officer of the United States, and has continued so vested and has exercised charge and trust over and in all such assets and property, and lawfully has been entitled to the actual custody and possession of the same, and, through the plaintiff, to demand and collect the same under the provisions of the act of congress. It sets out that, at the time the Scandinavian Bank became insolvent, the Broadway Bank had in its possession certain assets of the former bank, namely, said moneys, which the plaintiff, as receiver, and in behalf of himself and said comptroller, was entitled to demand, and receive manual custody of, from the Broadway Bank, but the latter bank refuses to deliver the same to the plaintiff or to the comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the treasury of the United States, which his duty in the premises, and a proper performance of the trusts aforesaid, requires to be done. It then sets forth that Allen, Stephens & Co. claim a part of said funds under their attachment. It prays that the moneys, assets of the Scandinavian Bank, in the hands of the Broadway Bank, be paid to the plaintiff, in aid of and to enforce the discharge of said trust, in behalf of himself and the

said comptroller. The attachment issued was an attachment against the property of the Scandinavian Bank. It is set up as such in the answer of Allen, Stephens & Co. Although, as between the Broadway Bank and the Scandinavian Bank, the former was a debtor to the latter for the moneys on deposit, yet, before the attachment of Allen, Stephens & Co. was levied, a trust had, under the act of congress, become impressed upon the moneys on deposit in the Broadway Bank, and such trust remained impressed upon them at all times afterwards, and followed such of them as were paid by that bank to Allen, Stephens & Co. Allen, Stephens & Co. did not take them as *bona fide* purchasers without notice, but took them with full knowledge of all the facts and of this suit.

§ 267. *The forms of proceeding in a court of equity are flexible, to suit the different postures of cases.*

The forms of proceeding in a court of equity are flexible, to suit the different postures of cases. It may model the remedy so as to suit it to controlling equities and the real and substantial rights of all the parties. It can adapt its decree to all the varieties of circumstances which may arise, and adjust it to all the peculiar rights of all the parties in interest. 1 Story's Eq. Juris., § 28. In adapting its decree to the special circumstances of a case, a court of equity will adjust all cross equities, when all the parties in interest are before the court, so as to prevent multiplicity of suits. *Id.*, 437. Allen, Stephens & Co. having taken the \$876.94 from the Broadway Bank, pending this suit, wrongfully, as against such bank and the plaintiff, without any title to it, and under a levy which was void as against the plaintiff's claim to the money, must be compelled to restore the money to the condition in which it was when this suit was brought, so that the Broadway Bank may respond for it to the plaintiff. It does not lie with Allen, Stephens & Co. to claim any advantage from their unlawful exaction from the Broadway Bank, or to complain that said bank paid the money to them and did not file a bill of interpleader and bring such money thereon into court. All parties had been brought into this court by this suit, and their rights placed *sub judice*, and Allen, Stephens & Co. cannot be heard to say that the Broadway Bank should have brought another suit. It is, therefore, proper that there should be a decree that Allen, Stephens & Co. respond to the plaintiff directly, in the first instance, for the money they received, and that the Broadway Bank should not be called upon to pay such money until there has been a failure to collect it on execution from Allen, Stephens & Co. The Broadway Bank might have brought the whole money into this court, in this suit, before paying any part of it to Allen, Stephens & Co., and, therefore, as respects the plaintiff, who did not assent to the disposition made of the money paid to Allen, Stephens & Co.; the Broadway Bank should respond to him for the money it paid to Allen, Stephens & Co., if such money cannot be collected on execution from Allen, Stephens & Co.

§ 268. *Ruling as to costs.*

The Broadway Bank claims that it should not be charged with costs, on the ground that what money it did not pay over it retained with the assent of the plaintiff or of the comptroller, and that the plaintiff made no demand for the money which the McKim attachment covered. Whatever assent was given before this suit was brought to the retaining by the Broadway Bank of enough money to cover the two attachments, the bringing of this suit was a withdrawal of such assent, and was a sufficient demand for all the money. As against the plaintiff, the Broadway Bank might have brought the money into

this court, in this suit, or, knowing, as it did, of the plaintiff's claim and of the conflicting claim of Allen, Stephens & Co., it might have brought a proper proceeding of interpleader, in a proper court, before this suit was brought. It made no effort to obtain relief from the state court in the suit brought by Allen, Stephens & Co. It is shown, by the order filed September 18, 1873, to have opposed the granting of an injunction against itself by this court from paying over the moneys to anyone but the plaintiff, and to have opposed the appointment of a receiver of those moneys. It asserts, in its answer, the invalidity of the plaintiff's claim, as against that of Allen, Stephens & Co., to such moneys. Under these circumstances it ought to pay costs to the plaintiff. The Broadway Bank claims that, if it is not awarded costs against the plaintiff, it should have costs against Allen, Stephens & Co. The court cannot award the costs of the Broadway Bank against Allen, Stephens & Co., as that would be, in effect, a decree between co-defendants. 2 Daniell's Ch. Pr. (4th Am. ed.), 1406, 1407. If the Broadway Bank had put itself in a position to be relieved from paying costs to the plaintiff, then, as Allen, Stephens & Co. have, by their conduct, occasioned this suit, the court might deem it proper to order the plaintiff to pay costs to the Broadway Bank, and then allow him to receive such costs again from Allen, Stephens & Co. *Id.* But the considerations before adverted to on the question of costs, as between the plaintiff and the Broadway Bank, indicate that the costs of the Broadway Bank ought not to be paid by Allen, Stephens & Co. Allen, Stephens & Co. claim that they should have costs from the plaintiff on the ground that the plaintiff in his bill asks no relief against them except an injunction and a receiver *pendente lite*. This is a mistake. The bill asks for a perpetual injunction against Allen, Stephens & Co., both as originally filed and as amended, from further proceeding on their attachment and from obtaining any judgment or order in their suit. This court is inhibited from granting such relief. Act of March 2, 1793, 1 U. S. Stat. at Large, 334, § 5, now § 720 of the Revised Statutes. But the bill sets out the illegality of the claim of Allen, Stephens & Co., and the wrong and injury to the plaintiff by what Allen, Stephens & Co. had done, and prays for a decree determining the conflicting claims to the moneys, and for an adjudication that the plaintiff is entitled to said moneys, to the use of his office, and for such other or further relief as may be proper, and for costs against all the defendants. Clearly, Allen, Stephens & Co. ought not to have costs from the plaintiff, but ought to pay costs to him.

The sheriff was a proper party to the suit as a claimant to the money. He ought not to have costs against the successful plaintiff. Nor ought he ultimately to pay the costs of the plaintiff, yet the plaintiff ought to have the costs of making the sheriff a party. But as the sheriff was merely a ministerial officer, and as the wrongful conduct of Allen, Stephens & Co. made it necessary to bring in the sheriff as a party, the proper course is for the plaintiff to recover against Allen, Stephens & Co. his costs of making the sheriff a party, and also the costs of the sheriff's defense, the latter costs to be paid over to the sheriff by the plaintiff when collected. Such is the practice laid down by Daniell, as above cited.

A decree will be entered establishing the plaintiff's rights, as set forth in the bill, as against the claim of Allen, Stephens & Co. and their suit and attachment and judgment, to the \$1,445.45, with interest from May 22, 1873, the time when process on the original bill was served on the Broadway Bank. The correspondence between that bank and the comptroller, and that bank and

the receiver, relieves it from interest prior to the bringing of this suit. The decree will provide that the Broadway Bank is liable to the plaintiff for such sum and such interest; that, towards paying it, Allen, Stephens & Co. are liable to the plaintiff for \$876.94, with interest from September 20, 1873; that execution issue against Allen, Stephens & Co. for that amount, and against the Broadway Bank for the residue; and that execution against the Broadway Bank for any amount except such residue be stayed until such execution against Allen, Stephens & Co. is returned unsatisfied, or until it otherwise appears that the plaintiff is unable to collect from Allen, Stephens & Co. the amount for which they are so decreed to be liable. In regard to costs, the decree will provide as above directed. The parties will be heard on the question as to a provision for a dividend on the claim of Allen, Stephens & Co.

§ 269. *District attorneys.*—The provision that suits arising under the national banking act shall be conducted by the United States district attorneys is directory merely. *Kennedy v. Gibson*, 8 Wall., 498. See the case, §§ 6-12. See § 245.

§ 270. *Parties.*—The proper defendant, in an action brought for the recovery of interest upon claims allowed against a bank in the hands of a receiver, is the bank itself, and not the comptroller or the receiver. *Chemical National Bank v. Bailey*, 12 Blatch., 480. See the case, §§ 148-150.

§ 271. *Bankruptcy.*—National banks are not liable to be proceeded against in bankruptcy. The provisions of the general currency act relating to the winding up of national banks by a receiver appointed by the comptroller is exclusive of the provisions of the bankrupt law. *In re Manufacturers' National Bank*, 5 Biss., 500.

§ 272. *Negligence.*—The bank is liable for the gross negligence of its officers even in regard to a gratuitous bailment. *National Bank v. Graham*, 10 Otto, 699. See the case, §§ 290-293.

§ 273. *Equity.*—A national bank in voluntary liquidation is not thereby dissolved, but may sue and be sued. The filing of a creditor's bill to enforce the individual liability of the stockholders of a national bank does not preclude a remedy in equity against the bank itself. *National Bank v. Ins. Co.*, 14 Otto, 54 (§§ 172-180); *Wright v. Merchants' National Bank*, 1 Flip., 568. See the case, §§ 258-260.

§ 274. *Coupons, suits on.*—A national bank may sue upon interest coupons payable to bearer, which are attached to bonds given by a town in aid of a railway company. *First National Bank v. Town of Bennington*, 16 Blatch., 56; *Town of Lyons v. Lyons National Bank*, 19 Blatch., 289.

§ 275. Where a national bank sues on interest coupons of town bonds issued in aid of a railway company, which are payable to bearer, and are regular promissory notes, it will be presumed that the bank acquired such coupons properly; but whether it did or not, the objection is one which can only be taken by the government. *Town of Lyons v. Lyons National Bank*, 19 Blatch., 289.

§ 276. *Suits in state courts.*—Suits by national banks can be brought in the state in which they are established. *Commercial National Bank v. Simmons*, 1 Flip., 450.

§ 277. The provision that certain actions may be brought against national banks in the courts of the state or of the United States in the jurisdiction in which they are located does not, as to other actions, divest other courts of jurisdiction. *New Orleans National Bank v. Adams*, 3 Woods, 24.

§ 278. *When stockholder may sue bank.*—The stockholder of a national bank has a right to sue such bank for misappropriating his funds. *Wilson v. First National Bank of Cheyenne*, * 1 Wyom. T'y, 110.

§ 279. *Suits in federal courts.*—Suits by or against national banks may be brought in the courts of the United States. *Kennedy v. Gibson*, 8 Wall., 498. See the case, §§ 6-12.

§ 280. Under the act a national bank located in one state may sue a citizen of another state in a circuit court of the latter state; and an averment that the bank is located in a certain state is sufficient to show jurisdiction. *Manufacturers' Nat. Bank v. Baack*, * 2 Abb., 232. And its citizenship for purposes of suit is determined by the place in which it is "located" or "established." *Ibid.*; S. C., 8 Blatch., 137.

§ 281. The courts of the United States, outside of the District of Columbia, have no jurisdiction of the treasurer of the United States or of the comptroller of the currency for their official acts. *Van Antwerp v. Hulburt*, * 7 Blatch., 428.

§ 282. The effect of the clause in the national banking act which permits national banks to sue and be sued, complain and defend in any court of law and equity as fully as a natural per-

son, does not give to national banks the right to sue or the capacity to be sued in every court within the United States, whether state or federal, or give to every such court jurisdiction over every suit which may be brought in it wherein they are plaintiffs or defendants. Its only proper effect is to provide that the corporation, when it has come or has been brought into a court which has jurisdiction of the suit, shall stand in court, in regard to the subject matter of the suit, in all respects in the same position as regards its own rights, or the rights of others against it, in which a natural person who is a suitor can stand. The question as to the proper court in which a suit is to be brought in respect to jurisdiction is left to be determined by other provisions of law. *Manufacturers' National Bank v. Baack*, * 8 Blatch., 138; S. C., 2 Abb., 282.

§ 283. The right of a national bank to sue in the federal courts does not depend on the judiciary act, but is derived from the national banking law, and consequently the limitation of the eleventh section as to suits brought by the assignees of commercial paper does not apply to them. *Commercial National Bank v. Simmons*, 1 Flip., 452.

§ 284. National banks may sue in the federal courts of the district in which they are located though the defendant resides in the same district. *Union National Bank v. City of Chicago*, 3 Biss., 88.

§ 285. Circuit courts of the United States have jurisdiction of suits by or against national banks without regard to the citizenship of the parties. *County of Wilson v. National Bank*, 18 Otto, 776; *Bank of Omaha v. Douglas Co.*, 3 Dill., 299.

§ 286. Bank must be sued in its own district — A national bank cannot be sued outside the district in which it is established or located, and service on the cashier outside such district, in a suit against the bank in the district in which such service is made, confers no jurisdiction. *Main v. Second National Bank of Chicago*, 6 Biss., 26.

§ 287. A suit cannot be maintained in a court in New York against a national bank in Georgia; and the fact that the receiver of the Georgia bank appears and answers in the action can give the New York state court no jurisdiction. *Cadle v. Tracy*, 11 Blatch., 106. See, also, *COURTS*, sub-title *Jurisdiction*.

IX. MISCELLANEOUS.

SUMMARY — *Gratuitous bailment*, § 288. — *Preference*, § 289.

§ 288. In cases of gratuitous bailment the bank is liable for the gross negligence of its officers in respect to the thing intrusted to it. And this to the same extent as if the deposit had been authorized by its charter. A national bank as part of its legitimate business may receive special deposits. Such special deposits may include government bonds. *National Bank v. Graham*, §§ 290-298.

§ 289. The preference of one creditor to another, mentioned in section 5243 of the act, is a preference given to an existing creditor to secure a pre-existing debt. A present loan to the bank for which security is given by it is not within the prohibition of the act. *Casey v. La Societé*, §§ 294-301.

[NOTES. — See §§ 302-331.]

NATIONAL BANK v. GRAHAM.

(10 Otto, 699-704. 1879.)

ERROR to the Supreme Court of Pennsylvania.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS. — The capital stock of the First National Bank of Carlisle, Pennsylvania, was \$500,000, divided into five hundred shares of \$1,000 each. From November 9, 1869, Samuel Hepburn, the president, owned four hundred and sixty shares. His son, C. H. Hepburn, was the cashier, and he and Hopewell Hepburn, another son and a director, owned ten shares each. From October 19, 1871, H. M. Hepburn, also a son and director, owned ten shares. John G. Orr, the teller and a director, owned the remaining ten shares. With one exception, these persons were directors from the year 1870. In 1867 Fannie L. Graham, the defendant in error, had \$4,000 of 7.30 bonds of the United States deposited in the bank for safe-keeping. They were called in by

the government, and at her request the cashier had them converted into the same amount of 5.20 bonds. These also were left in the bank for safe-keeping. The cashier gave her a receipt dated October 22, 1868, setting forth this fact and that the bonds were to be returned on the return of the receipt. The cashier cut off the coupons and collected them and placed the proceeds to her credit on the books of the bank, and paid her the amount as it was demanded. She kept an account with the bank. Before and after the times mentioned, the officers of the bank were accustomed to receive such deposits from others in the same way and for the same purpose. They were entered in a book kept by the bank. The fact of there being such deposits was frequently spoken of by the directors at meetings of the board. Some of the directors and quite a number of other persons had such deposits in the bank. No compensation was expected or received by the institution. It was a bailee without reward. The bank alleged that on the 5th of August, 1871, the bonds of the defendant in error were stolen from its vault. She did not learn the fact until some two or three weeks afterwards. She heard that some other securities belonging to her and so deposited had been stolen, and upon inquiry at the bank was told that those securities had been found upon a neighboring highway and had been returned, but that her government bonds had been stolen also and had not been recovered. She was requested to say nothing about their loss, and was assured that the interest should be regularly paid to her, and that the value of the bonds should also be made good, so that she should not be a loser. The interest was accordingly paid up to the 1st of July, 1873, inclusive. This suit was brought to recover the value of the bonds.

The defendant in the court below asked the court to instruct the jury that the bank, being a corporation chartered under the national banking laws, "was not authorized to receive bonds and valuables for safe-keeping;" that "the act of the cashier in taking the bonds of the plaintiff was not within the scope of his powers and duties as cashier, and, therefore, did not bind the bank; and that the plaintiff could not recover." This instruction the court refused to give, and the defendant excepted. The jury was instructed that, "to justify a recovery against the defendant in this case, they must be satisfied from the evidence that the plaintiff's bonds were received for safe-keeping with the knowledge and acquiescence of the officers and directors of the bank, and that, if the bonds were lost by the gross negligence of the bank or its officers, the bank was liable." The defendant again excepted. A verdict was rendered for the plaintiff. The jury thus found and affirmed the facts of knowledge and gross negligence by the bank. These points are, therefore, conclusively established, and are not open to inquiry.

§ 290. *A national bank is liable for gross negligence of its officers in cases in which the bank is a gratuitous bailee.*

Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side,—certainly none on the part of the depositor. She was entitled at any time to reclaim the securities. The bank was bound in good faith and in law to return them, or to keep them, without gross negligence until they were called for. If, when applied for, they were refused, it cannot be doubted that they, or their value, according to the form of action adopted, might have been recovered. *White v. Franklin Bank*, 22 Pick. (Mass.), 181. If the bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the

liability of the bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depositary. The only way of escape from liability open to the latter would have been to return the property to the owner, or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *Foster v. Essex Bank*, 17 Mass., 479. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract it may be regarded only as inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto*, at the option of the injured party. 1 Chitty, Pl., 151.

§ 291. *Ultra vires. The principle stated and cases cited.*

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants' Bank v. State Bank*, 10 Wall., 604. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. *Philadelphia, Wilmington & Baltimore R. Co. v. Quigley*, 21 How., 209; 2 Wait, Actions and Defenses, pp. 337-339; Angell & Ames, Corporations, secs. 186, 385; Cooley, Torts, pp. 119, 120.

§ 292. *Bank liable for deposit not authorized by its charter.*

Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *Foster v. Essex Bank*, *supra*; *Lancaster County National Bank v. Smith*, 62 Pa. St., 47; *Scott v. National Bank of Chester Valley*, 72 id., 471; *First National Bank of Carlisle v. Graham*, 79 Pa., 106; *Turner v. First National Bank of Keokuk*, 26 Ia., 562; *Smith v. First National Bank in Westfield*, 99 Mass., 605; *Chattahooche National Bank v. Schley*, 58 Ga., 369. The only authorities in direct conflict with these adjudications, to which our attention has been called, are *Willey v. First National Bank of Brattleboro'*, 47 Vt., 546, and *Whitney v. First National Bank of Brattleboro'*, 50 id., 389. The case first cited (*Foster v. Essex Bank*) was argued exhaustively by the most eminent counsel of the time, and decided by a court of great judicial learning and ability. Their opinion is marked by careful elaboration. The special deposit there was a cask containing gold coin. While it was maintained that the bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown. Here gross negligence is conclusively established. The depositor kept an account in the bank. The cashier cut off and collected the coupons, and placed the proceeds to her credit. The bonds, therefore, entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this

view of the subject further, because we think there is another ground free from doubt upon which our judgment may be rested.

§ 293. *Special deposits recognized by the banking act. Such deposits include bonds.*

The forty-sixth section of the banking act of 1864, re-enacted in the Revised Statutes of the United States, section 5228, declares that, after the failure of a national bank to pay its circulating notes, etc., "it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, and to deliver special deposits." This implies clearly that a national bank, as a part of its legitimate business, may receive such "special deposits;" and this implication is as effectual as an express declaration of the same thing would have been. *United States v. Babbit*, 1 Black, 55. The phrase "special deposits," thus used, embraces deposits such as that here in question. *Patterson v. Syracuse National Bank*, court of appeals of New York (recently decided and not yet reported). In that case it was said, "a reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done." It would undoubtedly be competent for a national bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly. We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider.

Judgment affirmed.

CASEY v. LA SOCIÉTÉ DE CREDIT MOBILIER.

(Circuit Court for Louisiana: 2 Woods, 77-87. 1874.)

STATEMENT OF FACTS.— On the 12th July, 1873, the Société de Credit Mobilier of Paris entered into a contract with the National Banking Association of New Orleans, by which the former agreed to accept for the latter bills to the amount of one million of francs, and the latter agreed to deposit as security therefor, in the hands of the firm of C. Cavaroc & Son, the senior member of which was the president of the banking association, securities adequate to indemnify the acceptor of the bills, and the firm was constituted the agent of the société. In pursuance of this agreement bills were drawn, accepted and discounted, and a number of notes due to the banking association, to the amount of \$220,021.43, were placed in the hands of the firm to hold as security for the acceptors. It had been agreed that as the notes matured others might be substituted for them, and C. Cavaroc, Sr., as president of the bank, out of abundant caution, added \$100,000 in notes to the deposit. When the banking association suspended payment C. Cavaroc & Son claimed to hold all the securities in their hands as indemnity for the société. This bill is filed by the receiver of the banking association, appointed by the comptroller of the currency, to subject the securities so held by C. Cavaroc & Son to the payment of the general debts of the banking association.

Opinion by Woods, J.

The claim of the complainant is that the alleged transfer of the notes and assets of the banking association to C. Cavaroc & Son, to secure the société for its acceptance of the bills of the association, was a transfer thereof in contemplation of insolvency, with a view to prevent the application of the assets in the manner prescribed by the national currency act, and with a view to the preference of one creditor to another; that such transfer is therefore null and void, and that said notes are still the property of the association, and applicable to the payment of its debts. It has been held by this court that to make "transfers, assignments, deposits and payments" void under the fifty-second section of the currency act, it is only necessary that the insolvency should be in the contemplation of the bank making the transfer, and not that it should be known to or contemplated by the party to whom they are made. *Case v. Citizens' Bank*, 2 Woods, 23; *Peckham v. Burroughs*, 3 Story, 544.

The evidence in the case satisfies my mind that the banking association, at the time it made the arrangement already recited with the société, to wit, on the 12th of July, 1873, was in an exceedingly embarrassed condition, if not actually insolvent. Although C. Cavaroc, Sr., its president, testifies that he did not at that time think that the bank was insolvent, he had abundant reason to know soon after that date that it was embarrassed and in a critical situation. This is evidenced by his application for assistance to other banks of the city of New Orleans. In my judgment the evidence shows so much clearly, but it does not show more. But conceding that C. Cavaroc, Sr., the president of the bank, at the time he transferred the notes to C. Cavaroc & Son, for the security of the société, knew that the association was insolvent, will that fact render the transfer made under the circumstances recited void? That alone is not sufficient. One of two alternatives must exist: (1) It must be with a view to prevent the application of the assets in the manner prescribed by the currency act, or (2) with a view to the preference of one creditor to another.

§ 294. *The preference of one creditor to another by a national bank is a preference to secure a pre-existing debt.*

Is it the meaning of the section of the currency act on which the bill is based that, after a national bank is in contemplation of insolvency, no person could do business with it except at the risk of having any means he may put under the control of the bank, no matter under what solemn contract for security, confiscated for the use of the general creditors of the bank? If this is the construction to be given to the fifty-second section of the currency act, then the moment a bank becomes embarrassed it must give up and suspend payment, for all who come to its assistance must do so without security. In my judgment, the preference of one creditor to another, mentioned in the fifty-second section, is a preference given to an existing creditor for a pre-existing debt. If a customer or friend of a bank, knowing it to be embarrassed and in need of assistance, proffers it, for instance, a loan of \$50,000 in cash, on receiving security for the amount by a transfer of a part of its portfolio, that cannot be fairly construed as giving him a preference over other creditors. Other creditors are not injured by such a transaction; for the securities that such a creditor takes out he leaves an equivalent in cash. He becomes a creditor solely on condition of receiving security.

§ 295. *A national bank may give security for present or future advances.*

The policy of the law is plain, namely, to prevent preference among creditors holding pre-existing debts. It clearly was not the purpose of the act to

forbid the bank from giving security to its friends for means to be advanced on the spot or in the future. The general creditors are not injured by such an arrangement; they may be greatly benefited by it. Take the case in hand. Suppose the association were actually insolvent on the 12th of July. The société in effect puts one million of francs into the possession of the bank and takes security for it. Is the general creditor any worse off? The bank had nothing when the securities were transferred. It gets dollar for dollar for what it transfers. Can that be called giving a preference to one creditor over another? As claimed by counsel for defense, it is in effect an exchange of values rather than the giving of a preference to a creditor. It seems to me to be established, beyond all controversy, by the evidence in this case, that the pledge of the notes of the association complained of was not made in contemplation of insolvency, but it was a struggle on the part of the officers of the bank to avoid insolvency; it was not made to give preference of one creditor over another, but it was a plan adopted by the bank to secure means to carry on its business with a view to be able to pay all its creditors. The construction claimed by complainant for the fifty-second section of the currency act would make the banks a trap in which the means of their friends, furnished on the pledge of securities, would be drawn in and applied to the payment of the general creditors.

In my judgment, the construction placed on the thirty-fifth section of the bankrupt act is applicable also to the fifty-second section of the currency act. That section of the bankrupt act declares that any sale or other disposition of property made by a person insolvent, or in contemplation of insolvency, within six months before the filing of a petition in bankruptcy, by or against him, by any person who has reasonable cause to believe him insolvent, such sale being made with a view to prevent the property coming to his assignee in bankruptcy, etc., shall be void. Under this section it has been held that a sale made in good faith, for the honest purpose of discharging a debt, and in the confident expectation that by so doing the person could continue business, will be upheld. *Tiffany v. Lucas*, 15 Wall., 410. So in *Cook v. Tullis*, 18 Wall., 332, it was held that an exchange of values may be made at any time, though one of the parties to the transaction may be insolvent; that there is nothing in the bankrupt act that prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to delay or defraud his creditors or give a preference to anyone, and does not impair the value of his estate. And in *Tiffany v. Boatman's Institution*, 18 Wall., 376, it was held that a man really insolvent, but not having yet openly failed, and hoping to overcome his difficulties and to carry on his business, violates no provision of the bankrupt act by pledging his property for money lent, this money being lent at the time when the pledge was made. See, also, *Clark v. Iselin*, 21 Wall., 360. On the strength of these authorities, construing a provision of the bankrupt act similar to the fifty-second section of the currency act, and upon my own independent judgment of what is the purpose and intent of said section, I am of opinion that the original transfer made by the banking association to the société of the assets mentioned was not void.

§ 296. *Whether indorsement as well as delivery is necessary to a pledge of negotiable paper in Louisiana, quære.*

But the complainant insists that the transfer was void, because not made in compliance with the code of Louisiana. It is claimed that the code requires

that when a negotiable instrument is pledged by a debtor it must not only be delivered to the creditor to whom it is transferred, but must be indorsed (Civil Code, art. 3123), and as it was conceded there was no indorsement of the notes in question, the attempted transfer was ineffectual to carry title. There has been some confusion in the legislation of Louisiana upon this subject, so that it is not by any means clear whether an indorsement as well as delivery of a negotiable instrument is necessary in order to complete an act of pledge. The act approved March 15, 1855, entitled "An act relative to pledges" (see Fuqua's Civil Code, 421, note), appears to have been a re-enactment of the act of 1852 (see acts of 1852, p. 15). The first section of this act declares that when a debtor wishes to pawn promissory notes, bills of exchange, etc., he shall deliver to the creditors the notes, bills of exchange, etc., so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith. There can, it seems to me, be no doubt that the purpose of this section was to make the delivery of a promissory note without indorsement sufficient as an act of pledge. But in a subsequent revision of the statute law of the state the provision requiring indorsement was allowed to remain; so that we have in the same statute book an article declaring that indorsement as well as delivery is necessary to the pledge of a promissory note, and another article in effect declaring that indorsement is not necessary. In my judgment it is not necessary to determine in this cause whether indorsement is or is not essential.

§ 297. *The receiver holds only the estate and title of the bank in its assets.*

The receiver holds only the estate and title of the bank in its assets. His title is the same as that of an assignee in bankruptcy. It will not be pretended that the bank could recover back the assets which it had pledged and delivered to the agents of the société because they were not indorsed, and at the same time hold on to the proceeds of the drafts for the acceptance of which the assets were pledged, unless there was fraud; and there was no fraud in this case. An assignment in bankruptcy, like any other assignment, by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. *Mitford v. Mitford*, 9 Ves. Jr., 100; *Gibson v. Warden*, 14 Wall., 248; *Campbell v. Slidell*, 5 La. Ann., 274; *Mitchell v. Winslow*, 2 Story, 630; *Ex parte Dalby*, Lowell's Dec. (1 Low.), 431.

§ 298. *The receiver cannot avoid a pledge which the bank could not avoid.*

There seems to be no reason why the position of receiver of an insolvent bank under the currency act is any better than that of an assignee in bankruptcy. If the receiver holds the same title to the assets of the bank that the bank itself held, he cannot avoid a pledge which the bank could not avoid. He is not a third person in the sense of the Civil Code. In the case of *Matthews v. Rutherford*, 7 La. Ann., 225, it was held that a notarial act of pledge or a written act registered in a notary's office is a formality which is necessary to protect the payee against third parties, but its omission is unimportant as between pledger and pledgee. I am of opinion, therefore, that the failure to indorse the notes pledged by the bank is a defect of formalities in making the pledge of which neither the bank nor the receiver can take advantage.

§ 299. *Whether the same person may act both as president and agent of a bank.*

It is further claimed by the complainant that C. Cavaroc, Sr., the president of the association, could not at the same time act as president and agent of the association and as the agent of the société. It is true that the same person

cannot sell as the agent of one and at the same buy as the agent of another, and a contract made by one who acts as the agent of both parties may be avoided by either principal. See Story on Agency, sec. 211 and note. Such a contract, made by a person acting as agent for two principals, involves an absurdity. But in this case the contract was made between the "société" and the "association," the latter acting through its president. But it seems to me clear that there was no legal obstacle, the contract having been made and being in force, to the turning over by the association, acting through Cavaroc, its president, of the assets in pledge to be held by the commercial firm of C. Cavaroc & Son. In fact, C. Cavaroc & Son were mere depositaries or stakeholders, and all stakeholders are agents for both parties.

§ 300. *A national bank making a contract not authorized by its charter cannot repudiate the contract and retain its fruits.*

It is further claimed by complainant that Cavaroc, the president of the banking association, could only act by authority of the charter or by vote of the directors in making the pledge of the assets of the association, and that no such authority is found in the charter or minutes of the board of directors. The minutes of the board of directors are evidence, however, that they knew what arrangement had been made between their bank and the "société," and they approved it by voting a compliment to C. Cavaroc, Jr., by whose agency the arrangement had been made. The books of the bank showed that it had received a million of francs as the result of this arrangement. It is impossible that the directors should have been ignorant of these facts — they never repudiated the contract nor returned to the société the fruits of it. This is a ratification. The acts of a corporation, evidenced by a vote written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal, and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual. Abb. Dig. on Corp., 579, and cases there cited. A corporation which has received the benefit of a loan cannot avoid liability on a mortgage to secure its payment by denying the authority of those who contracted the loan on its behalf. *Bissell v. Railroad Co.*, 22 N. Y., 258; *Bank v. Dandridge*, 12 Wheat., 70, 71.

It is claimed, lastly, by the complainant, that the contract between the banking association and the société was not legitimate banking business and could not be lawfully carried out. We are not cited to any clause in the national currency act forbidding such a contract, and can see no reason why the association might not lawfully make it. But conceding that the currency act, which is the charter of the association, did not authorize such a contract, it does not follow that the association can repudiate the contract and keep its fruits. Corporations have no right to violate their charters, but they have capacity to do so and to be bound by their acts when a repudiation of such acts would result in manifest wrong to innocent parties. *Bissell v. Railroad Co.*, 22 N. Y., 258. When it is a simple question of capacity to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity. *Navigation Co. v. Weed*, 17 Barb., 378. See, also, *Dispatch Line v. Bellamy Man. Co.*, 12 N. H., 205; *Moss v. Rossie L. M. Co.*, 5 Hill, 137. I am of opinion, therefore, that even admitting that the business carried on under the contract between the association and the société was irregular and not within the limits of legitimate banking, that hav-

ing made the contract and enjoyed its fruits neither the association nor its receiver can demand to keep the money of the société, which was received by virtue of the contract, and require the société to deliver up the assets that were transferred to it in consideration of the contract.

§ 301. *The substitution of one set of securities for another from time to time does not avoid the pledge. (a)*

Complainant further insists that the notes pledged by the association were changed, from time to time, as they fell due, and others substituted in their stead, and that this renders void the pledge, at least so far as such substituted notes are concerned.

The evidence leaves no doubt on my mind that such substitution was made. In fact, it is admitted by defendant. But has the substitution the effect claimed by complainant?

The case of *Clark v. Iselin*, 21 Wall., 360, is a pointed authority to sustain the negative of this proposition, and settles this objection to the title of defendant conclusively against complainant.

I have gone over the grounds relied upon by complainant to avoid the pledge and transfer of the assets of the New Orleans Banking Association to the Société de Credit Mobilier. I am unable to find that any of the grounds are tenable. In my judgment the pledge of these assets was a good one to secure the société against loss by the failure of the association to comply with its contract, and the receiver is not entitled to the pledged notes, or their proceeds, until the société has been made whole.

The bill must therefore be dismissed, and the injunction heretofore allowed dissolved.

§ 302. **Guaranty.**—A guaranty by the bank written upon commercial paper rediscounted by the bank is binding upon it. *People's Bank v. National Bank*, 11 Otto, 181. See the case, §§ 151, 152.

§ 303. **State bank.**—No authority is necessary from the state to enable a state bank to change its organization to that of a national bank. The option to make such change is given by the banking act. Congress is as competent to authorize such transmutation as to create such institutions originally. *Casey v. Galli*, 4 Otto, 676. See the case, §§ 75-81.

§ 304. **Directors may borrow from the bank.**—The president, and it seems the cashier or other officer and the directors of a national bank, may borrow money from the bank as any other person may, and execute a valid note for the same that will bind them as well as the bank receiving it; and such note is not void, nor, in the absence of fraud, can such note be repudiated or avoided by reason of that relation. *Blair v. First National Bank of Mansfield*, 2 Flip., 116.

§ 305. **Estoppel.**—A national bank may give security for a present debt or for future advances. It cannot repudiate a contract as *ultra vires* and retain the fruits of that contract. *Casey v. La Société*, 2 Woods, 77. See the case, §§ 294-301.

§ 306. The acceptance without objection of monthly statements from its correspondent banks binds the bank, and it is estopped to say that the items of such statements are not proper charges against it. *Burton v. Burley*, 9 Biss., 253. See the case, § 153.

§ 307. A bank, which retains the proceeds of paper which the vice-president has guaranteed in its name, is estopped to deny his authority to make such guaranty. *People's Bank v. National Bank*, 11 Otto, 181. See the case, §§ 151, 152.

§ 308. **Cashier.**—Third parties have a right to presume that a cashier has all the powers usually exercised by such officer. *Case v. Bank*, 10 Otto, 446. See the case, §§ 86-89.

§ 309. **Transfer of stock.**—The refusal of the cashier, upon proper demand, to transfer stock upon the books of the bank, is the refusal of the bank. *Ibid.*

§ 310. Under the national banking act no authority is conferred upon the cashier of a national bank to certify checks as good. *Merchants' National Bank v. State National Bank*, 3 Cliff., 206.

(a) This case was reversed by the supreme court on the above point. See *Casey v. Cavaroc*, 6 Otto, 467. See, also, *BALTIMORE*, §§ 33-47.

§ 311. The power to certify the checks of third persons in behalf of the corporation is not inherent in the office of cashier of a national bank, nor is the exercise of such a power within the scope of his usual and ordinary duties. *Ibid.*

§ 312. Insolvency.—The word “insolvency” as applied to national banks has the same meaning as it has in the bankrupt act as applied to traders; that is, a present inability to pay in the ordinary course of business. *Case v. Citizens' Bank*,* 2 Woods, 23.

§ 313. To make transfers void it is only necessary that the insolvency should be in the contemplation of the bank making the transfer. *Ibid.*

§ 314. The act of insolvency referred to in the banking law means an act which would be an act of insolvency upon the part of an individual banker. *Irons v. Manufacturers' Nat. Bank*, 6 Biss., 301. See the case, §§ 13-17.

§ 315. Lien of United States.—The United States has a prior lien over other creditors in the distribution of the assets of an insolvent national bank. *United States v. Cook Co. National Bank*, 9 Biss., 55. (Upon appeal to the supreme court of the United States this case was reversed and the contrary doctrine established. See 17 Otto, 445.)

§ 316. Definitions.—The words “contracts, debts and liabilities,” in section 5151, and the words “to pay the debts,” in section 5234, bear the same meaning. *Stanton v. Wilkeson*, 8 Ben., 357. See the case, §§ 34-39.

§ 317. “Discount” is the difference between the price and the amount of the debt, the evidence of which is transferred. *National Bank v. Johnson*, 14 Otto, 271. See the case, §§ 217-219.

§ 318. Bailee for hire.—A bank made application to another bank to loan some money for it, taking collateral security therefor, and requesting it to make a proper charge for its service. The latter bank made the loan as requested, but determined, inasmuch as the former bank was a large depositor, not to make any charge, but this determination was not communicated to the former bank. The collaterals received were deposited in the burglar-proof safe of the latter bank, from which they were stolen by burglars. *Held*, that the bank, in making its loan, was not a gratuitous bailee; that as the first bank coupled the request to transact the business with a promise to pay a reasonable charge therefor, and the latter bank accepted the agency without communicating the fact that it declined compensation, it was proper to assume that the position of an agent for hire was accepted. *Second National Bank v. Ocean National Bank*,* 11 Blatch., 362.

§ 319. Special deposit.—Where a bank, in consideration of a party's keeping a deposit in the bank, receives a box for safe keeping, there is a sufficient consideration to make the contract an obligatory contract of bailment. A special depositor in a bank is not bound by a by-law of which he had no notice. He is entitled to such security, neither less nor greater, than the course of business between him and the depository shows to have been mutually intended and expected between them, and the burden of proof is on the bank, in case of loss, to show what became of it. *White v. Bank*,* 4 Brewster, 240.

§ 320. It seems that a bank, under a clause in its charter permitting it to receive money on deposit, has no power to receive special deposits. *First National Bank v. Citizens' Bank*,* 2 Cent. L. J., 757.

§ 321. Net annual profits.—In estimating the net annual profits of national banks under laws relating to their taxation, all losses are to be deducted, from whatever sources arising, including embezzlements. A national bank, in its returns of profits, deducted from its gross profits amounts paid by it as state tax on its capital stock. An action was brought by the government to recover five per cent. of the amount so deducted. On the trial it was shown that the losses from embezzlements during the time, which were not discovered till subsequently, exceeded the amount thus deducted, and that it actually returned for the time a greater sum than its actual profits. *Held*, that there could be no recovery. *United States v. Central National Bank*, 10 Fed. R., 613.

§ 322. Such banks may be created without power to issue currency.—Under the national currency acts, national banks may be organized without the power to issue currency; and though the aggregate of circulation is limited, yet the act places no restriction upon the aggregate of capital of the banks organized under it. *National Currency Acts*,* 11 Op. Att'y Gen., 334.

§ 323. Treasurer of the United States cannot retain bonds for debt due the government.—The treasurer of the United States cannot retain bonds deposited with him to secure the circulation of a national bank for a claim due from such bank to the United States. *Case of the National Bank of Metropolis*,* 12 Op. Att'y Gen., 549.

§ 324. Deposit of bonds.—Notwithstanding the proviso of the act of 1874, that the amount of bonds deposited by a national bank should not be less than \$50,000, yet where a bank has a capital of \$50,000 it is required to deposit only \$30,000 in bonds; and banks of \$150,000 or more of capital must deposit one-third of the amount of their capital stock in bonds. *National Banks*,* 14 Op. Att'y Gen., 417.

§ 325. Postage.— Letters from the proper officers of national banks, which have been designated as government depositories to the treasury department, in relation to the business of such employment, and certified to be on official business, are not entitled to free transmission through the mails. *National Banking Association*,* 11 Op. Att'y Gen., 24.

§ 326. United States depositories.— Disbursing officers of the government may avail themselves of national banks which have been designated as United States depositories in the same manner as of public depositories of the United States, for all purposes except the deposit of receipts for customs. *Ibid.*, 27.

§ 327. The government is not liable for the acts of national banks; they are private corporations.— National banks are private corporations managed for private gain by their own officers. They are no part of the government, and it is in no way liable for their acts. Designating such a bank as a national depository does not in any way change its character, nor render its officers government officers, nor render the government responsible for their acts. It seems that when public money is deposited with such depository, it is not retained separate from its other funds, but that it becomes the property of the bank. So where money is paid into a court of the United States, though it must be deposited in a designated United States depository, yet the government is not liable for the money to the person who may be entitled to it in case of the failure of the depository. *Branch v. United States*,* 12 Ct. Cl., 286.

§ 328. The government is not liable in any manner for the proceeds of cotton deposited in a national bank, which is a designated United States depository, by the clerk of a federal court pending proceedings for confiscation, and which are lost by failure of the bank. *Ibid.*

§ 329. A state cannot limit the powers of a national bank.— It is not within the power of a legislature of a state to alter, modify, add to or diminish the powers, duties or liabilities created in, or conferred upon, a banking association established under an act of congress. The powers, privileges and duties of a corporate body are wholly derived from the sovereignty which gave it existence; and while the state may undoubtedly incorporate banking corporations, national banking associations cannot be merged in, or in any way identified with, similar corporations created by state legislation without the consent of congress. *National Banking Associations*,* 18 Op. Att'y Gen., 57.

§ 330. A state may compel the cashier to give a list of shareholders.— National banks organized under the acts of congress are subject to state legislation, except where such legislation is in conflict with some act of congress, or where it tends to impair or destroy the utility of such banks as agents and instrumentalities of the United States, or interferes with the purposes of their creation. So a state law is valid which requires the cashier of each national bank within the state, and the cashiers of all other banks, to transmit to the clerks of the several towns in the state in which any shareholder of such banking association may reside, the names of all such stockholders, together with the amount of money actually paid in on such share on a certain day. *Waite v. Dowley*, 4 Otto, 532.

§ 331. When dissolution of bank is complete.— The dissolution of a national banking association is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the comptroller of the currency, or by depositing an amount of treasury notes with him adequate for their redemption; and until this act is completed such association still exists and has all the duties and liabilities of such national bank in all particulars, and whatever remedies are given by act of congress for its violation of the provisions of the national banking law may still be pursued by the comptroller. *National Banking Associations*,* 18 Op. Att'y Gen., 58.

As to the general doctrine of Banking, see BANKS.

Taxation of National Banks, see REVENUE.

As to Bank Notes, see MONEY.

As to Corporations, Interest and Receivers, see those titles.

BARGES.

See MARITIME LAW.

BARRATRY.

See CARRIERS; INSURANCE; MARITIME LAW.

BEQUEST—BILL OF REVIEW.

BEQUEST.

See ESTATES OF DECEDENTS.

BIGAMY.

See CRIMES; DOMESTIC RELATIONS.

BILL IN EQUITY.

See PLEADING.

BILL OF ATTAINDER.

See CONSTITUTION AND LAWS.

BILL OF CREDIT.

See CONSTITUTION AND LAWS.

BILL OF DISCOVERY.

See EQUITY.

BILL OF EXCEPTIONS.

See APPEALS AND WRITS OF ERROR.

BILL OF EXCHANGE.

See BILLS AND NOTES.

BILL OF LADING.

See CARRIERS.

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I. NATURE, EXECUTION, DELIVERY AND CONSIDERATION.

SUMMARY—*Certificate of public debt*, § 1.—*Order payable contingently*, § 2.—*Authority of officers of the United States to draw bills*, §§ 3-6.—*Taking note for pre-existing debt; former recovery*, § 7.

§ 1. Certificates of the public debt of Texas are distinguishable from negotiable paper. Rights of a *bona fide* holder of a bill of exchange. *Combs v. Hodge*, §§ 8-10.

§ 2. An order, payable contingently upon the drawee having funds of the drawer, is not a bill of exchange; but after acceptance it imports a consideration. *Kemble v. Lull*, §§ 11-14.

§ 3. The authority of an officer of the United States to issue bills of exchange, not being expressly granted, can only arise as the incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance is entitled to money here, the person holding the fund may pay his drafts; and whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department or officer having the matter in charge has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, are always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government. *The Floyd Acceptances*, §§ 15-23.

§ 4. Although the use of bills of exchange by governmental officers may be authorized in some instances, their use in such cases, however common, cannot establish a usage to draw or accept bills in cases not authorized by law. *Ibid.*

§ 5. The secretary of war of the United States has no power to bind the United States as an accommodation indorser or acceptor of a bill of exchange; nor has he power to pay in advance, by accepting a bill drawn for supplies to be furnished subsequently. *Ibid.*

§ 6. No officer of the United States possesses express authority to draw or accept bills of exchange. *Ibid.*

§ 7. A. gave a note of \$5,000 to B., for the purpose of negotiation and sale. In fact but \$601 was owing by A. to B. B. indorsed the note as collateral security to C., for a debt which

was subsequently paid, whereupon B. agreed that the note should remain as a pledge in C.'s hands to secure another debt due from B. to C. C. sued D., an indorser of the note, and recovered \$601 from him. The maker, A., was not a party to this suit against D. In an action by C. against A., the maker, *held*, (1) That A., not having been a party to the suit against D., the indorser, could not set up the judgment in that action as a final adjudication of the matters in controversy in regard to the note. One satisfaction bars all actions on a note, but the holder may sue the maker and all prior indorsers, either concurrently or successively. (2) That the pledge of the note by B. as collateral security for a pre-existing debt was sufficient to pass a good title to the note to C., although there was no new consideration, such as forbearance or extension, for the pledge. C., the pledgee, being without notice, took the paper unaffected by any equities between the maker and prior holders. (3) The decisions of state courts, as to whether one who takes a note as collateral security for a pre-existing debt is a *bona fide* holder for a valuable consideration, are not binding upon federal courts, such question being one of general commercial law. *Railroad Co. v. National Bank*, §§ 24-34. See § 82; *infra*, IX, 8.

[NOTES.— See §§ 85-103.]

COMBS v. HODGE.

(21 Howard, 397-403. 1858.)

APPEAL from the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.— The plaintiff filed his bill to establish his claim to two certificates for a portion of the public debt of the republic of Texas, which had been issued to him in the year 1839, and which were transferable by him, or his attorney, or his representative, only, on the books of the stock commissioner of that state. He avers that these certificates with others were indorsed in blank by him, and sent to the defendant Love, in Texas, during the year 1840, with authority to receive an anticipated partial payment, and to obtain other certificates of the same description for the residue. That he did not give to his agent any authority to sell them, or to dispose of them for his own use, and has done no act to defeat his own legal title to them. That Love did not collect any part of the debt, and has failed to return the two certificates in question. That for fifteen years he has been unable to discover who was in possession of them, and has but recently ascertained that they were held by one of the defendants under a claim of title from Love. He attached to his bill a number of letters of Love, containing admissions of his receipt of the certificates, and of his agency for the plaintiff; and subsequently to the conversion by him of these, he wrote to the plaintiff in extenuation of his conduct, affirming that he had a power of attorney and letters from the plaintiff authorizing him to sell. That he would endeavor to replace the stock, or would give other stock of the same description, and insisted that the liberty he had taken was excusable. The defendant (Hodge) answered to the bill that these certificates were claimed as the property of the decedent, Andrew Hodge. That he purchased them from Love fairly, and for their full value, and with a firm conviction that he was authorized by a power of attorney, and the blank indorsement of the plaintiff, to dispose of them. The cause was heard upon the pleadings and a decree *pro confesso* against Love.

§ 8. *Pleadings in a former suit between other parties, signed only by counsel, cannot be used as admissions of parties in subsequent suit.*

The record in the district court at New Orleans in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this cause. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of

the respective parties. *Boileau v. Rutlin*, 2 Exch., 665. There is no evidence of the existence of a power of attorney from the plaintiff to Love, except that contained in the letter of Love before referred to. If that statement is at all admissible, it is insufficient to establish the fact. The letter was written in 1844, after Love had violated his obligation as a faithful agent, and in reply to reproaches of the plaintiff. In that letter he promises to restore to the plaintiff these or other certificates. There is no evidence of any fulfilment of this promise. He has failed to produce a power of attorney, or any letters which authorize his sale to his co-defendant. The witnesses of the contract between him and the decedent (*Andrew Hodge*) have not been examined.

§ 9. *Texas debt certificates distinguished from negotiable paper.*

These circumstances raise a strong presumption against the verity of his statement, and deprive his letter of any probative force. The title of the defendant therefore depends upon the effect to be given to the indorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a *bona fide* purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; and legislation in Great Britain and some of the states of the Union has extended to the same class of persons a similar protection in other contracts.

§ 10. *Rights of bona fide holder of a bill of exchange.*

But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule. In *Ashurst v. The Official Manager of the Bank of Australia*, 37 L. & Eq. R., 195, Justice Earl says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments, during their currency, delivery to a *bona fide* holder for value gives a title, even though the transferrer should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only in the sense I have mentioned." When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an indorsement on such a paper that the holder is entitled to sell or to discount it. *Bircleback v. Wilkins*, 10 Harris (Pa.), 26; *Ames v. Drew*, 11 Foster, 475; *Symonds v. Atkinson*, 37 L. & Eq., 585; 25 L. & Eq., 318. Nor can the holder write an assignment or guaranty not authorized by the indorser. 4 Duer, 45; 25 L. & Eq., 19; 6 Harris, 434. This doctrine has been applied to determine conflicting claims to

public securities which were not negotiable on their face, though the subject of frequent transfers.

The suit of *Tonkin v. Fuller*, 3 Doug., 800, was for four victualing bills drawn by commissioners of the victualing office on their treasurer, in favor of their creditor. These were sent to an agent with a power of attorney, "to receive money and give receipts and discharges," and who pledged them for an advance of money. Lord Mansfield said the only question is, who has the right of property in this bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretense. *Glyn v. Baker*, 13 East, 509, was a suit for bonds of the East India Company, payable to their treasurer, and sold with his indorsement. Le Blanc, justice, said: "Here are persons intrusted with the securities of A. and B., who part with the securities of A., and, when called on for them, give the securities of B. That difficulty can only be met by assimilating such securities to cash, which, whether it has an ear-mark set upon it or not, if passed by the person intrusted with it to a *bona fide* holder for valuable consideration, without notice, cannot be recovered by the rightful owner; but how does the similitude hold?" And Lord Ellenborough said, "any individual might as well make his bond negotiable."

The case of *Dunn v. Commercial Bank of Buffalo*, 11 Barb., 580, originated in the refusal of that bank to allow a transfer of stock on the books of the bank, which was transferable by the holder of the certificate or his representative. The plaintiff had the certificate and a blank assignment, and a blank power of attorney, and claimed to make the transfer. The court denied that certificates of stock in reference to negotiability are placed on the same ground as bills of exchange, and declare that it is incumbent on a party claiming under such a transfer to prove the contract or consideration. In *Menard v. Shaw*, 5 Tex., 334, the supreme court of that state decide that the agency of the payee named in certificates like the present is indispensable to a legal transfer on the books of the state, and that a forced sale was therefore inoperative. The decision of *Baldwin v. Ely*, 9 How., 580 (§ 1565, *infra*), does not sanction the claim of the defendants. The certificates, which were the subject of controversy, were issued under an act of congress, to a person or his assigns. The ordinary form of assignment was a blank indorsement, and this had been recognized as sufficient at the treasury of the United States, and in the ordinary traffic in the community. The defendant proved that he had paid value for them. In the cases cited from Douglas and East, the judges stated that the existence of similar facts might give another aspect to the claims of the defendants in these cases. In the case before us the certificates were transferable, in terms only, in a single mode. There was no evidence that a transfer in any other form than that prescribed had ever been recognized.

We have considered this cause upon the assumption that the defendant was a holder for value. There is no statement in the answer of the consideration paid to Love for these certificates, nor of the time, place and circumstances of the contract between him and the defendant's testator. It appears that the plaintiff did not direct their sale or transfer, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love. Upon the case as pre-

sented the court is constrained to reverse the decree of the circuit court, dismissing the plaintiffs' bill. But the case is presented in an unsatisfactory manner. The transaction between Love and the decedent (Hodge) has not been exhibited to the court, although parties fully cognizant of it are before the court.

We have concluded to remand the cause to the circuit court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

KEMBLE v. LULL.

(Circuit Court for Michigan: 3 McLean, 272-274. 1843.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought upon the following instrument: "Pontiac, June 21, 1841. \$700. On the 13th day of May, 1842, pay to Kemble, Jewett & Co. \$700, if in funds, and place the same to my account. W. J. Nelson." Directed to Messrs. Lull & Draper, and which was accepted by them. The first count was on the order, and the plaintiffs averred that, when the same became payable, a demand of payment was made of the defendants, which was refused. There was also a general count for money had and received. A general verdict for the plaintiffs was rendered by the jury, and a motion is now made for a new trial on points reserved.

§ 11. *Drawer of an order is not an assignor of it.*

1. The court has no jurisdiction. This is endeavored to be maintained on the assumed ground that Nelson is the assignor of the plaintiffs, and it is not shown that he could have sued for the demand in this court in his own name. Nelson is not an assignor in the sense contended. He gave an order on the defendants, in favor of the plaintiffs, for the sum in controversy, which was accepted. He is no more an assignor than the drawer of a bill of exchange is assignor to the drawee. It is the recognition of a debt by Nelson due to the plaintiffs, and the defendants by their acceptance promise to pay to the plaintiffs the sum named.

§ 12. *Contingent order is not a bill of exchange, but imports a consideration after acceptance.*

2. It is contended the instrument is not a bill of exchange; that it does not purport a consideration, and that there is no promise to pay the plaintiffs. The acceptance is an undertaking to pay the amount of the order to the plaintiffs. As the order was contingent on the fact of having funds, it is not a bill of exchange, nor has it the properties of such an instrument. But as the order was drawn on the funds in the hands of the acceptors, after their acceptance they cannot allege a want of consideration. At what time this order was accepted does not appear, but it is in evidence that funds of the drawer were in the hands of the acceptors at the time, and they were authorized to retain in their possession the means to meet the draft. But whether this was done or not, they are equally bound to pay the money, and having incurred this liability to the plaintiffs, *bona fide*, and on a sufficient consideration, they cannot set up as a defense a want of consideration between the drawer of the bill and the plaintiffs. *Robertson v. Fauntleroy*, 8 Moore, 10; *Lilly v. Hays*, 5 Ad. & Ell., 554.

§ 13. *Parol proof is not admissible to show the meaning of written words in an instrument which is free from ambiguity.*

3. It is insisted that the court should have left the construction of the instrument to the jury, and should not have rejected parol proof offered to show

what construction was given by the parties to the words, "if in funds." It is sufficient to say that the parol proof was not offered until the close of the testimony, when it was too late to offer evidence in chief. But the evidence was inadmissible had it been offered at the proper time. The language of the instrument is not ambiguous, and it was the duty of the court to construe it.

§ 14. *What is sufficient to show a consideration.*

4. A motion is also made in arrest of the judgment, on the ground that the special count is defective in not alleging a consideration. In this court the instrument is set out, and its acceptance, and this for reasons above stated shows a consideration. The motions for a new trial and in arrest of judgment are overruled.

THE FLOYD ACCEPTANCES.

(7 Wallace, 666-685. 1868.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—The instruments in controversy in these cases were time drafts, drawn on the secretary of war, and accepted by him, on account of supplies furnished for the army by the drawers. The drawers, finding it difficult to fulfil their contract for the furnishing of supplies without the use of ready money, made an arrangement with the secretary to draw time drafts on him to their own order, on which they could raise money, and as the money due them was paid the drafts were to be taken up. Drafts to a large amount were drawn and accepted accordingly, and passed into the hands of various holders.

Opinion by MR. JUSTICE MILLER.

The cases before us are demands against the United States, founded upon instruments claimed to be bills of exchange, drawn by Russell, Majors & Waddell, on John B. Floyd, secretary of war, and accepted by him in that capacity; purchased by plaintiffs before maturity for a valuable consideration, and, as they allege, without notice of any defense to them. Mr. Pierce, in his petition, relies on the facts that the signature of John B. Floyd to these acceptances is genuine, and that he was at the time of the acceptance secretary of war, as sufficient to establish his claim. He avers that Floyd, as secretary of war, had authority to accept the drafts, and that by his acceptance the United States became bound. It is evident that he means by this merely to assert, as a principle of law, that, by virtue of his office, the secretary had such authority, and not that there existed, in this case, special facts which gave such authority; for he mentions no such facts in his petition, and when the solicitors for the defendant undertook to show under what circumstances the bills were issued and accepted, he objected to the evidence. Its admission is one of the alleged errors on which he brings the case to this court. Both Mr. Pierce and his counsel, therefore, claim to recover on the doctrine that when a party produces an instrument in the form of a bill of exchange, which he has purchased before its maturity, drawn on the secretary of war, and accepted by him, he has established a claim against the government which admits of no inquiry into the circumstances under which the acceptance was made. The other defendants, also, in their original petitions, assert and rely upon the same principle; but they have also filed amended petitions, in which they set forth facts connected with the acceptance of the secretary, which they deem sufficient to establish his right or authority to accept. Most of the facts found under the issues made by these amended petitions were also found under the general issue

in Pierce's case, notwithstanding his objection, so that, if they avail the other plaintiffs, they will also support his claim.

It will be convenient, therefore, to consider first the proposition on which he rests his case, which, if found to be sound, disposes of all the cases in favor of plaintiffs. One of the main elements of that proposition, much and eloquently urged upon our attention, seems to be too well established by the decisions of this court to admit now of serious controversy. It must be taken as settled that when the United States becomes a party to what is called commercial paper — by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation, — they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper. Conceding, then, for the sake of argument, that the instruments under consideration are, in form, bills of that character, and that the signature of Floyd is genuine, and that he was at the time secretary of war, there remains but one question to be considered essential to plaintiffs' right to recover, and that concerns the authority of the secretary to accept the bills on behalf of the government.

§ 15. *United States may use bills of exchange.*

It is not to be denied that in the extensive and varied fiscal operations of the government bills of exchange are found to be valuable instruments, of which it has the right to avail itself whenever they may be necessary. In the transfer of immense sums of money from one part of the country to another, and in the payment of dues at distant points, where they should properly be paid, it uses, as it ought to use, this time-honored mode of effecting these purposes. In the case of such paper, issued by an individual, when we make ourselves sure of his signature, we are sure that he is bound, because the right to make such paper belongs to all men. But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers conferred to them.

§ 16. *Governmental agents limited by law in authority to draw bills.*

An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could, or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government. When this inquiry arises where are we to look for the authority of the officer? The answer which at once suggests

itself to one familiar with the structure of our government, in which all power is delegated and is defined by law, constitutional or statutory, is that to one or both of these sources we must resort in every instance. We have no officers in this government, from the president down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the president, the legislature and the judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that, on the question of the authority of the secretary of war to accept bills of exchange, we must look mainly to the acts of congress. The counsel for claimants, not altogether rejecting this view of the matter, maintain that the power is derived, 1st. From the true construction of the constitution and acts of congress. 2d. From the decisions of the supreme court of the United States; by which is probably meant only the authoritative construction of the constitution and laws. 3d. From the usage of the government in similar cases. We will examine these several alleged sources of the power in the reverse order to that here stated.

§ 17. *Usage of officers of the government to use bills of exchange.*

1. As regards usage, it must occur at once that, if there are instances in which the use of bills of exchange by the officers of the government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever, by its frequency, be made to stand as a just foundation for the very authority which is thus assumed. It is to be observed in this connection that the court of claims finds as a fact, in *Pierce's* case, that "the evidence fails to establish any usage or practice in the different departments of the government by virtue of which the secretary of war was authorized to accept, in behalf of the United States, the bills in suit;" and, so far as that case is concerned, this inquiry might close there. But, in the finding of facts which the same court makes in the other three cases, it is said "That it is, and has been, the practice of the heads of departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered." The usage here found is limited to specified classes of cases, and, if authorized by law, can be no evidence of a usage in cases not so authorized. It cannot be held to support the allegation of a usage so general as to apply to any case in which the head of the department may see proper to use it. We make the further observation in this connection, that, while it is readily to be seen that the exigencies of the business of the departments may require drafts to be drawn by them, and may justify drafts being drawn on them, which they ought to, and do, pay when presented, there can be no occasion for an acceptance by any department or officer of a draft drawn on either of them. We do not think, therefore, that usage is a sufficient reliance as an authority for the acceptance of these drafts.

§ 18. *Case distinguished.*

2. The *United States v. Bank of Metropolis* (15 Pet., 377; §§ 127-134, *infra*) is the case mainly relied on as establishing the doctrine contended for by plaintiffs, and is confidently asserted to be conclusive of the cases under consideration, unless overruled. That case undoubtedly did decide that when an

officer of the government, *authorized to do so*, accepted a draft in behalf of the United States or one of the departments, the validity of the instrument could not be disputed in the hands of an innocent holder. We have already stated this as the established doctrine of this court. And that proposition was the principal, if not the only, one controverted in that case. An attentive examination of it will show that the authority of the officers to accept was not raised by counsel or considered by the court. The Bank of the Metropolis being sued for certain balances in favor of the United States, pleaded as a set-off a draft drawn by Edwin Porter on Richard C. Mason, treasurer of the postoffice department, at ninety days, and accepted by him as treasurer; and also four drafts at ninety days, drawn by James Reeside on Amos Kendall, postmaster-general, and "accepted on condition that his contracts be complied with." It does not appear to have been controverted that Mason had authority to accept the draft of Porter, by either the counsel for the government or the bank; and the court seem to have treated it as conceded. The opinion of the court, after stating the facts, opens with the declaration that, "when the United States, *by its authorized officer*, becomes a party to negotiable paper, they have all the rights, and incur all the responsibilities, of individuals who are parties to such instruments." And further on it is said, that "an unconditional acceptance was tendered to it (the bank) for discount; . . . all it had to look to was the genuineness of the acceptance, and the *authority of the officer* to give it." If this language has any significance, it is that the authority of the officer, like the genuineness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government. Only a small part of that elaborate opinion is devoted to Porter's draft, and to the questions involved in it, and the remainder of it is occupied in discussing the effect of the condition annexed to the acceptance of Reeside's draft on its commercial character, and to determining what is implied in that condition. It seems, therefore, quite clear that no consideration whatever was given by the court to what constituted an authority to draw or accept bills of exchange; but that it was impliedly held to be a matter always open to inquiry when the draft was attempted to be enforced against the government. Nor are we aware of any case in this court in which the rule for determining that authority has been laid down.

§ 19. *No officer of the United States possesses express authority to draw or accept bills of exchange.*

Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that there is no express authority to any officer of the government to draw or accept bills of exchange.

§ 20. *Taker of governmental paper receives it at his peril.*

Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. Does the contract, called a bill of exchange, stand on any different footing? It is true, that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness and good faith which attended its origin, or any of its subsequent transfers; but in reference to the authority of the officer who makes it, to bind the government, it is to be judged by the same rule as other contracts.

§ 21. *Authority of United States officer to issue bills of exchange exists, when.*

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officers having the matter in charge, has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government. It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual. If A. authorizes B. to buy horses for him, and to draw on him for the purchase money, B. cannot buy land and bind A. by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well defined and limited authority was given, to ruin the principal who had conferred it. So it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances and other forms of negotiable paper, without authority and without limit. No government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper.

In accordance with these views, we are of opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government. An examination of the facts found by the court of claims confirms the views already stated. Counsel for the plaintiffs seem to have been of the opinion, from the start, that there was nothing in the nature of the transaction which would support the paper on which they sued, for they steadily resisted all efforts on the part of government to give the facts in evidence; and in the arguments made in this court the right to recover is rested almost exclusively on the proposition that, because in some cases the secretary might lawfully accept, it must be presumed in their favor that these drafts were lawfully accepted.

§ 22. *Secretary of war cannot accept bills as an accommodation acceptor.*

It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper, as it was found to be by the court of claims, by which the secretary undertook to make the United States acceptor for the sole benefit of the drawers. It was a loan of the credit of the government volunteered by him, without consideration and without authority. That the transaction was not payment, nor intended to be payment, for the supplies furnished is clear, because the acceptances were not expected to be paid by the government, nor payable at the treasury, but were to be met by the

drawers at the bank with which they dealt. These drafts did not interrupt in the least the regular payments made to Russell & Co. by the quartermaster's department, according to their contracts. Nor do the drafts seem to have had any relation to anything due on these contracts, or to what might become due before their maturity. It was, therefore, not payment, nor so considered by either party.

§ 23. — *nor to pay in advance for supplies.*

But if these acceptances can be considered as payments, they were payments in advance of the service rendered and supplies furnished — payments made before anything was due. They are in that view not only without authority of law, but are expressly forbidden by the act of January 31, 1823. 3 Stat. at Large, 723. The first section of that statute, which has never been repealed, enacts "that, from and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered, or the articles delivered previous to such payment." The transaction by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority for their acceptance, he must have learned at once that, if received by Russell, Majors & Waddell as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.

It is proper to observe that it does not appear from this record that anything remains due to Russell & Co. under their contract with the government, or that anything was due them at the maturity of any of these drafts, nor is there any attempt on the part of plaintiffs to show either of these things, or the state of the accounts between those contractors and the government at the time the drafts matured. These cases have long been before the departments, before congress and the court of claims, and have been the subject of much laborious consideration everywhere. The amount involved is large, the principles on which the claims are asserted are, to some extent, new, and we have given them a careful and earnest investigation. We are of opinion that the judgments rendered by the court of claims against the plaintiffs must be affirmed.

Justices NELSON, GRIER and CLIFFORD dissented, holding (1) that the instruments were not bills of exchange, and (2) that the secretary of war had authority to accept bills drawn for supplies, and that if the instruments had been negotiable the government would have been bound to a *bona fide* holder for value.

RAILROAD COMPANY v. NATIONAL BANK.

(12 Otto, 14-59. 1890.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—The railroad company made its promissory note for \$5,000, which, on being indorsed by Le Count and Palmer & Co., was placed in the hands of Hutchinson & Ingersoll, note brokers of Wall street, for negotiation and sale. This firm borrowed money at different times from the National

Bank upon collaterals, among others a loan of \$36,000 secured by this \$5,000 note and a number of other notes as collaterals. The collaterals upon another loan having proved insufficient, Hutchinson & Ingersoll executed an agreement by which, in effect, all the collaterals they had given should be held in gross, liable for any or all of their different debts to the bank. For this agreement no consideration in the way of forbearance or extension was given by the bank. The railroad company was indebted to Hutchinson & Ingersoll in the sum of \$600. On the 8th of August, 1873, it tendered to that firm the money, and demanded its \$5,000 note. Somewhat later it made a like demand of the bank. The \$36,000 loan was paid out of the other collaterals pledged to secure it, leaving the \$5,000 note untouched. The bank claimed the note as collateral to secure another loan of \$10,000, the specific assets pledged to its payment having been exhausted without paying the debt. In 1874 the bank sued one of the indorsers (Palmer & Co.) on the note, and the case having been sent to a referee, judgment was rendered against the defendant for \$601, the amount due by the railroad company to Hutchinson & Ingersoll, who in the interval had become insolvent. That judgment was satisfied. This suit was brought to recover from the railroad company the amount of the \$5,000 note, and judgment was rendered for the plaintiff. See, also, the statement of facts in the opinion by Mr. Justice CLIFFORD.

§ 24. *Judgment against indorser is not res adjudicata as to maker.*

Opinion by MR. JUSTICE HARLAN.

The first proposition of the plaintiff in error is that there has been a final determination by a court of competent jurisdiction, between the same parties or their privies, upon the same subject matter as that here in controversy. This contention rests upon the judgment of the supreme court of New York, in the action instituted by the bank against Palmer & Co., as the indorsers of the note in suit. The judgment in the state court clearly constitutes no bar to the present action. Personal judgments bind only parties and their privies. The railroad company was not a party to the separate action against Palmer & Co., nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the company received such notice in due time, it would perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right in that proceeding to controvert the claim of the bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. If, in the action against Palmer & Co., the bank had obtained judgment for the full amount of the note, and, being unable to collect it, had sued the railroad company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defense it might have against the note. This being so, it results that the company cannot plead the judgment in the state court as a bar to this action. An estoppel, arising out of the judgment of a court of competent jurisdiction, is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require. The liability of the maker and indorsers was not joint, but several, and therefore a judgment in an action against the indorsers upon the contract of indorsement could not bar a

separate action by the bank against the maker,—certainly not where the maker was without notice from the indorsers of the pendency of the action against them.

§ 25. *Rights of holder of note pledged as collateral security.*

The next proposition involves the right of the railroad company to show, as against the bank, that the note was executed and delivered to Hutchinson & Ingersoll for the purpose only of raising money upon it for the company, and that consequently they had no authority to pledge it as collateral security for their own indebtedness to the bank. It will have been observed from the statement of facts, that the note in suit was among those pledged to the bank as security for the call loan of \$36,000, made June 19, 1873; that Howes, Hyatt & Co., whose notes had been pledged as security for the call loan of \$10,000, made June 19, 1873, having become insolvent, Hutchinson & Ingersoll, July 22, 1873, at the request of the bank, executed the writing, dated June 19, 1873, whereby they pledged all securities, bonds, stocks, things in action, or other property theretofore deposited with the bank, whether specifically or not, as security for the payment of any and every indebtedness, liability or engagement held by the bank, for which they were, or should become, in any way liable. Although, therefore, the call loan of \$36,000 was extinguished without resorting to the note in suit, that note, under the agreement made July 22, 1873, stood pledged as collateral security, also, for the \$10,000 call loan of July 11, 1873. The bank, we have seen, received the note before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defense thereto, and in ignorance of the purposes for which it had been executed and delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the railroad company may have against the other parties to the note?

§ 26. *Authorities reviewed.*

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *infra*). After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of *or as security for a pre-existing debt* is according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may

safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts." After a review of the English cases, the court proceeded: "They directly establish that a *bona fide* holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the *bona fide* holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice Catron alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as collateral security for or in payment of previous indebtedness. And we understand the case of *McCarty v. Roots*, 21 How., 432, to affirm *Swift v. Tyson* upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." p. 438. "The delivery of the bills to the plaintiff as collateral security for a pre-existing debt, under the decision of *Swift v. Tyson*, was legal." p. 439.

It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor Kent in *Bay v. Coddington*, 5 Johns. Ch. (N. Y.), 54, reaffirmed in *Coddington v. Bay*, 20 Johns. (N. Y.), 637. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the later editions of his Commentaries (vol. iii, p. 81, note *b*), prepared by himself, reference is made to *Stalker v. McDonald*, 6 Hill (N. Y.), 93, in which the principles asserted in *Bay v. Coddington* were re-examined and maintained in an elaborate opinion by Chancellor Walworth, who took occasion to say that the opinion in *Swift v. Tyson* was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor Kent adds: "Mr. Justice Story,

on Promissory Notes, p. 215, note 1, repeats and sustains the decision in *Swift v. Tyson*, and I am inclined to concur in that decision as the plainer and better doctrine." Of course it did not escape his attention that the court in *Swift v. Tyson* declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt, as when transferred in payment or extinguishment of such debt.

§ 27. *The doctrine as to bona fide holder of paper assigned as collateral.*

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt; or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer; or the transfer is to secure a debt not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due,—in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper. Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift v. Tyson* is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects—one, where the paper is received as collateral security for antecedent debts. We concur with the author, "that, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration." 1 Parsons, Notes and Bills (2d ed.), 218.

Another ground upon which some courts have declined to sanction the rule announced in *Swift v. Tyson* is, that upon the transfer of negotiable paper merely as a collateral security for an antecedent debt nothing is surrendered by the indorsee,—that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes

upon him no additional burdens, and subjects him to no additional inconveniences. This may be true in some, but it is not true in most cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser. The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law, to present it for payment, and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of non-payment,—an undertaking necessarily implied by becoming a party to the instrument,—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the bank, at any time before maturity, and the proceeds either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, *pro tanto*, of any one of the call loans previously made to them, it would not be doubted that the bank would be protected against the equities of prior parties. Instead of procuring its formal discount, Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the bank. At the time the written agreement of July 22, 1873, was executed, by which this note, with others, was pledged as security for any debt then or thereafter held against them, the bank had the right to call in the \$10,000 loan, that is, to require immediate payment. The securities upon which that loan rested had become, in part, worthless, and it is evident that but for the deposit of additional collateral securities the bank would have called in the loan, or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. See Bigelow's Bills and Notes, 502 *et seq.*; 1 Daniel, Neg. Inst. (2d ed.), c. 25,

secs. 820-833; Story, Promissory Notes, secs. 186, 195 (7th ed.), by Thorndyke; 1 Parsons, Notes and Bills (2d ed.), 218, sec. 4, c. 6; and Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors.

It is, however, insisted that, by the course of judicial decision in New York, negotiable paper transferred merely as collateral security for an antecedent debt is subject to the equities of prior parties existing at the time of transfer; that the bank being located in New York, and the other parties being citizens of the same state, and the contract having been there made, this court is bound to accept and follow the decision of the state court, whether it meets our approval or not. This contention rests upon the provision of the statute which declares that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." It is undoubtedly true that, if we should apply to this case the principles announced in the highest court of the state of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper, transferred *merely* as collateral security for an antecedent debt, nothing more, is not a holder for value, within those rules of commercial law which protect such paper against the equities of prior parties.

§ 28. *The decisions of state courts do not conclude the judgment of this court on questions of general commercial law.*

The question here presented is concluded by our former decisions. We remark, at the outset, that the section of the statute of the United States already quoted is the same as the thirty-fourth section of the original judiciary act. In *Swift v. Tyson*, *supra*, the contention was that this court was obliged to follow the decisions of the state courts in all cases where they apply. But this court said: "In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It has never been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the true exposition

of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In *Carpenter v. Providence Washington Ins. Co.*, 16 Pet., 495, decided at the same term with *Swift v. Tyson*, it was necessary to determine certain questions in the law of insurance. The court said: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from these learned state courts, we may regret it, but it cannot be permitted to alter our judgment." In *Oates v. National Bank* (100 U. S., 239; §§ 397-404, *infra*), we had before us the precise question now under consideration. That was an action by a national bank, located in Alabama, against a citizen of that state, upon a promissory note there executed and negotiated. It was contended that the decision of the supreme court of Alabama should be accepted as the law governing the rights of parties. We, however, held — referring to some of our previous decisions — that the federal courts were not bound by the decisions of the state courts "upon questions of general commercial law. . . . We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the federal courts to determine, upon their own judgment as to what these rules and doctrines are."

To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We could not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract there made, are not in exposition of any legislative enactment of that state. They express the opinion of that court, not as to the rights of parties under any law local to that state, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world. Suppose a state court, in a case

before it, should determine what were the laws of war as applicable to that and similar cases. The federal courts, sitting in that state, possessing, it must be conceded, equal power with the state court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the state court as the true interpretation, for that locality, of the laws of war, and as the "law" of the state in the sense of the statute which makes the "laws of the states rules of decision in trials at common law." We apprehend, however, that no one would go that far in asserting the binding force of state decisions upon the courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions. Further elaboration would seem to be unnecessary.

Judgment affirmed.

JUSTICES MILLER and FIELD dissented.

Opinion by MR. JUSTICE CLIFFORD.

Commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.

§ 29. *Nature of bills of exchange and promissory notes.*

Bills of exchange and promissory notes are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. Everywhere the rule is that they may be transferred by indorsement, or when indorsed in blank or made payable to bearer they are transferable by mere delivery. International regulations encourage their use as a safe and convenient medium for the settlement of balances among mercantile men of different nations, and any course of judicial decision calculated to restrain or impede their full and unembarrassed circulation for the purposes of foreign or domestic trade would be contrary to the soundest principles of public policy. *Goodman v. Simonds*, 20 How., 343, 364 (§§ 420-425, *infra*).

STATEMENT OF FACTS.—Sufficient appears to show that the corporation plaintiff became the holder of the note described in the declaration, and that, payment being refused, it instituted the present action of *assumpsit* to recover the amount. Service having been made, the defendant appeared and set up several defenses, which are fully exhibited in its answer filed in the case. Certain proceedings followed, which it is not necessary to notice, as the parties by consent waived a jury and submitted the cause to the circuit court upon an agreed statement of facts. Hearing was had, and the circuit court rendered judgment in favor of the plaintiff for the amount of the note and costs of suit, and the defendant sued out the present writ of error. Eight errors are assigned, but it will not be necessary to give the several assignments a separate examination, as the questions presented do not properly involve more than three material propositions: 1. That the cause of action is barred by a former recovery in an action by the plaintiff against the indorsers of the note. 2. That the plaintiff, inasmuch as it holds the note as collateral security for a pre-existing debt, is not a *bona fide* holder of the same within the meaning of the commercial rule which shuts out proof of equities between the antecedent parties to the instrument. 3. That by the law of the state the plaintiff, in view of the

facts exhibited in the agreed statement, is not entitled to the benefit of that rule, and that the law of the state in that regard furnishes in such a case the rule of decision in the federal courts. Special findings were made by the circuit court, from which it appears that the defendant was the maker of the note, and that it was payable to the order of its treasurer, by whom it was indorsed in blank, and that it was also indorsed by the firm of Palmer & Company, consisting of the president and financial agent of the corporation defendant.

Enough appears to show that the note was made and indorsed for the sole purpose of raising money for the use of the defendant, nothing having been paid to either of the indorsers for their indorsement. When duly executed and indorsed in blank, the defendant placed the note with others in the hands of a firm of note brokers for sale to raise money for its use. Prior to that the same note brokers had frequently borrowed money from the corporation plaintiff; but they did not keep any account with the bank, and had no other transactions with the same than those set forth in the findings of the court. Twelve call loans at seven per cent. interest were made at different times by the plaintiff to the note brokers on collaterals, as specifically enumerated and described in the findings, each of which was separate and had no reference to any other, and it appears that each was made upon a separate lot of collaterals. Two of these loans, to wit, the one for \$36,000 and the last one, which is for \$10,000, will be the subject of special comment in disposing of the case. Before the brokers applied for the loan of \$36,000, it appears that they had paid all their previous loans obtained from the plaintiff, and that they procured the loan upon collaterals, among which was the note for \$36,000 described in the findings. Other banks or capitalists made loans to these brokers, taking collaterals as security, and the plaintiff three weeks later loaned them \$10,000 more, taking as security the four notes mentioned in the findings.

Adequate collaterals were at that time held by the plaintiff for each of those loans, but it appears that the promisors of one of the collaterals given for the last loan, within eleven days after the money was advanced, failed in business and became notoriously bankrupt, and that knowledge of that fact reached the plaintiff. Prior to that it was known that the brokers who negotiated the loans were insolvent, and the findings show that they, at the request of the plaintiff, executed and delivered to it the instrument exhibited in the transcript, in which they agreed that all securities, bonds, stocks or other property deposited by them with the plaintiff might be held by it, and be deemed security for all their indebtedness to the plaintiff, as more fully set forth in the findings. Certain advances were made by the brokers to the defendant, by reason of which the latter became indebted to them in the sum of \$600, and it appears that the defendant tendered that sum both to the brokers and the plaintiff, and demanded the return of note in suit. Payment in full of the large note was obtained by the plaintiff out of the collaterals originally deposited with it for that purpose, and it appears that the moneys collected from those collaterals exceeded the amount of that loan by the sum of \$2,403.61, so that the entire balance remaining due on the last loan was \$5,906.99. Process to enforce payment was first sued out against the indorsers, and in that action the plaintiff recovered judgment in the sum of \$600, which sum, with the costs of suit, was duly paid; and it appears that the balance due, deducting the collections from the collaterals and the judgment against the indorsers, is \$5,136.68, for which, with interest and costs, the judgment was entered in the circuit court.

§ 30. *A judgment against indorser does not estop holder from suing maker. Authorities cited.*

Judgments rendered in courts of competent jurisdiction are conclusive between the parties and privies until the same are reversed or in some manner set aside and annulled. When a fact has once been tried and decided by a court of competent jurisdiction, it cannot be again contested between the same parties or their privies in the same or any other court, if it appear that the same matter was directly involved in the pleadings and that the merits of the cause were decided in the first case. Parties and privies in such a case are bound by the estoppel, but the holder of a negotiable bill of exchange or promissory note may pursue his remedy against the indorsers as well as the immediate promissory party. Consequently, as stated by Mr. Bigelow, an indorsee of a bill of exchange or promissory note may sue all the prior parties concurrently or successively at his election, subject to the condition that he is entitled to but one satisfaction. Bigelow, Estoppel (2d ed.), 55; Bishop v. Haywood, 4 T. R., 478; Britten v. Webb, 2 Barn. & Cress., 483; Windham v. Wither, 1 Stra., 515; Burgess v. Merrill, 4 Taunt., 468; Farwell v. Hilliard, 3 N. H., 318; Porter v. Ingraham, 10 Mass., 88. Authorities to show that the holder in such a case is not estopped to sue the maker because he has recovered judgment against the indorser are numerous and decisive. Russell & Erwin Manuf. Co. v. Carpenter, 5 Hun (N. Y.), 162; Story, Promissory Notes (7th ed.), sec. 401; Pritchard v. Hitchcock, 6 Mann. & G., 151, 201.

§ 31. *One who takes a note as collateral security for a pre-existing debt is a bona fide holder.*

Suppose that is so, then it is insisted by the defendant that the plaintiff is not a bona fide holder for value in the usual course of business within the meaning of the commercial law. Questions of fact are set at rest by the findings, from which it appears that the note is payable to the treasurer of the defendant or order, by whom it was indorsed in blank as well as by the firm, consisting of the president and financial agent of the company; that it was placed by the maker in the hands of the brokers for sale to raise money for the use of the maker, and that the plaintiff loaned the full amount of the note to the agents of the defendant and took the note indorsed in blank as collateral security for the loan before maturity. None of these matters are disputed, and it is equally and undeniably true that the whole of the money loaned went into the hands of the defendant, in pursuance of the arrangement it made with its own agents. Neither fraud nor mistake is alleged or even suggested in respect to any one of these matters, from which it follows, as a necessary legal conclusion; that the plaintiff became the actual holder of the note in good faith before maturity by delivery from the agents of the defendant, and that it as such assumed the responsibility to demand payment of the maker when the note fell due, and, if not paid, to give the required notice of non-payment to the indorsers. Beyond all question, the findings show that the plaintiff in good faith became a party to the note described in the declaration before maturity, and that as such holder it was bound to adopt proper measures to fix the liability of the indorsers, and that if it had failed to demand payment of the maker, or to give the required notice to the indorsers, it would have become liable to the party from whom it received the note for whatever loss ensued from such neglect. Such a holder of a foreign bill of exchange, if not paid at maturity, must see that it is duly protested; and for the same reason the holder of an inland bill or negotiable promissory note must see to it that proper steps are

taken, in case of non-payment by the acceptor or maker, to fix the liability of parties to the instrument who would otherwise be discharged.

Securities of a negotiable character may be transferred by indorsement made at the time they are delivered, or if indorsed in blank or made payable to bearer, they may be transferred by mere delivery without any new indorsement. In either case the holder, other things being equal, acquires full title to the instrument, the correct commercial rule being that whoever lawfully and in good faith becomes the holder of a valid negotiable bill of exchange or promissory note before maturity by direct indorsement, or by delivery when indorsed in blank or made payable to bearer, assumes the responsibility, if not paid when it falls due, of entering protest or of making demand and giving notice of non-payment, as the case may require; and that in all cases of such a transfer the holder, whether he paid cash for the note or made new advances to the transferrer, or accepted it in substitution of prior collaterals surrendered, or received it in payment of property sold or of antecedent indebtedness, or as collateral security of a pre-existing debt or any pecuniary liability for the pledgor, is a holder for value in the usual course of business within the meaning of the commercial law, and is unaffected by any equities between the antecedent parties, provided he took it in good faith and without notice of anything to impeach the title of the person from whom it was received. Authorities everywhere agree at the present time that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of anything which impeaches its validity, if he takes it under an indorsement made before maturity, holds the title unaffected by any equities between the antecedent parties, even though as between them it may be without any legal validity. *Swift v. Tyson*, 16 Pet., 1, 15 (§§ 382-386, *infra*). Instruments of the kind are commercial paper in the strictest sense, and must ever be regarded as favored securities, on account of their universal convenience in mercantile transactions; and the settled rule is that transferees of the same hold the instrument clothed with the presumption that it was negotiated for value, in the usual course of business, at the time of its execution, and without notice of any equities between the antecedent parties to the instrument. *Collins v. Gilbert*, 94 U. S., 753.

Possession of such an instrument before maturity, if indorsed in blank or payable to bearer, is *prima facie* evidence that the holder is the owner and lawful possessor of the same; and nothing short of proof that he had knowledge at the time he took it of the facts which impeach the title as between the antecedent parties, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 343, 365; *Bank v. Leighton*, 2 Exch., 61; *Wheeler v. Guild*, 20 Pick. (Mass.), 545, 550; *Magee v. Badger*, 34 N. Y., 247, 249. Apply that rule in an action by the transferee against the maker of a negotiable note indorsed in blank, or payable to bearer, and it is clear that he has nothing to do in the opening of his case except to prove the signatures to the instrument and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date in the usual course of business, without notice of anything to impeach his title. *Pettee v. Prout*, 3 Gray (Mass.), 502; *Way v. Richardson*, id., 412. Clothed as the instrument is with the described presumption, the plaintiff is not bound to give any evidence to show that he gave value

for the same until the other party has clearly proved that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Fitch v. Jones*, 5 El. & Bl., 238; *Smith v. Braine*, 16 Ad. & Ell., N. S., 242; *Hall v. Featherstone*, 3 H. & N., 282.

Cases arise where the supposed defect or the infirmity of the title appears on the face of the instrument; and where that is so, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law. *Andrews v. Pond*, 13 Pet., 65; *Fowler v. Brantley*, 14 id., 318; *Brown v. Davies*, 3 Term R., 86. Decided cases of the highest authority support that proposition, but it is a very different matter when it is proposed to impeach the title of the holder by proof of facts and circumstances outside of the instrument itself, as he is then to be affected, if at all, by what has occurred between other parties. For his own acts he is plainly responsible, but he may well claim exemption from any consequences flowing from the acts of others, unless it be first clearly shown that he had knowledge of such facts and circumstances at the time he became the holder of the instrument. Actual knowledge of such facts and circumstances must be proved to defeat the title of the holder; and the question whether he had such knowledge or not is a question of fact for the jury, and, like other questions of *scienter*, must be submitted to their determination.

Indorsers of negotiable securities enjoyed the protection of that rule for ages before any successful attempt was made to annex to it any qualification, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Hinton's Case*, 2 Show., 235; *Anonymous*, 1 Salk., 126; *Miller v. Race*, 1 Burr., 452; *Grant v. Vaughan*, 3 id., 1516; *Peacock v. Rhodes*, 2 Doug., 633; *Lawson v. Weston*, 4 Esp., 56. Throughout the whole period covered by those decisions it was universally understood that the title of the *bona fide* holder was unaffected by any equities between the antecedent parties; but it was subsequently decided that, if the indorser of the instrument had no valid title to the same, and that such facts and circumstances were known to the indorsee, at the time of the transfer, as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. *Gill v. Cubitt*, 3 Barn. & Cress., 466. For a brief period that rule was followed, but it was never satisfactory, and at the end of twelve years was distinctly overruled in the tribunal where it was first promulgated. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Arbouin v. Anderson*, 1 Ad. & Ell., N. S., 498. We must hold, said Lord Denman, in the case last cited, that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession, and that, to meet the inference so raised, fraud, felony or some such matter must be proved.

Abundant authority to support the proposition that the case which, for a period, relaxed that rule has been overruled for more than half a century is found in the reported cases already cited; and Mr. Chitty says that the old rule of law that the holder of a negotiable security, transferable by delivery, can give a title which he himself does not possess to a person taking the same *bona fide* for value is by those decisions again re-established in its fullest extent. *Chitty, Bills* (13th ed.), 257; *Worcester County Bank v. Dorchester & Milton*

Bank, 10 Cush. (Mass.), 491. Conclusive support to that conclusion is found in decisions not previously cited, and in the text-writers of the highest authority. *Bank of Pittsburgh v. Neal*, 22 How., 96 (§§ 405-407, *infra*); *Murray v. Lardner*, 2 Wall., 110. Nothing short of fraud, not even gross negligence, says Mr. Justice Story, if unattended with *mala fides* on the part of the taker of the instrument, will invalidate his title so as to prevent him from recovering the amount. Story, *Promissory Notes* (7th ed.), sec. 382. Every person, says the same learned author, is treated in the sense of the rule as a *bona fide* holder for value, not only who has advanced money or other value for it, but who has received it in payment of a precedent debt, or has a lien on it, or has taken it as collateral security for a precedent debt, or for future as well as for past advances. Story on Bills (4th ed.), sec. 192.

During the period the modified rule referred to was recognized as good law in the courts of the country where it was first promulgated, it must be admitted that the courts of several of the states in our own country accepted the same rule, and that the pernicious effects resulting from those examples are still to be seen in some of the more recent state decisions. Attempt was made at one time to maintain that the holder of a negotiable security, if he received it as payment of a precedent debt, could not be regarded as a *bona fide* holder for value in the usual course of business, even though he took it without notice of any defect in the title of the transferrer, or of any equities between the antecedent parties; but that erroneous rule of decision is abandoned and overruled. *Bank of St. Albans v. Gilliland*, 23 Wend. (N. Y.), 311; *Small v. Smith*, 1 Den. (N. Y.), 583, 586; *Edwards, Bills and Notes* (2d ed.), 322. Reported cases also show that it was decided during that period in the courts of the same state that if a party in good faith took a negotiable security of a holder without due inquiry, or with knowledge of such facts and circumstances as would put a prudent man upon inquiry in making purchases of personal property, he would not acquire a good title to the instrument if it appeared that equities existed between the antecedent parties, and that vigilant inquiry would have enabled the taker to have ascertained the true character of those equities; but the appellate tribunal of the state has exploded that legal heresy as applied to negotiable securities, and has in that respect adopted the true commercial rule as administered in the courts of Westminster Hall. *Pringle v. Phillips*, 5 Sandf. (N. Y.), 157; *Welch v. Sage*, 47 N. Y., 143, 147.

Prior to the decision in the case of *Gill v. Cubitt*, the rule was that nothing short of proof of knowledge of the facts and circumstances constituting the equities between the antecedent parties would enable the maker to defend the suit of the holder; but the court in that case decided that the transferee could not recover if the circumstances under which the transfer took place were such as would naturally have excited the suspicion of a prudent and careful man. State court decisions in many cases followed that erroneous theory; but the case itself has been authoritatively overruled in the tribunal where it had its origin, and the old rule, as re-established by the later adjudications, has been in repeated instances adopted by this court and by the highest courts of the state where the present controversy arose. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 343, 364; *Seybel v. National Currency Bank*, 54 N. Y., 288, 295; *Dutchess Insurance Co. v. Hachfield*, 73 id., 226.

Much progress, it will be seen from the preceding observations, has been made within the last thirty years in securing uniformity of decision in respect to mer-

cantile controversies between the federal and state courts, and the courts of this country and those of the parent country, from which most of our commercial rules and usages are derived. *Howry v. Eppinger*, 34 Mich., 29. Concede all that, and still it is insisted by the defendant that the plaintiff took the note merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes a negotiable security under such circumstances cannot be regarded as acquiring it in the usual course of business, and consequently that he takes it subject to prior equities. Many decisions of the courts of the state concur that if there is a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable bill of exchange or promissory note before maturity as a collateral security for a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will not be affected by any prior equities between other parties, at least to the extent of the debt for which it is so held. *White v. Springfield Bank*, 3 Sandf. (N. Y.), 222; *New York Marbled Iron Works v. Smith*, 4 Duer (N. Y.), 362.

When commercial paper is pledged by the apparent owner before it matures, as collateral security for advances, the pledgee, in good faith, is entitled to hold it for the amount of such advances, though it turns out afterwards that the party making the pledge was a mere agent for the true owner, and that the transaction was a breach of duty to the principal. *Belmont Branch Bank v. Hoge*, 35 N. Y., 65; *Murray v. Beckwith*, 81 Ill., 43. Where full value is paid by the pledgee, and the transfer is made before maturity, without notice of any prior equities between the antecedent parties, the title of the holder of the security is not subject to be defeated by proof that he might have obtained such notice by the exercise of active vigilance. Cash advances or the sale of goods or other property will constitute a good consideration for the transfer; nor is such a payment or sale indispensable, as it is equally well settled that the actual discharge of a precedent debt, or the surrender of prior collaterals, or a binding agreement to give time for the payment of a debt then due, will have the same effect. *Elting v. Vanderlyn*, 4 Johns. (N. Y.), 237; *Morton v. Burn*, 7 Ad. & Ell., 19; *Jennison v. Stafford*, 1 Cush. (Mass.), 168; *Baker v. Walker*, 14 Mees. & W., 465; *Walton v. Mascal*, 13 id., 452; *Wheeler v. Slocumb*, 16 Pick. (Mass.), 62; *Kearslake v. Morgan*, 5 T. R., 513.

Examples given by Mr. Justice Story show that the receiving a note as security for a debt or forbearance to sue a present claim or debt, or an exchange of securities, or becoming a surety, or doing any other act at the request or for the benefit of the maker or indorser, will constitute a sufficient consideration for a note as well as the payment of money, or the making of advances or giving credit, or the discharge of a present debt, or the performance of work or labor at the request of the party. Story, *Promissory Notes* (7th ed.), sec. 186. Differences of opinion, however, still exist where the transfer is made as a collateral security for a pre-existing debt, without any other consideration than what flows from the nature of the contract at the time the instrument is delivered, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt. Further argument to show that where negotiable paper is received in payment and extinguishment of a pre-existing debt the holder is entitled to protection is quite unnecessary, as the authorities in support of the proposition, even in this country, are quite too numerous for

citation. *Townsley v. Sumrall*, 2 Pet., 170, 182 (§§ 142-150, *infra*); *Parsons, Bills and Notes*, 221.

Nor is it necessary to add anything to prove that the title of the holder is good if he took the note outright for goods or other property sold and delivered to the transferrer of the note at the time the transfer was made. All this is admitted, or, if not admitted, is so fully established by authority as not to require any further argument in its support. Substantial uniformity of judicial opinion exists both in this country and in England to that extent, but there is still some diversity of decision in this country upon the question whether the same conclusion will follow where the negotiable security is transferred as collateral security without any other consideration than the delay of payment incident to the transaction and what flows from the relation of debtor and creditor in respect to the existing debt and the obligation which the transferee assumes by the reception of the negotiable instrument before maturity. Standard decisions of the state courts are referred to by the defendant where it is held that the title of the holder under such circumstances is not good. *Bay v. Coddington*, 5 Johns. (N. Y.) Ch., 54, 59; *Coddington v. Bay*, 20 Johns. (N. Y.), 637, 644; *Stalker v. McDonald*, 6 Hill (N. Y.), 93, 95.

Sixty years have elapsed since the commercial rule adopted and enforced by that series of decisions was first promulgated, and yet it does not and never has commanded the slightest countenance from any court sitting in Westminster Hall. Earnest differences of opinion existed in that country among judicial men in respect to the extent of the protection which the commercial law afforded to a *bona fide* holder of a negotiable security against the equities between the antecedent parties, but there is no authentic evidence that any substantial diversity of opinion ever arose in the courts of that country touching the question under consideration. Partners engaged in business being in want of available means, the senior member gave his note to a bank to enable the firm to overdraw their account, and the junior member gave his note to the maker of the first note for half the amount. In the course of subsequent transactions the payee of the last note indorsed it to his creditors as collateral security for a pre-existing debt. Payment of the note being refused, the holders sued the maker, who made defense that the plaintiffs were not *bona fide* holders; but the court held otherwise, and rendered judgment in favor of the plaintiffs, separate opinions being given by all the justices of the court. *Heywood v. Watson*, 1 M. & P., 268; S. C., 4 Bing., 496. Consideration was given for the note in the case of *Percival v. Frampton*, 2 C., M. & R., 180, but the court unanimously held that, if the note had been transferred merely as a collateral security for a previous debt, the plaintiffs might properly be described as holders for a valuable consideration.

Holders of a negotiable security transferred before maturity as a collateral security for a pre-existing debt become parties to the instrument to such an extent that they assume the responsibility of making demand and giving the required notice to fix the liability of the indorser; and it is held that where a creditor received such a security from the debtor and failed to make seasonable demand of payment, that his laches as between himself and his debtor were equivalent to the payment of the collateral. *Peacock v. Purcell*, 14 C. B., N. S., 728; *Taylor v. Williams*, 11 Metc. (Mass.), 44. Proof of fraud may defeat the right of the holder in such a case, but where there is no such proof the settled rule in England is that a party taking a negotiable instrument as a collateral security takes it for a sufficient consideration and is entitled to recover.

Poirier v. Morris, 22 Law J. Rep., N. S., Q. B., 312; S. C., 2 El. & Bl., 89, 104.

Securities of the kind were deposited by the defendant with the plaintiffs as collaterals for a pre-existing debt, among which was the check in controversy, and it appeared that the defendants having failed to pay the debt the plaintiffs brought an action on the check, the defense being the want of consideration and that the plaintiffs were not holders for value; but the court of exchequer ruled otherwise, and rendered judgment in favor of the plaintiffs, from which the defendant appealed to the exchequer chamber. Both parties were fully heard in the appellate tribunal, and the court decided that the title of a creditor to a negotiable security transferred to him on account of a pre-existing debt, if received *bona fide*, without notice of any infirmity in the title of the debtor, is indefeasible, whether the instrument is payable at a future time or on demand. Currie v. Misa, Law Rep., 10 Ex., 153. Questions of various kinds, it seems, were discussed in the subordinate court; but the statement of the justice who gave the opinion of the court in the appellate tribunal is, that the argument was addressed almost entirely to the question whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value; and the court, Justice Lush giving the opinion, decided that question in the affirmative. His reasons for the conclusion are cogent and satisfactory, and in the course of the opinion he remarked that "it was not disputed on the argument, nor could it be, that if instead of a check the security had been a bill or note, payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable;" to which he also added, that the proposition had been established by many authorities, both in that country and in the American courts.

§ 32. *Consideration for a deposit of a note as collateral..*

No attempt was made to controvert that proposition as applied to bills or notes payable at a future day; but the defendant insisted that inasmuch as the check was payable on demand the rule did not apply, as there was no consideration, because it could not be implied that there was any agreement for delay. Suffice it to say in that regard that the court decided that the supposed distinction "had no foundation either in principle or upon authority," and proceeded to remark that it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. Forbearance is doubtless a good consideration for the transfer of such an instrument; but a valuable consideration in the sense of the law, as the court remarked in that case, may consist either in some right, interest, profit or benefit accruing to the one party, or some extension of time of payment, detriment, loss, or responsibility given, suffered or undertaken by the other. Call loans may be regarded as payable on demand, and, inasmuch as the collateral in this case was payable at a future day, the implication is not an unreasonable one that the arrangement operated as an injury to the holder and as a benefit to the debtor and pledgor. Such a reason may doubtless have weight; but it is by no means certain that it is the true foundation of the title of the holder, as other authorities hold that a negotiable security transferred for such a purpose is in some sense a conditional payment of the debt, the condition being that the debt revives if the security is not realized. Belshaw v. Bush, 11 C. B., 191-205; Griffiths v. Owen, 13 Mees. & W., 58, 64.

Still not satisfied, the defendant in the case (Currie v. Misa) appealed from

the judgment of affirmance rendered in the exchequer chamber to the house of lords. Much instruction is derived in respect to the issue between the parties by referring to the propositions maintained by the counsel of the appellant, of which the following are the most important: 1. That there was a total failure of consideration, inasmuch as the defendant Misa never received any value for his draft except the four bills that were dishonored. 2. That the check in question was not a bill of exchange, nor a promissory note, nor an order for the payment of money on demand. 3. That the existence of a past debt is not a sufficient consideration for the transfer of the check. Enough is reported of the arguments for the appellant to show that nothing was left undone by his counsel in their power to do to sustain those propositions; but the learned judges overruled them all, and affirmed the judgment rendered in the two lower courts. In giving the principal opinion, Lord Chelmsford said that he entertained no doubt that, as between the defendant and the depositor of the check, there was a sufficient consideration, and that the bankers were holders for value, and he proceeded to remark that the counsel of the appellant admit that if the judges are of that opinion it will dispose of the case. All the judges concurred that the holders were holders for value, and the result was the same as in the court of original jurisdiction. *Misa v. Currie*, 1 App. Cas., 554, 563.

Corresponding views are held in the queen's bench, in the court of appeals, and in the high court of chancery. Where a party by means of a false pretense, or condition which he does not fulfil, procures another party to give him a note or acceptance in favor of a third person, to whom he pays it and who receives it *bona fide* for value, the queen's bench decided that the giver remains liable to pay the same, because his acceptance or transfer of the same imports value *prima facie*, and he can only relieve himself from his promise to pay the holder by showing that he is not a holder for value, or that he received the instrument in bad faith, or with notice of its infirmity. *Watson v. Russell*, 3 B. & S., 34, 40. Two of the justices concurred in that proposition without any qualification, and the chief justice also concurred in the same to the extent of the debt of the holder it was pledged to secure, which is the same rule that Shaw, C. J., with the concurrence of all his associates, adopted nearly twenty years earlier. *Chicopee Bank v. Chapin*, 8 Metc. (Mass.), 40. Commercial securities, when transferred to discharge a pre-existing debt, it is admitted, give the holder a good title which will shut out prior equities; and the court of appeals in a recent case decided that there was no difference in that regard between past and present consideration to be found in the books, and held that the transfer of a bill of lading for a valuable consideration to a *bona fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was delivered to the transferee by the lawful holder. *Leask v. Scott*, 2 Q. B. D., 376, 380.

Certain bankers pressed their debtors for better security, and the debtors, having promised to comply with the request, hypothecated merchandise for the purpose, evidenced by warehouse certificates, which the debtors agreed to deliver as soon as they could be procured from the warehouse. They, the debtors, procured the warrants, but refused to deliver the same, when the plaintiffs instituted the present suit, to which the respondents demurred, insisting that the existence of the debt is no sufficient consideration for such an agreement. Among other things, the respondents contended that the allegations of the bill

did not exhibit a transaction where the complainants promised to abstain from suing their demand for any certain time; but the vice-chancellor held that the bankers did, in effect, give, and that the respondents did receive, the benefit of some degree of forbearance and benefit that they would not have obtained if they had not made the agreement, and the demurrer was accordingly overruled. *Alliance Bank v. Broom*, 2 Drew. & Sm., 289.

Without more, these authorities are sufficient to show that there is but one voice upon the subject in the courts of the parent country, and that they speak to the point with a degree of unanimity and uniformity well calculated to excite admiration and to inspire confidence that the rule of decision is both correct and just. Not only every court, but every judge of every court, in that country concurs in the proposition, that the holder of such a negotiable security before maturity, as collateral to a pre-existing debt, without notice of any prior equities, is a *bona fide* holder for value in the usual course of business, and that his title to the instrument is good, and wholly unaffected by any such prior equities between the antecedent parties. Text writers everywhere adopt the same rule, and recognize and commend it as the correct and true rule of decision. So, if a bill or note be indorsed as a *collateral security*, says Chitty, that is an adequate consideration to enable the party to sue thereon, though he advanced no new credit on the bill or note at the time; and he lays down the same rule as to the receipt of a bill or note in payment of a pre-existing debt. Chitty, Bills, 13th ed., 74. In the ordinary course of things, says Mr. Justice Story, the holder is presumed to be the *prima facie* holder of such a security for value, and he is not bound to give evidence that he gave any value for it, until the other party establishes the want or failure or illegality of the consideration, or that the bill had been lost or stolen before it came to the possession of the holder. It may then be incumbent on him to show that he has given value for it, because he ought not, under such circumstances, to be placed in a better situation than the antecedent parties through whom he obtained the instrument. Story, Bills (4th ed.), sec. 193; Story, Notes (7th ed.), secs. 195, 196. A creditor, says Byles, may agree to take a bill as collateral security for a debt already due, without affecting his present right to sue for the debt; but if a creditor elects so to do, he becomes the trustee to that extent of the debtor, and is bound to perform the duties of a holder in respect to presentment and notice of dishonor, and if he fail to do so, the parties only liable conditionally are discharged, as no one but the actual holder can perform those duties. Byles, Bills (5th Am. ed.), 369; *Peacock v. Purcell*, 32 L. J., 256; S. C., 14 C. B., N. S., 728.

Litigated cases often arise where there is a present consideration given for the transfer; and Mr. Daniel regards it as agreed that the holder of the collateral security, in all such cases, is a *bona fide* holder for value, if he took the security without notice of any equities between the antecedent parties, or if there was any agreement, express or *implied*, to give time of payment of the debt to the debtor; but he admits that, where neither of these conditions exists in the case, the question is one of more difficulty. Those two propositions he supports by sound reasons and convincing suggestions, and then proceeds to examine the argument for and against the proposition, that the same conclusion should be reached even where there is no new consideration other than what arises from the relation of debtor and creditor, nor any express agreement to extend the time of payment. His view is, that the issue in such a case must turn upon the question whether there is any implied suspension of the

prior debt until the collateral becomes due, and that an implied agreement is as binding as one expressed in terms, of which it is supposed no one entertains the least doubt. Different examples are put by the author, and the proper presumption in each supposed case is stated; but he finally comes to the conclusion that, inasmuch as the holder in such a case becomes a party to the collateral security, and that he thereby assumes the burden as such holder of fixing the liability of the indorser, he is properly to be regarded as a holder for value, if he took the collateral in good faith and without notice of any equities between the antecedent parties. 1 Daniel, *Negotiable Securities* (2d ed.), secs. 827-830; *Blanchard v. Stevens*, 3 Cush. (Mass.), 162, 167; *Maitland v. Citizens' National Bank of Baltimore*, 40 Md., 540, 564.

Three of the theories involved in the controversy are presented by Mr. Parsons for careful examination: 1. Where negotiable paper is received in payment of an antecedent debt; but further discussion of that topic is unnecessary, as it is conceded in this case that the title of the holder in such a case is as good as if the contents were paid in cash. 2. Where it is received as collateral security for a pre-existing debt. 3. Where it is received as collateral security for a debt contracted at the date of the transfer. Two objections, as the author states, are usually taken to each of the last two theories: 1. That, as no new consideration is paid by the holder, he is not injured by the impeachment of his title. 2. That such a transfer as is supposed in either of the last two cases is not one made in the usual course of business.

Transfers of negotiable securities, for the purpose supposed, are seldom made, except in the execution of some agreement or understanding, by which the transferrer is to be benefited; as, by delay or forbearance or farther credit, or the giving up of other collaterals; or the substitution of one collateral for another, or the promise to forego the means of obtaining other indemnity or security. Few cases, it is presumed, arise where the interest of the debtor is not consulted; so that, if the rule should be confined to the cases falling within the abstract theory of such a defense, the question would cease to be of much importance, nor would it often be true that, if the title of the holder should be impeached, he would be left in as good condition as he was before. 1 Parsons, *Bills and Notes*, 219.

Debtors are often benefited by delay, but creditors are usually sufferers. Transactions of the kind, it is said, are not to be regarded as transfers made in the usual course of business; but the court is unable to adopt that conclusion, as the statement of the learned author is believed to be correct, that a large part of the use that is made of negotiable paper is as a means of borrowing money or of securing debts previously contracted. Bills and instruments of the kind, indorsed in blank or payable to bearer, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer. Where a party executed such a note to take up a prior note, and his agent delivered it to a third person as collateral security for his own pre-existing debt, *Shaw, C. J.*, held that the holder took a good title as against the maker to the extent of his debt, but that he could not recover any more than the amount of his pre-existing debt. *Stoddard v. Kimball*, 6 Cush. (Mass.), 469.

Adjudged cases, almost without number, decide that, where the pre-existing debt is discharged, the title of the innocent holder is beyond question; but frequent attempt is made to show that there is a distinction between taking such a note in payment of a pre-existing debt and taking it as a collateral security for such a payment. One whose debt is due, says *Redfield, C. J.*, must pay it, or

become a bankrupt in the commercial sense. If, instead of money, he gives a bill or note, either on time or at sight, whether this is payment in form or is given as collateral to his debt, he gains time, and is saved from the disgrace and ruin consequent upon stopping payment. Viewed as it may be, the debtor in either case derives the benefit of an implied understanding that the creditor will not immediately press for payment, unless the new security proves unproductive, and, if it does, that the creditor may pursue any other proper remedy. Difference in form between payment and collateral security, it was admitted, existed; but the court unanimously held that there was no difference in principle, provided the indorsement was unqualified, so as to impose upon the holder the obligation to conform to the law merchant in enforcing payment. *Atkinson v. Brooks*, 26 Vt., 569, 576. Other state decisions, too numerous for citation, hold that a party taking a negotiable note in payment of, or as a collateral security for, a precedent debt, is a *bona fide* holder for a valuable consideration, and that he is entitled to the same protection as a holder who receives the same in payment for goods delivered at the time of the transfer; or one who pays cash for the instrument when it is delivered. *Allaire v. Harts-horne*, 21 N. J. L., 665; *Hamilton v. Vought*, 34 id., 187, 191; *Culver v. Benedict*, 13 Gray (Mass.), 7, 10; *Johnson v. Way*, 27 Ohio St., 374, 379; *Brush v. Scribner*, 11 Conn., 388; *Gwynn v. Lee*, 9 Gill (Md.), 138.

§ 33. *Obligation of state decisions upon federal courts. Authorities cited.*

Even suppose that the title of the plaintiffs is good under the rule of the commercial law, as understood and administered in the federal courts, still it is insisted by the defendants that the state courts have adopted a different rule in such a case, and that the state rule of decision is the one applicable in the case before the court. Both parties are citizens of the same state; and it must be admitted that if the state rule is applicable in the case, then the ruling of the circuit court is erroneous. Various arguments were advanced in support of the proposition, but the one most pressed is that derived from the thirty-fourth section of the judiciary act, which provides that the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. 1 Stat., 92. State laws furnish rules of decision in trials at common law in the federal courts, in cases where they apply, which leaves it plainly to be understood that those laws do not apply in all cases, and it was early decided that they do not apply to the process and practice of the federal courts. *Wayman v. Southard*, 10 Wheat., 1. In cases depending on the statutes of a state, and more especially in those representing titles to land, the court adopts the construction of the state, where that construction is settled and can be ascertained. *Polk v. Wendal*, 9 Cranch, 87, 98. Where any rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by them. *Jackson v. Chew*, 12 Wheat., 153, 162. Controversies often arise where this court will refuse to adopt a decision of the state court, as in the construction of a will, unless it appears that the decision has become, by acquiescence, a rule of property in the state. *Lane v. Vick*, 3 How., 464, 476. Three decisions from the state courts show that the rule of decision adopted by the courts of the state at that period support the views of the defendants, and we regret to say that the tendency of some of the later decisions in the same tribunals are in the same direction. *Atlantic National Bank of N. Y. v. Franklin*, 55 N. Y., 235.

Such being the fact, it becomes necessary to decide the question whether the decisions of a state court compel this court to apply to the facts of the case a rule of decision believed to be in direct conflict with the rule of commercial law. Nearly forty years have elapsed since this question was first presented to this court for decision. Doubts were then entertained whether the state rule was absolutely settled; but for the purposes of the decision, that point was unconditionally admitted. Then as now the chief argument in support of the proposition was that the question was controlled by the thirty-fourth section of the judiciary act, to which the court responded, in the first place, by denying that the word "laws," used in the section, included the decisions of the local tribunals within the scope of its meaning. In the ordinary meaning of language, said Mr. Justice Story, it will hardly be contended that the decisions of the courts constitute laws, adding that, at most, they are only evidence of what the law is, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill-founded or otherwise incorrect. His views were that the laws of a state are more usually understood to be the rules and enactments of the legislature, or long established local customs having the force of laws. None, it is believed, can dissent from that view, and we have the authority of that opinion for saying that, in all cases prior to that time, the court had uniformly supposed that the section, when properly interpreted, was limited in its application to state laws strictly local, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character; that the court had never supposed that the section applied, or was designed to apply, to the construction of ordinary contracts or other written instruments, nor to questions of general commercial law. These views were enforced by many other illustrations, and the court decided—every member of the court but one concurring—that the section, upon its true intentment and construction, is strictly limited to local statutes and local usages, and that it does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect of which are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. *Swift v. Tyson*, 16 Pet., 1, 18 (§§ 382–386, *infra*).

Judicial views of a corresponding character were expressed by Lord Mansfield, as chief justice of the king's bench, nearly a century earlier, when he said that the maritime law is not the law of a particular country, but the general law of nations. *Luke v. Lyde*, 2 Burr., 882. Mr. Justice Story referred to that case, in support of the decision of the court, and quoted the celebrated maxim of Cicero, which, liberally interpreted, is to the effect that maritime law is not one thing in one country and another thing in a different country, nor one thing to-day and another to-morrow, but that, in all times and nations, it is immutable and imperishable. Translation by Yonge (London, 1853), 360.

Commercial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations. Codes, laws and ordinances of other states, says a learned writer, whether ancient or

modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where the law is decided to be the other way. *Levi* (2d ed.), 2. Authoritative support to the proposition, that the decisions of the state courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet., 495, 511. Insurance against fire in that case was effected by a mortgagor, and one of the questions was as to the amount the insured was entitled to recover. Reported cases from the state reports were referred to as furnishing the rule of decision. Responsive to that argument, Mr. Justice Story remarked, among other things, that the question presented was a question of general commercial law, involving the construction of an insurance contract, which is by no means local in its character, or regulated by any local policy or customs; that the decisions of the state tribunals are entitled to great respect, but that they cannot conclude the judgment of this court in such a case; and that this court is bound to interpret the instrument according to its own opinion of its true intent and objects.

Equally decisive views have often been expressed by this court in other cases, of which one deserves special notice. Preliminary to the point decided, the court very properly admitted that the federal courts will pay due regard to the laws of the states and their construction by the state tribunals; but the court decided, Mr. Justice Harlan giving the opinion, that this court is not bound by the decisions of the state courts in determining a question of general commercial law; that such is the established doctrine of the court, so frequently announced as not to require any extended citation of authorities in its support. *Oates v. National Bank*, 100 U. S., 239 (§§ 397-404, *infra*); *Amis v. Smith*, 16 Pet., 303, 314; *Conkling's Treatise* (5th ed.), 140. Argument to show that the decisions of this court referred to contradict the decisions of the state court upon the matter in decision is quite unnecessary, as that is admitted. Nor is it correct to suppose that the leading case, contradicting the views of the state court, is unsupported to its full extent by other decisions of this court. Instead of that, the doctrines of that case were directly and fully reaffirmed in the following case, decided more than twelve years later: *Watson v. Tarpley*, 18 How., 517 (§§ 1174-1177, *infra*). State legislation, as shown in that case, had prescribed regulations in respect to the protest of bills of exchange, and notice of their dishonor repugnant to the requirements of the law merchant; and this court held that the state regulations were not operative, and that the payee or indorsee of the bill, in spite of the state law, might enforce his rights in the federal court, as defined and recognized by the decisions of this court. Reference was there made to the sentiments expressed by Lord Mansfield, that the maritime law was not the law of one country only, but of the commercial world; and the court decided that the commercial law was not circumscribed within any local limits, and that citizens resorting to the federal tribunals for the ascertainment of their rights might well claim the benefit of the rules of the general commercial law. Six of the justices of the court, including the chief justice, held the same views in the still later case, to which special reference is made. *Goodman v. Simonds*, 20 How., 343, 371 (§§ 420-425, *infra*). Collaterals, previously held in that case, had been surrendered when the new arrangement was made, and the evidence showed an agreement for forbearance; and the court, in order to prevent a dissent, rested the case, so far as

respected the question of consideration, upon those special facts; but it is deemed proper to state that two-thirds of the court entirely approved of the views of Mr. Justice Story, as expressed in *Swift v. Tyson*, and in his valuable works upon bills of exchange and promissory notes. Confirmation of the proposition that his views in that decision are correct is also derived from a note appended to the text of the third volume of Kent's Commentaries, by the distinguished author, in which he says that he is inclined to concur in that decision as the plainer and better doctrine. 3 Kent, Com. (12th ed.), 81; Cooley, Const. Lim. (4th ed.), 18.

State decisions, in respect to titles to real estate and transfers of property, usually furnish the rule of decision in the federal courts, by virtue of the before-mentioned provision of the judiciary act; but the established practice is that it does not apply, except in matters of a strictly local character; that is to say, to the positive statutes of the states, and the interpretations of the same by their own tribunals, including rights and titles to things having a permanent locality, such as real property, and that it does not extend to questions of general commercial law, from which it follows that where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the federal courts, which is not determined by the positive words of a state statute, or its meaning as construed by the state courts, the federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision. 1 Daniel, Neg. Inst. (2d ed.), sec. 10.

Transactions of a commercial character extend throughout the civilized world, and it is well known that they are chiefly conducted through the medium of bills of exchange and other negotiable instruments. Uniformity of decision is a matter of great public convenience and universal necessity, acknowledged by all commercial nations. Should this court adopt a principle of decision, which, when carried into effect, would establish as many different rules for the determination of commercial controversies as there are states in the Union, it would justly be considered a public calamity, as it must necessarily depreciate our negotiable securities in all the foreign markets of the world where our merchants have commercial transactions. Stable and immutable rules are necessary to give confidence to those who receive such securities in the usual course of business, when indorsed in blank, or made payable to bearer, so that if such a bill or note is made without consideration, or be lost or stolen, and afterwards be negotiated for value to one having no knowledge of such facts, in the usual course of business, his title shall be good, and he shall be entitled to collect the amount. Uniformity of decision in such cases is highly desirable, and these observations are sufficient to show that nothing is wanting to accomplish that great object but the concurrence of a few more of the state courts, of which none are more to be desired than the courts of New York and Pennsylvania. It is hoped that they will concur at no distant day. For these reasons, the conclusion is that the judgment should be affirmed.

§ 34. *What is the consideration for a note pledged as collateral security for a pre-existing debt.*

Opinion by MR. JUSTICE BRADLEY.

I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the

indorsee (the bank) to present the note for payment and give notice of non-payment as the only, or the principal, consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to, namely, the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned a mortgage for that purpose the title of the bank to hold the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the *bona fide* transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

§ 35. Generally.—A writing, executed and payable at the same place, promising to pay a fixed sum, "with current rate of exchange," is a promissory note. *Palmer v. Andrews*, McAL., 491.

§ 36. Note of unincorporated bank.—The note of an unincorporated bank, "payable out of the joint funds thereof, and no other," is a promissory note. *United States v. Smith*, 2 Cr. C. C., 111.

§ 37. Certificate of deposit.—A certificate of deposit, "for the use of B., and payable only to his order on the return of this certificate," is a promissory note. *Austen v. Miller*, 5 McL., 153.

§ 38. A certificate of deposit, to pay which there are funds in bank and which is paid on presentation, is money; and an agent employed to borrow money upon a promissory note placed in his hands, who takes such certificate, does not exceed his authority. *Poorman v. Woodward*, 21 How., 206.

§ 39. Bill of exchange; effect; oral evidence.—An instrument in the following form: "St. Louis, Mo., May 10, 1861. At sight pay to the order of Stilwell, Powell & Co. four thousand dollars. value received, and charge the same to the account of (Signed) Lewis, Page & Co. To the Marine Bank of Chicago, Ill.," is a bill of exchange, whose legal effect is that it is payable in money, in the current coin of the country; and the holder had a right to call upon the Marine Bank, not for depreciated bank notes, but for money, and, on its refusal, to hold the drawers. It is not competent to introduce oral evidence to change the legal effect of this instrument. *Olshausen v. Lewis*,* 1 Biss., 419.

§ 40. Voucher; nature of; rights of innocent holder.—A voucher, indorsed in blank and deposited as collateral security, though not strictly commercial paper, is of the nature of negotiable paper, and in the hands of an innocent, *bona fide* holder, for a fair, valuable consideration, is not subject to the equities existing between the original parties. *Talty v. Freedman's Trust Co.*,* 1 McArth., 523.

§ 41. Receipt not a note.—A writing as follows: "\$2,000. Received of Royal Southwick, two thousand dollars, on account. Loan. J. H. Jones & Co." (Indorsed.) "Waiving demand and notice. W. Manufacturing Co., J. H. Jones, Treas.:" Held, a receipt, and the indorsement a mere *nudum pactum*. *In re Wrentham Manufacturing Co.*, 2 Low., 119.

§ 42. Order not a bank bill.—An order for a specified sum, made on the United States Bank by one of its branches, is not a bill which it is counterfeiting to forge and utter. *United States v. Brewster*, 7 Pet., 161.

§ 43. **Absence of drawee; instrument not a note or bill.**—An instrument in the form following: “\$2,637.47. Parkville, Mo., April 5, 1857. Fifteen months after date pay to the order of Fielding Burns and Lewis Burns twenty-six hundred and thirty-seven 47-100 dollars, at the Bank of the State of Missouri, in the city of St. Louis, Mo., for value received, bearing ten per cent. interest after the 2d day of April, 1858. McCown & Buck,” with the following words written upon the face of it: “Accepted. April 2, 1857. S. N. Simpson, H. J. Bliss,” not being addressed to a drawee, is not a bill of exchange. Neither is it a promissory note or writing obligatory. But it may be declared upon as a promissory note, with an averment that the acceptors, when they accepted it, then and there promised to pay it; or an averment showing their original liability to pay the debt for which the writing was given. *Bliss v. Burnes*,* McCahon, 97.

§ 44. **Government draft held not a bill of exchange.**—A written instrument, in form a bill of exchange, but accompanied by other official documents, and drawn on a foreign government by the United States, is not a bill of exchange within the law merchant. It is not subject to protest or to damages if dishonored. *United States v. Bank of United States*, 5 How., 382. See the case, §§ 1630-32.

§ 45. **Order on city treasurer.**—An instrument in the following form: “\$1,000. City Comptroller's Office, San Francisco, 1854. City Treasurer,—Pay to J. A., or bearer, the sum of one thousand dollars, for grading, etc., P. street, out of street assessment fund. B., Comptroller,” is not a bill of exchange. *Byerque v. City of San Francisco*, 1 McAl., 175.

§ 46. A draft is a bill of exchange, although payable to the drawees. *Wildes v. Savage*, 1 Story, 22. See the case, §§ 986-990.

§ 47. An inland draft of one bank upon another is a check. *First Nat. Bank v. Coates*,* 8 McC., 9.

§ 48. A check is not an inland bill of exchange although payable at a future time, and no grace is allowable upon it. *In re Brown*, 2 Story, 502. See the case, §§ 807-811.

§ 49. Bank checks are not inland bills of exchange, although they have many of the properties of such bills. *Merchants' Bank v. State Bank*, 10 Wall., 604.

§ 50. A check certified “good” requires no additional stamp. *Ibid.*

§ 51. Certified checks are included in the circulation of a bank for the purposes of taxation. *Ibid.*

§ 52. An instrument in this form, and stamped: “No. 1, Helena, May 15, 1871. A. and B., bankers,—Pay to C., or bearer, twenty dollars. E.,” indorsed, “F.,” is a check. It is not within that provision of the statute relating to bills of exchange and promissory notes, as to demand, protest and notice. *McDonald v. Storkey*,* 1 Mont. T'y, 393.

§ 53. **Consignee's notes.**—Consignee's notes, given to consignor by way of advancements, are business, not accommodation, paper. *In re Many*,* 17 N. B. R., 514.

§ 54. **United States 7-30 notes.**—United States 7-30 notes issued under act of March 3, 1863, are not money, but merely evidence of indebtedness. *United States v. Vermilye*, 10 Blatch., 280.

§ 55. **United States treasury notes are promissory notes.** *United States v. Hardyman*, 13 Pet., 176.

§ 56. **United States treasury notes are legal tender for debts due the United States for duties, taxes and sales of public lands to the full amount of principal and interest accruing on such notes.** *Thorndike v. United States*, 2 Mason, 1.

§ 57. **Place of date.**—A note may be dated at the beginning or end. *Sheppard v. Graves*, 14 How., 505.

§ 58. **Factory prices.**—“Factory prices” in a note means the prices at which the goods may be bought at the factories. *Whipple v. Levett*, 2 Mason, 89.

§ 59. **M per centum.**—A United States treasury note read “with interest at the rate of one M per centum.” *Held*, that the letter M was a material part of the description of the note. *United States v. Hardyman*, 13 Pet., 176.

§ 60. **Not memoranda.**—Promissory notes are not merely memoranda of times and amounts of advances made in partnership accounts. *Smith v. Burnham*, 8 Sumn., 435.

§ 61. **Company note; personal liability.**—A writing as follows: “Office of Belleville Nail Mill Co., Dec. 15, '75. \$5,477.13. Four months, etc., . . . and charge same to account of Belleville Nail Mill Co. A., Pres't; B., Sec'y. To C., Treas., Belleville.” *Held*, a draft of the company, and not binding upon A. and B. personally. *Hitchcock v. Buchanan*, 15 Otto, 416.

§ 62. **Joint note; action upon.**—A note to A., B., C. or D. is a promise to pay each individually, and not a joint promise to the three persons first named or the last. An action must be brought in the name of some one of the promisees, and not in their names jointly. *Samuels v. Evans*,* 1 McL., 473.

§ 63. *Consul's draft on his government.*—A bill of exchange drawn by the consul-general of France on the public treasury of that country is an official undertaking on which he is not personally liable. *Jones v. Le Tombe*,* 3 Dal., 384.

§ 64. *Certainty of time essential.*—A writing acknowledging a specified amount, consisting of principal and interest to be due to the plaintiff for four years and six months' services, and promising to pay him that sum with interest as soon as the crop should be sold or the money could be raised from any other source, is not a promissory note, because it is not payable at a time certain; nor is it such a due bill as the law regards as a promissory note. It amounts to a promise to sell the crop or to raise the money otherwise within a reasonable time, and that the sum due should then be paid. It does not mean that if the crop should be destroyed or could never be sold, and the parties promising could not otherwise procure the money, the debt should never be paid. *Munez v. Dantel*, 19 Wall., 530.

§ 65. *Pleading; averring incorporation; execution of note.*—In declaring against indorsers of a note averred to have been made by "the Sutton Woolen Mills" by F., their agent, it is not necessary either to prove the execution of the note or to aver that the woolen mills is an incorporated company, the action being founded on the contract of indorsement. *Kendall v. Freeman*,* 2 McL., 189.

§ 66. *Proving execution.*—A witness' testimony that he had formerly been in possession of the notes in controversy, and that he thought the notes produced in evidence were like those he had, and that he believed them genuine, is not enough to prove execution. *Brown v. Piatt*, 2 Cr. C. C., 253.

§ 67. *Drawing by cashier; parol proof.*—Parol evidence is admissible to prove that the drawing of a check by the cashier of a bank to the order of the teller was done in his official capacity. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat., 336.

§ 68. Where a promissory note given for a debt due to a bank was payable to "A., Esq., cashier, or order," and not indorsed by A., held, that the bank could not sustain an action thereon, although A. acted as its agent in taking the note, and had no personal interest therein. *Bank of United States v. Lyman*,* 20 Vt., 686.

§ 69. *When indorser a maker.*—A person who writes his name on the back of a note at its inception, and before delivery, for the purpose of giving the maker credit with the payees, is an original party to the note, liable as maker. *Pierce v. Irvine*,* 1 Minn., 369.

§ 70. *Power of attorney.*—A power of attorney, with blanks for the description of the draft, executed, acknowledged and left with the attorney, authorizes him to fill up the blanks and indorse the draft in his principal's name. *Kimbrow v. First Nat. Bank*,* 1 McArth., 415.

§ 71. *Treasurer may sign.*—The treasurer of a company may sign notes when authorized by usage or order of the directors so to do. *In re Great Western Tel. Co.*, 5 Biss., 843.

§ 72. *Descriptio personæ.*—A draft was signed "B., Agent." Held, that the word agent was merely *descriptio personæ*, and that parol evidence to fix the liability upon an unknown principal was inadmissible. *Dessau v. Bours*, McAl., 20.

§ 73. *Master of vessel, drafts by; lien.*—The drawee of a bill of exchange, with notice that the master of a vessel has no authority to draw, acquires no lien on the ship for advances made on such bills; neither does his indorsee. *Bark Joseph Cunard, Olc.*, 120; *Brig Atlantic, Newb.*, 514; *The Woodland*, 14 Blatch., 499.

§ 74. *Shipowners who ratify the act of a master of their vessel in drawing a bill upon their agent occupy the position of drawers.* *Wallace v. Agry*, 4 Mason, 336. See the case, §§ 773-775.

§ 75. *Agent's authority; principal's bankruptcy; revocation.*—The principal's bankruptcy, none of the parties having notice thereof, will not take away an agent's authority to draw. *Ogden v. Gillingham*, Bald., 48.

§ 76. *Drawer; funds in hands of drawee; reasonable expectation of payment.*—It is not necessary that the drawer shall have funds in the hands of the drawee sufficient to pay the amount of the bill. It is sufficient if he have a reasonable expectation that his draft will be paid if presented within a reasonable time. *Olshausen v. Lewis*,* 1 Biss., 419.

§ 77. *Interpretation.*—All contracts, including notes and bills, should be so interpreted as to effectuate the intention of the parties. When a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. *Rey v. Simpson*,* 23 How., 841.

§ 78. *Consideration.*—A promissory note imports a consideration. *Cook v. Gray*,* Hemp., 84; *Conrad v. Nicoll*, 4 Pet., 294.

§ 79. *The face of a note is prima facie evidence of the consideration paid for it, as between indorser and indorsee.* *Martin v. Kercheval*,* 4 McL., 117.

§ 80. A bill importing on its face to be for value received is *prima facie* evidence of that fact against third persons as well as against the original parties to it. *Mandeville v. Welch*, 5 Wheat., 277.

§ 81. — indorsee need not inquire.—The presumption is that a note is given for value, and that the indorsee paid value for it. An indorsee is not bound to inquire into the consideration of the note or the circumstances out of which it grew. *In re Great Western Telegraph Co.*, 5 Biss., 383.

§ 82. — antecedent debt.—An antecedent debt is a sufficient consideration for a note. *Riley v. Anderson*,* 2 McL., 589. Even against an accommodation indorser. *Varnum v. Belamy*,* 4 McL., 87; *Pugh v. Durflee*,* 1 Blatch., 412; *City Bank of Columbus v. Beach*,* 1 Blatch., 438. See § 7.

§ 83. A pre-existing debt is a good consideration for assigning a promissory note. *Swift v. Tyson*, 16 Pet., 1. See the case, §§ 382-386.

§ 84. The fact that a bill was a signed to plaintiff as collateral security for a pre-existing debt does not impair his right to recover. *McCarty v. Roots*,* 21 How., 432.

§ 85. One who takes an accommodation bill for an existing indebtedness is a *bona fide* holder for value, although he knows the draft to be accommodation paper. *City Bank of Columbus v. Beach*,* 1 Blatch., 438.

§ 86. Collateral.—Surrender of other collaterals and extension of time on principal note is a sufficient consideration for a note indorsed as collateral. *Goodman v. Simonds*, 20 How., 343. See the case, §§ 420-425.

§ 87. Evidence of consideration admissible, when.—Where public policy demands it, evidence of consideration is admissible. *Hoyt v. Macon*,* 2 Col. Ty., 501.

§ 88. Indorsee's consideration; maker cannot show.—The maker of a note cannot show what consideration the indorsee gave the indorser for it. *Martin v. Kercheval*,* 4 McL., 117.

§ 89. Maker may show no consideration.—Maker may show that payee and all indorsees paid no consideration for the note. *Ibid*.

§ 90. Statute as to consideration.—An act of Virginia required that if the consideration of a bill be a pre-existing currency debt, or be current money paid at the time of the draft, the bill shall express the amount of the debt, or currency paid, which was the real consideration, and that, on failure to do so, the bill, though it may be expressed for sterling, shall be taken to be for current money. The bill in suit read thus: "For value received in current money." The jury found that the real consideration of the bill was an engagement to draw other sterling bills. *Held*, that the words "in current money," in view of this finding, were immaterial, and that the inquiry must be as to the real consideration. *Brown v. Barry*, 3 Dal., 365.

§ 91. Indorsement imports consideration.—The indorsement of a note is *prima facie* evidence of consideration. *McClintock v. Johnston*, 1 McL., 414; *Veitch v. Basye*,* 2 Cr. C. C., 6. But see *Welch v. Lindo*,* 7 Cr., 159, holding that an indorsement must be shown to have been made for a valuable consideration.

§ 92. Consideration to accommodation indorser.—The law imputes to one who indorses to give credit to the promisor the consideration paid to the promisor. *Bank of United States v. Weisiger*,* 2 Pet., 381; *Offut v. Hall*,* 1 Cr. C. C., 572.

§ 93. Indorsement a sufficient consideration.—The indorsement of a note by defendant is a sufficient consideration to support an action. *Vowell v. Lyles*,* 1 Cr. C. C., 423.

§ 94. Action by a payee on a note which appeared to have been specially indorsed. *Held*, that the indorsement and delivery of the note by the plaintiff was *prima facie* evidence that it was transferred for value, and threw the burden on plaintiff to show that it was either transferred for collection or was retransferred, or that he had repaid the money to the indorsee. *Veitch v. Basye*,* 2 Cr. C. C., 6.

§ 95. An indorsement for the purpose of giving credit to the maker is supported by a sufficient consideration; and the fact that it was made before the note was filled up, or that the note was filled up in the handwriting of the plaintiff, is immaterial. *Patton v. Violet*,* 1 Cr. C. C., 463.

§ 96. Presumption of consideration; rebutted how.—Although a note or an indorsement be *prima facie* evidence of a receipt of money from the holders by the indorser, yet, if it be proved that the money for which the note was made was paid to the maker for his sole use, the presumption arising from the mere act of indorsement is destroyed. *Page v. Bank of Alexandria*,* 7 Wheat., 85.

§ 97. Indorsement a consideration for other notes.—Notes given as compensation for the indorsements of other notes are valid. *The Providence County Savings Bank v. Frost*,* 13 N. B. R., 356.

§ 98. Count upon indorsement must state consideration.—A count upon the mere indorsement of a note not payable to order must aver the consideration. *Janney v. Geiger*, 1 Cr. C. C., 547.

§ 99. No consideration; parol evidence.—Between the immediate parties to a note parol evidence is admissible to show that there was no consideration, and that the defendant did not indorse the note to give it credit. *Corcoran v. Hodges*, 2 Cr. C. C., 452.

§ 100. Burden of proof.—The burden of proof is on the party who alleges that a note was made or indorsed without consideration. *Packwood v. Clark*,* 2 Saw., 546.

§ 101. Illegal currency.—An act of the legislature of Tennessee to "suppress private banking" covers and penally prohibits all devices by which an illegitimate currency can be issued and circulated in a community. *Davidson v. Lanier*, 4 Wall., 447. See the case, §§ 1319-1324.

§ 102. Delivery.—Putting a renewal note in the postoffice, addressed to a person in another state, is not a delivery of it until it is taken out of the office and accepted by him. *Mott v. Wright*, 1 Biss., 53. See the case, §§ 582-584.

§ 103. Draft on alien enemy.—A citizen of the United States may in time of war draw a bill on an alien enemy. *United States v. Barker*,* 1 Paine, 156.

II. ACCEPTANCE.

SUMMARY — *United States bound by acceptance of officer*, § 104.—*Promise to accept*, §§ 105-112.—*Verbal promise governed by law of place*, § 113.—*Usage as to drafts against consignments*, §§ 114-116.—*Conditional acceptances*, §§ 117, 118.—*Privity between acceptor and payee*, § 119.—*Acceptance not a collateral undertaking*, § 120.—*Acceptance supra protest*, § 121.—*Defense by accommodation acceptor*, § 122.—*Payment; revocation*, § 123.—*Drafts with bills of lading attached*, §§ 124-126.

§ 104. The United States is bound by the acceptance of its agent or officer—*e. g.*, the postmaster-general—acting within the scope of his authority. *United States v. Bank of the Metropolis*, §§ 127-134. See § 3.

§ 105. A letter describing a bill of exchange, and promising to accept it, amounts to a virtual acceptance in favor of one to whom it is shown and who takes the bill on the credit of it. *Schimmelpennich v. Bayard*, §§ 135-133. See § 185.

§ 106. This is true, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt. *Coolidge v. Payson*, §§ 139-141.

§ 107. A promise to accept a bill already drawn or to be drawn, in consideration of, or as an inducement to, another's purchasing it, is binding upon the promisor if such bill is purchased upon the credit of such promise, whether the purchase was made before or after the drawing of the bill, or whether it was drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration. *Townley v. Sumrall*, §§ 142-150.

§ 108. A promise to accept is binding, although one who buys a bill, relying upon it, knows the drawer has no funds in the hands of the drawee (promisor). *Ibid.*

§ 109. The fact that the purchaser of a bill, relying upon the promise of another to accept it, was formerly a partner of the drawer, and the bill was then transferred to a creditor of the former firm to pay a firm debt, does not discharge the promisor of acceptance; nor will the fact that the firm accounts are still unsettled have this effect. *Ibid.*

§ 110. A collateral agreement between a drawer and a holder to pay the bill if dishonored will not invalidate a promise to accept. *Ibid.*

§ 111. An action may be maintained upon a general promise to accept contained in a letter, by any one who makes advances upon the faith of it, although the letter was not written to such one. *Cassel v. Dows*, §§ 151-153.

§ 112. A promise contained in a letter of credit, written by persons who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money and take the bills when drawn, will be an available contract in favor of persons to whom the letter of credit is shown, who advance money and take the bills on the faith thereof. It is not void for want of privity between them and the persons writing the letter of credit. *Russell v. Wiggin*, §§ 154-157.

§ 113. A. at Chicago sold B. & Co., of St. Louis, the defendants, a quantity of pork, drawing a draft on B. & Co. to pay for it. This draft was sent to the bank, plaintiff, which returned it to A. by messenger, refusing to discount it unless accompanied by the bill of lading of the pork as security. A. directed the messenger to return to the bank and say that B., one of the firm of B. & Co., was then in Chicago, and had authorized the drawing of the draft;

that it was drawn against five hundred barrels of pork, bought by A. for B. & Co. and duly shipped to them. B. was present and heard these directions given to the messenger without objection. The clerk returned to the bank and made this statement to the vice-president, who, upon the faith of it, discounted the bill, and suit was finally brought upon it by the bank. *Held*, that, although the payment of the bill would be governed by the law of Missouri, that being the place of performance of the contract as to payment, the contract as to acceptance was performed in Illinois, and was governed by the laws of that state, and that this transaction amounted to a parol promise to accept the bill, which under the laws of Illinois is valid and binding. *Scudder v. Union National Bank*, §§ 158-162.

§ 114. Usage of trade authorizes a merchant to draw against consignments to the drawee, who must pay the drafts, if the consignments enable him to do so. *Schimmelpennich v. Bayard*, §§ 185-188.

§ 115. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill generally to the account of the shipper. *Held*, that the drawees were not bound to accept or pay the bill in consequence of the proceeds of the shipment being received by them. *Ibid*.

§ 116. Authority was given to draw against consignments. A bill for \$5,000 was drawn, presented for acceptance, and acceptance refused. Subsequently it was presented for payment, and then accepted to the extent of the value of the consignment. This conditional acceptance was immediately followed by a protest for non-payment. *Held*, that the holder would not be presumed to have taken the conditional acceptance, and to have waived the benefit of the previous refusal. The protest rebuts the presumption of an assent to the conditional acceptance. The holders having received from the acceptors the avails of the consignment, *held*, that this was a receipt of such avails, not as a full satisfaction of the bill, but only an application of the proceeds as far as they would go towards payment. *Cassel v. Dows*, §§ 151-153.

§ 117. Upon an unconditional acceptance the acceptor is absolutely bound, no matter what equities exist between the drawer and acceptor, provided the holder be a *bona fide* purchaser without notice; and this rule applies to the United States as well as to all others. *United States v. Bank of the Metropolis*, §§ 127-134.

§ 118. An acceptance upon condition—*e. g.*, that contracts as to carrying the mail shall be performed—becomes absolute upon performance of the condition, and the condition herein referred to will not embrace payment for forfeitures already incurred; and it is not incumbent upon one who buys a bill payable upon this condition to inquire into the contractor's accounts with the United States to see about such forfeitures. Nor is such acceptance retroactive. *Ibid*.

§ 119. Privity of contract exists between an acceptor and a payee. *Raborg v. Peyton*, §§ 163-163.

§ 120. A collateral engagement to pay the debt of another is not created by an acceptance; it is an absolute engagement to pay the holder of the bill; and the engagements of all the other parties are merely collateral. *Ibid*. See, also, *Townslley v. Sumrall*, §§ 142-150.

§ 121. The drawees of a bill, having no funds of the drawer, refused to accept it, but for the honor of an indorser procured the plaintiff to accept and pay it as a favor for the drawees, who immediately informed the indorser of all the circumstances, and he was in no wise prejudiced or damaged. *Held*, that the plaintiff had a right under the circumstances to accept and pay the bill *supra protest* for the honor of the indorsers, and was entitled to recover the amount with charges and interest upon it. *Konig v. Bayard*, §§ 167, 168.

§ 122. An accommodation acceptor of a bill of exchange, transferred before maturity by the drawees in liquidation of an antecedent debt, cannot set up as a defense to an action against him upon the bill the fact that he was an accommodation acceptor, that fact being known to the holders when they received the bill. *Jewett v. Hone*, §§ 169, 170.

§ 123. A., in Norway, drew in favor of B. upon C., in Northfield, Minnesota, against the account of W. & J., of La Crosse. C. accepted the draft, charging W. & J. with the amount, and issued to B. a certificate of deposit for all but a small portion of the draft, which was paid in money. C. then sent the draft to W. & J. of La Crosse, who dishonored it. It was then protested and returned to C., who then notified B. of its non-payment, canceling his certificate of deposit, and taking his note for the portion paid in money. B. then advised A. of the non-payment of the draft, who thereupon sent B. the money. Subsequently A. learned the facts as to the issue of the certificate, etc., to B. by C. *Held*, that C.'s acceptance of the draft, the charging of it to W. & J., the issuing of the certificate of deposit to B., and payment to him of a small sum of money, amounted to a payment as to the drawer (A.), and

could not be revoked by the drawee so as to charge the drawer, who might recover the amount of the draft from C. *Andressen v. First National Bank*, § 171.

§ 124. A bank that discounts a draft accompanied with a bill of lading, providing for the delivery of certain cargoes of wheat to the order of its cashier as security for advances on the draft, acquires a special property in the wheat and may hold it as security for the acceptance and payment of the draft. Such bank will not lose its special property in the wheat although the agent of the bank in another city places the wheat for storage with warehousemen who are also drawees of the draft discounted, having arranged to purchase the wheat of the drawer. And if such drawees, having expressly received the wheat as bailees, and in their capacity of warehousemen, assume to own it, and sell and ship it to third parties before paying the draft of which the wheat is security, such third parties will take no title to the wheat and will be liable to the holder of the draft for converting it. *Dows v. National Exchange Bank*, §§ 172-175. See § 197.

§ 125. A time draft, with a bill of lading attached, was forwarded to an agent for collection, without any special instructions. *Held*, that whether the draft and accompanying bill of lading evidenced a sale on credit, or a request for an advancement on the goods [cotton] consigned, or a bailment, to be sold on the consignor's account, the drawees were entitled to the possession of the cotton and the bill of lading thereof, before they could be required to accept the draft; and, if they declined to accept because possession was denied to them concurrently with their acceptance, the effect of their refusal would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. *National Bank v. Merchants' Bank*, §§ 176-182.

§ 126. A time draft, together with a bill of lading, was sent to a bank for collection. *Held*, that it had the right to assume that the duty confided to it was to procure acceptance of the draft, and, upon acceptance, to deliver the bill of lading to the drawee, or, if acceptance was refused, to protest and give notice to the indorser, retaining the bill of lading until the maturity of the draft, unless instructed before then to return it. *Woolen v. New York & Erie Bank*, §§ 183, 184.

[NOTES.—See §§ 185-210.]

UNITED STATES v. THE BANK OF THE METROPOLIS.

(15 Peters, 377-406. 1841.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This is an action of *assumpsit* brought by the United States to recover the sum of \$27,881.57. The defendants pleaded the general issue. On the trial of the cause, the defendants claimed credits amounting to \$23,000, exclusive of interest and costs. The items had been presented to the proper accounting officer and were not allowed. They were acceptances of the postoffice department, of the drafts of mail contractors, and an item of \$611.52, called in the record "E. F. Brown's overdraft." The jury found for the defendants, and certified there was due to them by the United States \$3,371.94, with interest from the 6th of March, 1838.

The errors assigned are, that the court refused to give to the jury the following instructions, which were asked after the evidence had been closed on both sides: 1. That upon the evidence aforesaid, the defendants are not entitled in this action to set off against the plaintiff's demand the amount of the acceptances given in evidence by the defendants, nor the amount of the overdraft of E. F. Brown. 2. If the jury believe, from the evidence, that when the acceptance of the draft of E. Porter was given by the then treasurer of the department, there was nothing due to Porter standing on the books of the postoffice department, and that on the books of the department, when the acceptance fell due, there was nothing due to him, then the defendants cannot set off the amount of said acceptance against the plaintiff's claim in this action. 3. That if the accounts of E. Porter and Reeside, as contractors with the postoffice department, were not finally settled on the books of the postoffice department

when the present postmaster-general came into office, it was his duty to have said accounts settled; and if in such settlement there were credits claimed by them as allowed by order of Mr. Barry, when postmaster-general, and entered on the journal, but not carried into these accounts in the ledger, and finally entered as credits in these accounts, which credits were for extra allowances which the said postmaster-general was not legally authorized to allow them, then it was in the power, and was the duty, of the present postmaster-general to disallow such items of credit.

We will consider the instructions asked in connection, and upon the merits of the case; but before we conclude will express an opinion upon the form of the first.

It appears that the five drafts claimed as credits were drawn on the post-office department by contractors for carrying the mails. That they were accepted, and were discounted at the Metropolis Bank in the way of business. Porter's draft was at ninety days after date, for \$10,000, payable at the Metropolis Bank to his own order, to be charged to account, and was unconditionally accepted by R. C. Mason, signing himself treasurer of the postoffice department. It is admitted that he was so.

Reeside drew four drafts. One on the 17th October, 1835, for \$4,500; another on the 20th October, 1835, for \$1,000; a third on the 23d October, 1835, for \$4,500; and the fourth on the 28th October, 1835, for \$3,000. They were payable to his own order ninety days after date, for value received; to be charged to his account for transporting the mail, and addressed to the postmaster-general. The following was the form of all of them, and of the acceptances of the postmaster-general:

\$4,500.

WASHINGTON CITY, October 17, 1835.

SIR: Ninety days after date, please pay to my own order, four thousand five hundred dollars, for value received, and charge to my account, for transporting the mail.

Respectfully yours,

JAMES REESIDE.

Hon. AMOS KENDALL, Postmaster-General.

"Accepted, on condition that his contracts be complied with."

AMOS KENDALL.

Porter's draft was unconditionally accepted. It was discounted by the defendants, upon his indorsement. The bank became the holder of it, for valuable consideration, and its right to charge the United States with the amount cannot be defeated by any equities between the drawer and the postoffice department, of which the bank had not notice.

§ 127. *The United States is bound by the acceptance of its agent or officer acting within the scope of his authority.*

When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility, of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued. But if the United States sue, and a defendant holds its negotiable paper, the amount of it may be claimed as a credit, if, after being presented, it has been disallowed by the accounting officers of the treasury; and if the liability of the United States upon it be not discharged by some of those causes which discharge a party to commercial paper, it should be allowed by a jury as a credit against the debt claimed by the United States. This is the privilege of a defendant for all equitable credits given by the act of March 3, 1797 (1 Stats. at Large, 512). 1 Story, 464. This,

and the liability of the United States, in the manner it has been stated, has been repeatedly declared, in effect, by this court. It said in the case of the *United States v. Dunn*, 6 Pet., 51, "the liability of parties to a bill of exchange or promissory note has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from." From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining these principles. It was held in the case of the *United States v. Barker*, 4 Wash., 464, that the omission of the secretary of the treasury, for one day, to give notice of the dishonor of bills which were purchased by the United States, discharged the drawer. And this court said, when that case was brought before it, there was no right to recover on account of the neglect in giving notice after the return of the bills. 12 Wheat., 561. That and other cases like it show how rigidly those principles have been applied in suits on bills and promissory notes in which the United States was a party. The acceptance of Porter's draft was unconditional, and there is nothing in the evidence to discharge the acceptor. There is neither waiver, express or implied, of his liability. There was no understanding nor communication concerning it between the bank and any officer of the postoffice department before it was discounted. The bank advanced the money which it was the object of the bill to obtain. It cannot be doubted the acceptance was given for that purpose. The want of consideration, then, between the drawer and the acceptor, can be no defense against the right of the indorsee, who gave a valuable consideration for the bill.

§ 128. *Upon an unconditional acceptance the acceptor is absolutely bound, no matter what equities exist between the drawer and acceptor, provided the holder be a bona fide purchaser without notice; and this rule applies to the United States as to all others.*

It does not matter how the drawer's account stood. Whether he was a debtor or a creditor of the department; whether the bank knew one or the other. An unconditional acceptance was tendered to it for discount. It was not its duty to inquire how the account stood, or for what purpose the acceptance was made. All it had to look to was the genuineness of the acceptance, and the authority of the officer to give it. The rule is, that a want of consideration between the drawer and acceptor is no defense against the right of a third party, who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawer, if that be not known by such third party before he gives value for it. The evidence, then, concerning Porter's account was immaterial and irrelevant to the issue. It cannot affect the rights of the bank, and did not lessen the obligation of the department to pay the acceptance when it became due.

But the evidence does not show that anything was due by Porter when the draft was accepted, or when it came to maturity. Mason, the witness, says "that in the *interim* a sufficient sum had been raised and carried to the credit of Porter to pay the draft; but that he had also within the dates been charged with the amount of a draft, drawn upon him by the postmaster at Mobile, accepted by him, which draft was payable in 1833, and that he was charged with failures and forfeitures incurred as contractor in 1833; which charges were made by order of Mr. Barry, then postmaster-general. It was certainly right to debit Porter with these charges, if they were due by him; but that did not change the relative rights and obligations of the bank and the department

upon his bill. If either are to lose by Porter, shall it be that party who was bound to know the state of the account before it gave an unconditional acceptance, for the purpose of accommodating its own agent; or the other, who placed faith in the acceptance, advanced the money upon it which it was intended to raise, and who could not have learned what was the state of Porter's account, as it is proved that the charges which it is now said should have priority of payment over the bill were not made against Porter until after his bill had been accepted? Certainly the loss should fall upon the first. It cannot be otherwise, unless it be affirmed that an acceptor may claim to be discharged on account of his own negligence, and that, having induced a third party to advance money upon his acceptance, he shall be permitted to intervene between himself and the indorsee of the paper a debt due to him by the drawer. The evidence offered to invalidate this credit was done from ignorance of the legal consequences incurred by such an acceptance. In such a case the bank rightfully looked to the United States for payment of this bill; and if Porter owes anything for forfeitures incurred as contractor, or on account of the Mobile draft, the United States must look to him. There is no proof on the record, however, of anything being due by Porter on those accounts; and we do not intend to express any opinion upon his liability, or the rights of the United States, in respect to them, one way or the other.

§ 129. *An acceptance upon condition is an absolute acceptance, provided the condition be complied with.*

What are the merits of the case upon Reeside's drafts? They were drawn on the postmaster-general, at ninety days, payable to the order of the drawer, and were to be charged to his account for transporting the mail. They were "accepted on condition that his contracts be complied with." This is, of course, as binding as an absolute acceptance, if the condition has been performed. What is the proof of performance, and how shall this conditional acceptance be construed? Mason, the witness, says: "Reeside, in fact, performed the services for which he was contractor in the year 1835; and the money which he earned upon his contracts was applied, to an extent exceeding the amount due upon his drafts, to the extinguishment of balances created against him, by recharging him with sums of money which had been allowed to him by Mr. Barry, the former postmaster-general, as contractor for carrying the mail, by giving him credit therefor in a general account current on the journal, but not entered in the ledger, where his account remained unsettled when the present postmaster-general came into office." It is said this does not cover the condition of the acceptance, because Reeside stipulated by his bond to pay forfeitures and repay advances, and that he owed the department on both accounts when these acceptances were given, and that in this sense his contracts were not complied with. If this be so, in one sense the contracts would not be complied with; but is that the construction which should be put upon such a condition, when the subject matter to which it relates is considered?

§ 130. *A condition "that contracts be complied with" does not mean that past forfeitures be paid.*

If one purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the condition therein. He cannot use general terms, and then exempt himself from liability by relying upon particular facts which have already happened, though they are connected with the condition expressed. Why? Because the particular fact is of itself susceptible of being made a distinct condition. This case furnishes as good an

illustration of the rule as any other can do. Instead of the words being used, "accepted on condition that his contracts be complied with," could it not have been as easily said, accepted on condition that forfeitures already incurred shall be paid, and that advances made shall be refunded? This would have conveyed a very different meaning, and would have put the bank, when the drafts were offered to it for discount, on inquiry. If they had been discounted without inquiry, it would have been done at the risk that the earnings upon the contracts, and such as might be earned between the date of the acceptances and the times of payment, would be enough to pay forfeitures, repay advances, and to take up the bills. It matters not what the acceptor meant by a cautious and precise phraseology if it be not expressed as a condition. And when we are told, as we are in this case, by the person making these acceptances, that the form of words was devised expressly for that purpose, meaning for the purposes of having forfeitures paid and advances refunded, and to avoid promising to pay anything to the order of contractors so long as anything should be due from them to the department, we think it will be admitted that the purpose explained is larger than the condition expressed. And from the passage in the evidence just cited, how just does the rule appear which has been laid down by the court, that, in the case of acceptances of commercial paper, that which can be made a distinct condition must be so expressed; nor can anything out of the condition be inferred, unless it be in a case where the words used are so ambiguous as to make it necessary that parol evidence should be resorted to to explain them.

§ 131. *It is not incumbent on the holder of paper upon condition to use due diligence to discover the facts known to the acceptor concerning such condition.*

Then the *onus* of proof would be on the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it. The error in this case arose from the acceptor supposing that the defendants did know, and if they did not they were bound, upon such an acceptance, to inquire into the stipulations and conditions of Reeside's contracts before they discounted the bills; and it is said they did not use "due diligence to acquire information." The objection then implies that information of these forfeitures and advances could have been given, and that it was not given when these acceptances were made. This makes it, then, a question of due diligence between the acceptor and the defendants, as to his obligation to communicate what he knew, and their want of caution in not making the inquiry. We think it will be conceded to be a general principle, that one having knowledge of particular facts, upon which he intends to rely to exempt him from a pecuniary obligation, about to be contracted with another, of which facts that other is ignorant, and can only learn them from the first, or from documents in his keeping, that the fact of knowledge raises the obligation upon him to tell it.

This would be the law in such a case, and it is in this case. Inquiry by the defendants would, at most, have resulted in obtaining what was already known to the acceptor. He held the contracts; he knew, or should have known, officially, the state of the accounts between the contractor and the department; and when he conditionally accepted his drafts, which were to be charged to his account for transporting the mail, as his liability to pay them would occur in ninety days, it was but reasonable that he should have said, in plain terms, when giving his acceptances: "If the earnings of the contractor from this time to the maturity of the draft shall be sufficient to pay what he owes, and

the debt he may incur until then, then these drafts will be paid." This would have been a condition about which there would have been no mistake.

But, further, if two persons deal in relation to the executory contracts of a third, as these contracts were, and one of them being the obligee induces the other to advance money to the obligor, upon "condition that his contracts be complied with," and he knows that forfeitures have been already incurred by the obligor for breaches of his contract, and does not say so, shall he be permitted afterwards to get rid of his liability by saying to the person making the advance: "I cannot pay you, for when I accepted there was already due to me from the drawer of the bill more than I accepted for. I had knowledge of it then, and so might you have had if you had made the inquiry, but you did not choose to inquire, so I will pay myself first, because my acceptance was on condition that his contracts be complied with?" Such is the case before us as it was presented by the argument, and we cannot doubt it will be thought decisive that it was the duty of the acceptor, in this instance, to communicate what he knew of Reeside's account if he had any conversation with the defendants before the drafts were discounted, and that it was not the duty of the defendants to inquire. It cannot be answered by saying the words of the acceptance were intended to provide for what might exist, but what was not then known, or for breaches of the contracts which had already occurred, but which had not been charged with a penalty; for either would be an admission that inquiry by the defendants when the acceptances were made could not have resulted in getting the information at the department.

§ 132. *An acceptance upon condition that his "contracts be complied with" is not retroactive.*

But, again, will the terms of the acceptance admit in any way of retroactive construction? The words must be taken according to the ordinary import of them. They are "accepted on condition that his contracts be complied with." Can there be compliance with an executory contract, but in future, if breaches have already happened? Supposing no breaches to have occurred necessarily implies such as may occur in the future, and subsequent compliance. If both past and future breaches, then, are, as contended for, to be comprehended within the condition of this acceptance, why may not the condition be extended to such as may happen after the maturity of the drafts, as well as to such as had occurred before they were accepted? A literal interpretation must lead to both, and that will not be contended for. But the argument is, that the defendants should have inquired into the "stipulations of the contracts and the extent of the condition;" and it is said: "The bank would have been informed that the department expected Mr. Reeside to renew his drafts until the accumulation of his current pay would be sufficient to meet them, and had his pledge to take them up himself if earlier payment should be required." Be it so. Can there be a plainer admission than there is in the preceding sentence, written by the acceptor, that it is necessary to go out of the condition of the acceptance to ascertain his meaning, and that his construction rests upon facts known by himself and Mr. Reeside, which the defendants could not have known but from one or the other of them? Facts out of the condition, and which could alone become a condition by being so expressed. Again, it is taken for granted in the argument, if the defendants had inquired into the stipulations of the contracts and the bond, that they would have been informed of the forfeitures which had been incurred. But that would not follow. Before such knowledge could have been obtained, it would have been necessary to take one step

further beyond the condition — an inquiry into the accounts. Where shall such construction stop, if it be allowed at all? The law does not permit a conditional acceptance to be construed by anything extraneous to it, unless where the terms used are so ambiguous that it cannot be otherwise ascertained.

We will suppose, however, that the stipulations of Reeside's contract and his bond had been known to the defendants. Might they not very justifiably have concluded that his drafts were accepted to aid him with an advance to fulfil his engagements? The bond in evidence shows that a necessity for advances was contemplated. It had been the habit of the department to make them to contractors. Its exigencies, it is said, required advances to be made. The witness Mason says: "From the year 1830 the pecuniary affairs of the department were much deranged, and it was frequently unable to pay debts due by it to contractors. Under such circumstances the department was in the practice of giving to contractors acceptances for sums less than was actually standing to their credit unconditionally; and such acceptances were always taken up at maturity, prior to May, 1835. That occasionally, and with the special approbation of the postmaster-general, acceptances were given upon the faith of existing contracts, conditional upon the performance of the contracts, which were understood to become absolute if the contractor performed the services stated in the contract." The defendants, in the year 1835, held acceptances of the same character for more than \$70,000, all of which were under protest for non-payment, but subsequently paid prior to the institution of this suit, except those in dispute in this case. The witness further says the Bank of the Metropolis and other banks in the city of Washington and elsewhere have been, for many years, in the practice of discounting such acceptances. That it was often done for the accommodation of the department, often for the accommodation of the drawer, and frequently of both. This testimony brings the department and the bank in connection upon acceptances of the former for contractors; shows the course of business upon them, and aids to give a proper construction to the acceptances under consideration. When it is remembered, also, that these acceptances were given to renew others of the department which were overdue, we think it cannot be doubted that the terms, "accepted on condition that his contracts be complied with," cannot retroact to embrace forfeitures which had been incurred, and to refund advances said to have been made before the date of these acceptances. The argument upon this point was made upon the false assumption that there had been a communication between the postmaster-general and the defendants concerning these acceptances before they were discounted; or that there was an obligation upon the part of the defendants to make an inquiry into the state of Reeside's contracts and his fulfilment of them, because the acceptances were conditional. It did not exist here, nor does it in any case of a conditional acceptance. The acceptor is bound by his contract as it is expressed, and so it may be negotiated without any further inquiry.

Having fully canvassed the argument upon the point of the obligation of the defendants to inquire into the condition of the acceptance, we turn for a moment to the case as it is shown to be by the evidence. Reeside's earnings between the date of the acceptances and the time for the payment of them were not applied to pay forfeitures or refund advances. They were exhausted by recharging him with sums of money which Mr. Barry had allowed to him as contractor for carrying the mail, which were credited in the journal but not entered into the ledger. That they were not posted cannot affect Reeside's right to such allowances; and something more must appear than the testimony

in this case discloses before it can be admitted that credits, given by Mr. Barry, were legally withdrawn by his successor. There is no evidence in this cause to impeach the fairness and legality of the allowances credited by Mr. Barry; no proof that Reeside had incurred forfeitures, or that advances had been made to him. Proofs should have been given if it was intended to justify the recharges for the causes stated. • No attempt was made to do so. The allowances, then, are credits in Reeside's account which the defendants may use to prove his performance of the conditions of the acceptance; and they do show performance, as the amount earned would have paid his drafts if it had not been diverted.

§ 133. *A head of a department has no right to review the acts of his predecessor, except to correct an error of calculation.*

The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances which the said postmaster-general was not legally authorized to allow, then it was the duty of the present postmaster-general to disallow such items of credit. The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims in which material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the department. The act of 21 July, 1836 (5 Stats. at Large, 80), entitled "An act to change the organization of the postoffice department," is only affirmative of the antecedent right of the government to sue, and directory to the postmaster-general to cause suits to be brought in the cases mentioned in the seventeenth section of that act. It also excludes him from determining, finally, any case which he may suppose to arise under that section. His duty is to cause a suit to be brought. Additional allowances the postmaster-general could make under the forty-third section of the act of March 3, 1825 (4 Stats. at Large, 114; 3 Story, 1985); and we presume it was because allowances were supposed to have been made contrary to that law that the seventeenth section of the act of 21 July, 1836, was passed. In this last the extent of the postmaster-general's power in respect to allowances is too plain to be mistaken. We cannot say that either of the sections of the acts of 1825 and 1836, just alluded to, covers the allowances made by Mr. Barry to Reeside. But if the postmaster-general thought they did, and that such a defense could have availed against the rights of the bank to claim these acceptances as credits in this suit, the same proof which would have justified a recovery in an action by the United States would have justified the rejection of them as credits when they are claimed as a set-off.

We pass to the credit claimed and called E. F. Brown's overdraft. But why it is so called we do not know, for certainly no overdraft occurred when he checked alone upon the contingent fund of the department deposited to his credit in the bank. Seven thousand and seventy dollars and twenty-four cents, on the 30th of April, 1835, were deposited to his credit. By the 7th of June he had drawn of that sum \$3,076.97. Then the postmaster-general directed the bank not to pay Brown's checks, unless they were approved by Robert Johnson, the accountant of the department. It is in proof that no check of Brown's was afterwards paid without Johnson's approval. On the 2d of December following, the original deposit to Brown's credit was drawn out in his checks, approved by Johnson, and it was found there had been an overdraft of something over \$600. We do not say that an overdraft out of the bank, by authorized officers of the United States, is in any case chargeable to the United States, unless it can be shown that the money overdrawn has been applied to the use of the United States; but, in the present instance, we think no proof of such application was necessary, and we cannot resist the conclusion that the defendants are in equity entitled to this credit; for the proof is that, on the day that the overdraft was known, the postmaster-general wrote a letter to the cashier of the bank, stating that "the contingent fund of the department was exhausted, but the public service requires that a number of bills chargeable to that appropriation shall be paid sooner than the usual sum can be obtained from congress; I therefore request the favor of your bank to pay such bills against the department, of that character, as may be presented, with the certificate that the amount is allowed, signed by Robert Johnston, accountant of this department." The request was complied with, and the bank advanced, until the 14th of May, 1836, more than \$6,000, to pay claims on the contingent fund. In this case, as in those of more humble dealings, the course of business between parties must be used when it can apply to explain their understanding of past transactions. Nor can the inference be resisted that, when the postmaster-general discovered the contingent fund had been overdrawn, and requested that other overdrafts might be made on the same account, that it was an admission of the correctness of the first. We think, then, that the United States was a debtor to the defendants for Porter's draft, and Reeside's drafts, and for the overdraft on the contingent fund, principal, interest and costs.

But it is said, though the credits claimed by the defendants shall be found to be due by the United States, they cannot be set off in this suit. This was the first instruction asked, and refused by the court. It is urged that, to allow them as credits in this suit, is, in effect, to permit money to be taken from the treasury otherwise than it is directed to be disbursed by law. That the money previously held by the defendants had been passed to the account of the treasurer of the United States by direction of the postmaster-general, in conformity with the act of the 2d of July, 1836. 4 Story, 2164. That when the defendants complied with the letter of instruction, written to them by the postmaster-general, on the 16th of July, 1836, and transferred the money then on deposit to the credit of the department to the treasurer of the United States, for the service of the postoffice department, and when they consented to receive future deposits according to a form sent, and to transact the business according to the regulations contained in the letter of the 16th of July, 1836, that the defendants cannot legally charge their claims against that account by way of set-off in this suit.

§ 134. *A defendant in a suit brought by the United States may set off any demands he may hold against the United States.*

To the foregoing objections, a brief but conclusive answer may be given. That is certainly the treasury of the United States where its money is directed by law to be kept; but if those whose duty it is to disburse appropriations made by law employ, or are permitted by law to employ, either for safe keeping or more convenient disbursement, other agencies, and it shall become necessary for the United States to sue for the recovery of the fund, that the defendant in the action may claim, against the demand for which the action has been brought, any credits to which he shall prove himself entitled, if they have been previously presented to the proper accounting officers of the treasury, and been rejected. Such is the law as it now stands. This right was early given, by an act of congress, to all defendants in suits brought by the United States. 1 Story. It has been repeatedly before this court. The decisions upon it need not be cited. They apply to this case. The transfer of the deposit to the treasurer of the United States; the letter of the postmaster-general, directing it to be done; his regulations for keeping the account, and for disbursing it, were directory to the defendants; and their compliance with such directions was an acknowledgment that the postmaster-general had the right to give them, as the conditions upon which they were to continue the depositary of the fund. But it cannot be inferred, either from the act of 2d of July, 1836, requiring that when the revenues of the postoffice department have been collected, that they shall be paid under the direction of the postmaster-general into the treasury of the United States; or because appropriations for the service of the department shall be disbursed by the checks of the treasurer, indorsed upon warrants of the postmaster-general, and countersigned by the auditor of the postoffice department, under the words "registered and charged;" or from the declaration in the postmaster-general's letter to the defendants, that no other credit, set-off or deduction will be admitted in this account. It cannot be inferred that the defendants accepted the postmaster-general's letter as a contract to surrender the right, secured to them by the statute, to claim credits in a suit brought against them by the United States; or that it imposed upon them any legal obligation not to do so.

From the previous and contemporaneous correspondence between the bank and the postmaster-general, concerning these drafts, it is clear such was not the apprehension of the defendant when the account was opened with the treasurer of the United States, in compliance with the postmaster-general's letter. That was done in compliance with the law changing entirely the fiscal arrangements of the department, and for that purpose the postmaster-general was the proper organ to direct it to be done; but any condition in that letter not required by the act of congress, under which he was acting, though officially made, is rather an evidence of what he wished to do than a conclusion that he had the power to impose it, or that the defendants had consented to look to congress for the reimbursement of the debt due them, and not to the courts of justice. When the account was changed to the treasurer of the United States, there was a large balance on deposit to the credit of the postoffice department. The fund, however, was not the less that of the United States, in the one case or the other. The change, then, made no difference as to the ownership of the fund, in their right to retain, if the defendants had any right at all to retain it for their debt. They had been dealing with the executive branch of the government in a matter of money, and could not be turned to the legis-

lature without their consent to ask it to do, as a favor, what the judiciary could settle as a right. If the defendants had supposed such was to be the consequence of carrying the fund to the treasurer's account, it is manifest, from the evidence in the case, that it would not have been done. That they did not do so, it is to be inferred also, from the evidence, arose from an indisposition to enforce a right until every effort had been made to obtain it by amicable adjustment, and from an indisposition to embarrass a department which had been severely pressed, and was then just beginning to be relieved. The post-master-general says, in his letter of March 19, 1838, that, "excepting the refusal, in common with other banks, to pay the warrants of this department in gold and silver, or an equivalent, commencing in May last, and the seizure of both a general and special deposit of moneys in the treasury to meet alleged claims, under the circumstances exhibited in the annexed papers, the Bank of Metropolis has faithfully discharged its duties as a deposit bank for this department." The circumstances alluded to are those which have been the subject of comment in this case; and it is our opinion that they confirm the right of the defendants to the credits claimed. There was no error, then, in the court not giving the instructions asked for, and the judgment is affirmed.

It is proper for us to say, however, if the law and the merits of the case were not with the defendants, that the court might well have refused to give the first instruction from the manner in which it is asked. After the evidence had been closed on both sides, the court was asked to say "that, upon the evidence aforesaid, the defendants are not entitled, in this action, to set off against the plaintiffs' demand the amount of acceptances aforesaid, so given in evidence by the defendants, nor the amount of the overdraft of E. F. Brown." It raises all the issues, both of law and fact, in the case, and requires the court to adjudge the case for the plaintiffs. This the court could not do, as there were contested facts in the case which it was the province of the jury to decide. The court could only have said, alternatively, what was the law of the case, accordingly as the jury did or did not believe the facts; and this, it will be admitted, would have been equivalent to a refusal of the instruction. When instructions are asked they should be precise and certain to a particular intent, that the point intended to be raised may be distinctly seen by the court, and that error, if one be made, may be distinctly assigned.

SCHIMMELPENNICH v. BAYARD.

(1 Peters, 264-292. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows:

Baltimore, May 23, 1822,	- - -	£500	favor of J. P. Kraft.
Baltimore, May 27, 1822,	- - -	200	favor of defendants.
Baltimore, May 27, 1822,	- - -	300	favor of defendants.
Baltimore, May 27, 1822,	- - -	500	favor of defendants.
Baltimore, June 12, 1822,	- - -	1,000	favor of defendants.
Baltimore, June 18, 1822,	- - -	300	favor of defendants.
Baltimore, July 31, 1822,	- - -	1,000	favor of defendants.
Baltimore, July 31, 1822,	- - -	fr. 10,000	favor of defendants.
Baltimore, July 31, 1822,	- - -	5,000	favor of defendants.

These bills were regularly protested for non-acceptance and non-payment, but were accepted and paid, *supra* protest, by the drawees, for the honor of the defendants, the indorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case stated. The judges were divided in opinion on the following points, which have been certified to this court:

1. Whether the authority to John C. Delprat to draw on the plaintiffs did or did not amount to an acceptance of the bills.

2. Whether the bills paid by the plaintiffs, *supra* protest, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instruction of the plaintiffs to J. C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same, having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills and the drawees.

On the 11th January, 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy:

"The undersigned, N. and J. and R. Van Staphorst, merchants in this city, and John C. Delprat, of Philadelphia, present the last, choosing for the present act his *domicilium citandi et exequendi*, at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations:

"ARTICLE I. The second undersigned (namely, J. C. Delprat) shall, to the benefit of the first undersigned (N. and J. and R. V. S.), manage in the United States of America the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections, and procuring of consignments, and shall further perform everything the first undersigned will appoint him to do as their agent.

"ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom any consignments or commissions from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned without their prejudice.

"ART. III. The first undersigned allows to the second undersigned the faculty to value on them direct, or payable in London, at no shorter date than sixty days' sight, for such moneys as the second undersigned shall employ to make advances on whole or part of cargoes of current articles, namely, to the amount of two-thirds of the invoice price of articles laden in chartered vessels, and of three-fourths in vessels owning to the shippers, and likewise consigned to the first undersigned; it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods; and it being understood that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall inclose and forward, or cause to be inclosed and forwarded, to the first undersigned, the bill

of lading and invoice of the goods on which the above-mentioned advances might have been made; and shall cause the above goods to be duly insured in America to that effect; that the policy of said insurance be delivered up, duly indorsed, to the second undersigned, and rests with him until the end of the expedition. It being further a fixed rule that the first undersigned must never come in the predicament of having made any advances on cargoes or part of cargoes which are not duly insured in America.

"The first undersigned further oblige themselves to open a credit of \$40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard & Co., New York, to be made use of by the second undersigned, in case any advances are required on consignments to be made to the said first undersigned, that credit to be renewed every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them. If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned to stop for a while further consignments, then the said first undersigned retain the faculty to prescribe to the second undersigned such limits and orders as they shall find proper, according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

"ART. IV. As sometimes an opportunity might offer to procure a good consignment to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned to make use likewise of the above mentioned credit of \$40,000 to interest the first undersigned; in such expeditions for a proportion not larger than one-fourth, with this restriction, that said proportion must never exceed the amount of \$10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their account being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, namely, after that termination shall have been duly advised to the second undersigned by the first undersigned.

"ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned one-third of the amount of the two per cent. commission to be earned by the first undersigned on the consignments to be procured, and further, one per cent. from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article 4; it is to be understood that then no benefit arises from the third of the two per cent. commission of those goods; and finally, that the second undersigned is promised an allowance for traveling and other expenses the sum of \$2,000, say two thousand dollars, per annum, to commence with the 1st of February, 1818.

"ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January, 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid) this contract will be continued from year to year, but that, in case one of the parties should desire the annulment of the present contract, said party shall be obliged to signify his intention to the other party four months before the expiration thereof.

"ART. VII. Ultimately, it has been stipulated that in the unhopd for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any of the articles above mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of

two arbiters, to be chosen in the city of Amsterdam, one by each party; who, in case of difference of opinion between them, shall have the faculty of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences; both parties renouncing to all law measure and impediments, and especially to the faculty of laying any arrests or hindrance on moneys, goods or possessions belonging to any one of the parties undersigned; all such aforesaid measures to be considered now and then as null, void and of no effect whatsoever; the consequences thereof to be suffered by the party which might have made use of the aforesaid measures.

"Of the present act have been made two copies, etc.

"AMSTERDAM, 11th January, 1818.

(Signed)

"N. and J. and R. VAN STAPHORST.

"JOHN C. DELPRAT."

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows:

"*Messrs. Le Roy, Bayard & Co., New York* (confidential):

"AMSTERDAM, 21st January, 1818.

"GENTLEMEN: Thinking it useful for the extension of our commercial relations in the line of consignments (one of the branches of our establishment) to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts; in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence which must actuate a person employed during such a long period by your worthy house. We judged it necessary, for the obtaining of said purpose, to leave at the disposal of Mr. Delprat sufficient means to facilitate his exertions, namely, by opening with you, in his favor, a credit to be made use of by him in the manner pointed out in the inclosed abstract of our contract with said gentleman. We therefore request, and authorize you to furnish Mr. Delprat to the extent of \$40,000, say forty thousand dollars (to be made advances with by him on such cargoes, or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our house in part of cargoes to the forementioned purpose). The credit to run for the space of two years, unless countermanded by us in such a manner that, when Mr. Delprat has availed himself of the whole or part of said credit of \$40,000, that credit, or part of the same, must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat. You will observe, the sole object of the mission of Mr. Delprat is to obtain solid consignments from good houses, throughout the United States, and the disposal of the credit opened in his behalf with your house is exclusively intended to facilitate said business. In this important matter, it will be a point of great security, and, as such, eminently satisfactory to us, that our said agent may be able to have recourse, in every circumstance, to wise and friendly counsel; and we therefore request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, particularly with respect to those transactions for which, by virtue of the credit aforementioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured; that the moneys he may dispose of will have no other than the destination just mentioned. To this effect, we authorize you, gentlemen, in case of moral certainty that the moneys Mr. Delprat should demand from you by virtue of the above-mentioned credit would not be employed in the aforementioned

manner, and earnestly request you not to pay, and to refuse him, any moneys whatsoever, on account of the above credit.

"In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat; and if, unexpectedly, that conduct could appear in the least exceptionable, we mean either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long experienced friendship, your ideas respecting that subject, and be perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, and to solicit your friendly co-operation towards the attaining the object of his mission, which, we are fully persuaded, can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,

"Gentlemen, your most obedient servants,

"N. and J. and R. VAN STAPHORST.

"(Indorsed) Confidential, Amsterdam, 21st of January, 1813. N. and J. and R. Van Staphorst. Received, March 29th. Answered, 24th do."

This letter was answered by Le Roy, Bayard & Co. in the following terms:

"PRIVATE.

"NEW YORK, 24th of March, 1818.

"*Messrs. N. and J. and R. Van Staphorst, Amsterdam:*

"GENTLEMEN: We have the honor of replying to your esteemed favor of 21st of January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of \$40,000, subject to renewal, as fully expressed in your letter. We doubt not, from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part to reap the utmost benefit from the mission intrusted to him.

"Believe us, with honor and esteem, gentlemen,

"Your obedient servants,

"LE ROY, BAYARD & Co."

It is proper to observe that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard & Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of \$40,000, therefore, which was raised for Delprat with Le Roy, Bayard &

Co., was merely the application of so much of their funds, in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions in consequence of this credit, which manifest, unequivocally, the desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th June, 1819, they renew the credit of \$40,000, and add, "at the same time, we confirm our former orders not to exceed said amount for our account. In case you have funds in hand for any of our institutions, and you think proper to remit us for the same Mr. Delprat's bills on us, the nature of which you are well acquainted with, you allow him, then, the same credit which you do to all persons from whom you take bills, in the persuasion of their solidity and of the reality of the transaction on which the bills are issued." In answer to this letter, the defendants say, on the 24th of September, 1819: "You also accord us the permission to remit this gentleman's (Delprat's) drafts for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character must, with us, act in lieu of vouchers, to exhibit the reality of transactions which may give origin to such drafts, the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May, 1820, when N. and J. and R. Van Staphorst addressed a letter to Messrs. Le Roy, Bayard & Co., of which the following is an extract: "There being frequent opportunities of drawing here now, on New York, we will probably have, for some time to come, occasion to dispose of the dividends which 'you will receive for our account, in October next,' and so on; and we have therefore directed Mr. Delprat not to make use of his credit of \$40,000, lately opened in his favor. We thus also request you, by the present, to consider the same as annulled until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy, Bayard & Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers than is contained in a letter of the 6th February, 1821, which contains the following clause: "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us in your hands, or by drawing and indorsing the shipper's draft, must not exceed, henceforth, one-half of the 'true invoice.'" As a compensation for this reduction of the advance to be made in the United States, J. and N. and R. Van Staphorst engaged, on the arrival of the shipments, to remit to the consignors the estimated value of the cargoes in bills on their house in the United States. Delprat acknowledged the receipt of this letter on the 17th of April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May, 1820, when his credit with the house of the latter was annulled. At least no subsequent letter appears in the record until the 9th of July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connection with Mr. Delprat; whose conduct, they said, had been so imprudent as to oblige them, at the same time, to protest several of his drafts. Their knowledge, they say, of

the former intercourse between Le Roy, Bayard & Co. and Mr. Delprat, and of the great regard felt for him by those gentlemen, induce them to state the chief reasons which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December, 1820, although the balance then due from him was fully \$7,837.54, being "for the proceeds of gin consigned by us to him; for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," etc. They then proceed to state that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of \$6,000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances, which we till now have not received, though the goods were with him for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances, and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds, "were matters situated, when last Friday, contrary to anything we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for £200, £300, and £500, issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped;" and, on the other hand, 2d, £500, florins 1,250 and 1,750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive that, taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state, in substance, that they could choose only between the alternatives of allowing the debt due from Mr. Delprat to be swelled to a still larger amount, and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find that, among the drafts to be protested for non-acceptance, and perhaps afterwards for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened. This letter was received by the defendants on the 1st day of September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs to hold at their disposal all the proceeds of the goods shipped in his name by the Virgin and other vessels, and all balances due to him. This order was inclosed to the plaintiffs in a letter of the 7th September, 1822, in which they say: "We can, of course, only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account; and if any should accrue, we will thank you to take such legal steps which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial John C. Delprat was examined as a witness. He deposes that the several bills of exchange on which this suit was instituted were drawn in his capacity as agent, on account of, and for the purpose of making advances on, shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft, for £500, were accompanied by letters of advice. That during the whole period of his agency he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. and J. and R. Van Staphorst, who never found fault with him for doing so; but, to encourage him to

make such shipments, gave him credit for one-half the commission upon the sales of the shipments so made upon his own account. On his cross-examination the witness stated that the bill for £500 in favor of Krafft was drawn for shipments by the Edward, Jason and Mayflower. He cannot say when the Edward sailed. The Jason had arrived and the Mayflower had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft but was returned to witness, who sent it to the defendants. The bills of lading and the invoices were not sent with it. The three bills of the 27th of May, for £1,000, were drawn on account of shipments in his own name by the Virgin. She sailed about the 30th July. They were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for £1,000, and for £300, were drawn on tobacco shipped by the Henry belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of the 31st of July were drawn on the shipments by the Virgin generally. They were not accompanied by bills of lading or invoices. The defendants received a commission for indorsing his bills on the plaintiffs. In making the advances on shipments on his own account he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged, and then drew on the defendants as the money was required, either on his own shipments or the shipments of others; which bills were credited to the defendants. He understands that all his transactions with the defendants were carried by them into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them. He was concerned in shipments with Mr. Krafft, and did a great deal of business with him, but did not consider himself as a general partner. The connection between the plaintiffs and J. C. Delprat was formed by the agreement of the 11th January, 1818. He was constituted their agent for purposes therein described, and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections and procuring of consignments." To enable him to perform this duty he was allowed the faculty to value on them direct or payable in London, at no shorter date than sixty days' sight, for such moneys as he should "employ to make advances on the whole or part of cargoes of current articles," namely, to the amount of two-thirds of the invoice price, etc. It being understood that his letters of advice should be accompanied by the bills of lading and invoices of the goods on which the advances may have been made.

§ 135. *Liability of principal for drafts in excess of agent's authority.*

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever, but was an agent appointed for particular purposes, with limited powers calculated to subserve those purposes. To procure consignments it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose and to a limited extent. Out of the limits assigned to him he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw, must have performed some act, in relation to the particular bills, which imposes on them in law the character of acceptors.

§ 136. *Coolidge v. Payson reviewed; acceptance by letter.*

This point was considered by this court in the case of *Coolidge v. Payson*, 2 Wheat., 66. *Coolidge & Co.* held the proceeds of a cargo, claimed by Corn-

thwait & Cary, whose claim depended on the decision of this court, of a case depending therein. Cornthwait & Cary were desirous of drawing these funds out of the hands of Coolidge & Co., and offered a bond, with sureties, as an indemnity, in the event of an unfavorable decision. Coolidge & Co., in a letter to Cornthwait & Cary, state some formal objections to the bond, and add, "we shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams feels satisfied on this point, he will inform you, and in that case your draft for \$2,000 will be honored." In answer to the letter addressed by Coolidge & Co. to Williams on this subject, he declared his satisfaction with the bond, as to form; declared his confidence that the last signer was able to meet the whole amount himself; but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given." On the same day, Cornthwait & Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson & Co. also called on him, and received the same information. Two days afterwards Cornthwait & Cary drew on Coolidge & Co. for \$2,000, and paid the bill to Payson & Co., who presented it to Coolidge & Co., by whom it was protested. Payson & Co. sued them as acceptors. The court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwait & Cary, did declare that he was satisfied with the bond referred to in that letter; and that the plaintiffs on the faith and credit of the said declaration, and also of the letter to Cornthwait & Cary, did receive and take the bill in the declaration, they were entitled to recover in the action. The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this court.

In this case the drawee had written a letter to the drawer, promising to honor his bill for \$2,000, if Mr. Williams should be satisfied with a bond of indemnity which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise. The court in its opinion reviews several decisions in England on this point, in all of which the promise to accept was express, and in some of which the court declared the opinion that the promise ought to be accompanied by circumstances which may induce a third person to take the bill. After reviewing these cases, this court laid down the rule "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

It cannot be alleged that these bills are brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

§ 137. *A party bound to honor a bill, in the character of drawee, can acquire no rights as acceptor supra protest.*

But, although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the court must be satisfied that the payment is, in fact, what it professes to be,—a payment really for the honor of the indorsees.

If the drawees, thus refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound, in good faith, to accept or pay as drawees, they will not be permitted to change the relation in which they stand to the parties on the bills by a wrongful act. They can acquire no rights, as the holders of bills paid *supra protest*, if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions is, whether the drawees were bound to accept or to pay these bills. And, first, were they so bound because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence than was required when considering the first question. It is apparent, from the contract of the 11th of January, 1818, that Mr. Delprat came to the United States as the agent of N. and J. and R. Van Staphorst to manage their mercantile interest; "consisting chiefly in forming new solid connections and procuring of consignments;" and also with commercial views of his own. The principal object of the contract is to define his authority and to regulate his conduct as agent. He is allowed to draw on the plaintiffs for such moneys as he should employ, in making advances on current articles consigned to his principals, to the amount of two thirds of the invoice price of articles laden in chartered vessels. He was still further restricted in his advances by orders received long before the bills in question were drawn, to one-half of the true invoice. Mr. Delprat's authority, then, to make advances was limited, at the date of this transaction, to one-half the invoice price. One, and perhaps the most usual, mode of conducting business of this description is to draw in favor of the consignor, or to indorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor which was raised by the bill. In either case, however, drafts beyond one-half the invoice price of the consignments actually made would exceed the authority given. Circumstances may exist which would impose on the principal the obligation to pay such drafts; but the question we are now considering relates only to the authority under which the bills were drawn. That authority restricted the agent in the amount of his drafts to one-half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited? The first bill on the list is for £500, drawn in favor of J. P. Krafft, on the 23d of May, 1882, and indorsed by him to the defendants. The letter of advice states this bill to be drawn on account of shipments by the Edward, Jason, and May Flower, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record. The shipment by the Jason had arrived, and the May Flower had sailed before the bill was drawn. Mr. Krafft was at the time indebted to N. and J. and R. Van Staphorst. The bill was returned by Krafft to Delprat, and then indorsed by the defendants. It does not appear certainly who remitted this bill, although the probability is that, as it was indorsed by the defendants, not as purchasers, but for a commission, it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true that he further states that, after the bill was so returned, he sent it to the defendants; but this was no doubt done for the purpose of having it indorsed by the defendants, in order to give it credit. Neither does it appear, from the evidence in the cause, that Krafft accompanied the shipments on

account of which this bill was drawn, by any letter of advice, or otherwise directing the proceeds thereof to be applied to the discharge of this bill; but, on the contrary, the letter of advice addressed to the plaintiffs by Delprat directed the bill to be charged to the account of Krafft generally. Under these circumstances, taken in connection with the additional one that Delprat was concerned, generally, with Krafft, in the shipments made to the plaintiffs, the court is of opinion that there is no material difference between this bill and those drawn on account of shipments made by and in the name of Delprat, which are now to be considered.

It has already been stated that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. and J. and R. Van Staphorst. His transactions, in his two characters, were as distinct from each other as if they had been the transactions of distinct persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals. As a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar and unusual provisions to place Mr. Delprat under the authority of the house in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties in the following words: "The second undersigned (Delprat) binds himself to procure to no person or persons in this kingdom any consignments or commissions, from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned; they being willing, on their side, to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice."

This article contains the only limitation on the entire independence of Mr. Delprat as a merchant. It is, perhaps, a necessary limitation, which was, in part, the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house does not impress on his consignments to the Van Staphorsts, or on his bills drawn on those consignments, a character different from that which would have belonged to them had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands. If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the kingdom of the Netherlands any consignments or commissions, from himself or any other, except to the Van Staphorsts. The singular application of the word "procure," to consignments made by Mr. Delprat himself, may be connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article the Van Staphorsts allow Mr. Delprat "the faculty to value on them direct or payable in London," for such moneys as he shall employ to make advances on the whole or part of cargoes of current articles consigned to them to the amount of two-thirds of the invoice price.

It may be said that, as in the preceding article, consignments made by Delprat on his own account were considered as procured by him and were placed on the same footing with consignments made by others; so in this the express authority to draw bills might embrace transactions of both descriptions. But

we do not think that the inaccurate use of words in one article will justify a departure from the correct construction of a succeeding article, unless the same words are used, or the bearing of the one on the other is such as to require that departure. The same motives existed for restraining the agent from making as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence, and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition. The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat as a merchant and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands independent of contract. The usage of trade allows such drafts to be made on a shipment, and the consignee must pay the bills if the shipment places funds in his hands to pay them. But as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement in order to determine whether it provides for the future connection between the parties further than as regards their characters as principal and agent.

The faculty given to Mr. Delprat by the third article, to value on the Van Staphorsts, is "for such moneys as he should employ to make advances" on articles consigned to them. Money laid out in the purchase of articles on his own account cannot, with any propriety of language, be denominated money employed in making advances on articles consigned to him. The distinction between money advanced on articles consigned and money employed in purchases, although the articles may be purchased for the purpose of being consigned, is obvious. Money advanced is always to another, never to the individual making the advance. This language shows, we think, incontestably, that the article was drawn with a sole view to bills drawn by Mr. Delprat as agent, not on his own account as a merchant. A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him in making advances to others, but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy, Bayard & Co., inclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable that they would have given him an express authority to draw on his own account on invoices to be priced by himself. But the language of the article applies, we think, entirely to his bills drawn as agent; not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says that during the whole period of his agency he was in the habit of making shipments on his own account to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. and J. and R. Van Staphorst, who never found fault with him for doing so; but in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments so made on his own account. The Van Staphorsts were commission merchants desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat as well as from others. But this does not prove that

the power given him as their agent to make advances to others was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law, and the contract between the parties does not show that either was dissatisfied with those principles or wished to vary them. This question refers, we presume, to the authority given by the contract of the 11th of January, 1818. The first article describes the objects which were committed to Mr. Delprat by the Van Staphorsts. These were: the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connections and procuring of consignments."

The second article restrains the right Mr. Delprat might otherwise have exercised of consigning to other houses in the Netherlands. The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe. This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and indorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs extending this authority appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered in answering the preceding questions. It asks whether the plaintiffs were bound to accept and pay the bills in question; and whether the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants? The opinion has been already expressed that the bill, drawn on the 23d of May, 1822, for £500 sterling, in favor of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments and in drawing these bills Mr. Delprat acted for himself as an independent merchant. The relation between him and the plaintiffs was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th September, 1822, which were given in evidence by the defendants, they state him to be then their debtor, and it is not shown that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

§ 138. *Authority of agent, with limited powers, to draw on his principal.*

It is believed to be a general rule that an agent, with limited powers, cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. But the defendants, in this cause, cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it requests their friendly supervision of the conduct of Mr. Delprat, and desires

them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters, written during the continuance of Mr. Delprat's credit with the latter, which shows the determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are well acquainted with, that they (the defendants) allow him the same credit that they do other persons from whom they take bills in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add: "This is not the effect of any want of confidence in our agent, but merely profluently from our invariable rule to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th May, 1819, announcing that he had filled his credit, they say: "In addition to it he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about £3,000 sterling, or that we should take his drafts on Amsterdam for a similar value. The personal regard which we bear for Mr. Delprat would have induced us promptly to accede to his request had not the restriction laid upon us of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations or purchase of his drafts was neither wished nor contemplated by you." And in their letter of the 7th of September, 1822, inclosing the order of Mr. Delprat on the plaintiffs for any balances belonging to him in their hands, so far from complaining of the protest of the bills, they say: "We can, of course, only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account."

Messrs. Le Roy, Bayard & Co., then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do in the letter of the 24th June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The fourth and fifth questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the court after verdict, but on a motion for a new trial, which was not made.

The sixth question, whether a judgment can be rendered on the verdict of the jury, has been answered, so far as this court can answer it. We do not understand it as referring to the amount of the verdict, for on that the circuit court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action as the holders of bills, accepted and paid, *supra* protest, for the honor of the drawers, it is already answered.

The decision of a majority of this court on the points on which the judges of the circuit court were divided will be certified in conformity with the foregoing opinion.

This cause came on to be heard on a certificate of division of opinion of the judges of the circuit court of the United States for the southern district of

New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof this court is of opinion, 1. That the authority to John C. Delprat to draw on the plaintiffs did not amount to an acceptance of the bills. 2 and 3. That the bills mentioned in the declaration were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account; and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands. 4 and 5. These questions are understood to be waived, and do not appear to arise in the case. 6. The sixth question is decided by the answer to the second and third, so far as respects the right of the plaintiffs to maintain their action. On the *quantum* of damages, this court can give no opinion.

All which is ordered to be certified to the court of the United States for the second circuit and district of New York.

COOLIDGE v. PAYSON.

(2 Wheaton, 66-75. 1817.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwait & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors. At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the circuit court excepted, and this court is divided on the question whether the exception ought to be sustained. On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the *Hiram*, claimed by Cornthwait & Cary, which had been captured and libeled as lawful prize. The cargo had been acquitted in the district and circuit courts, but from the sentence of acquittal the captors had appealed to this court. Pending the appeal, Cornthwait & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore, with scrolls in the place of seals, and drew on them for \$2,700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwait & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say: "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will, therefore, be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for \$2,000 will be honored."

On the same day, Coolidge & Co. addressed a letter to Mr. Williams, in

which, after referring to him the question respecting the legal obligation of the scroll, they say: "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?" In his answer to this letter, Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given." On the day on which this letter was written, Cornthwait & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written. Two days after this, the bill in the declaration mentioned was drawn by Cornthwait & Cary, and paid to Payson & Co., in part of the protested bill of \$2,700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders. On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwait & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwait & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co. in their letter to him. To this charge the defendants excepted; a verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwait & Cary contains no reference to their letter to Williams, which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwait & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwait & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

§ 139. *Written promise to accept is binding.*

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt? In the case of *Pillans v. Van Mierop*, 3 Burr., 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet, in that case, after two arguments, and much consideration, the court of king's bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance. Between this case and that under the consideration of the court, no essential distinction is perceived. But it is contended that the authority of the case of *Pillans v. Van Mierop* is impaired by subsequent decisions. In the case of *Pierson v. Dunlop*, Cowp., 571, the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion, contradict those laid down in *Pillans v. Van Mierop*. His lordship observes: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." If the case of *Pillans v. Van Mierop* had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of *Pierson v. Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

§ 140. *Sufficiency of letter containing promise to accept.*

It has been argued that those circumstances to which Lord Mansfield alludes must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances;" but it is not said that the answer must contain those circumstances. In the case of *Pierson v. Dunlop* the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed. In the case of *Mason v. Hunt*, Doug., 296, Lord Mansfield said, "there is no doubt but an agreement to accept

may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee or any other person may show such promise upon the exchange, to get credit, and a third person who should advance his money upon it would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor." What is it that "the drawer or any other person may show upon the exchange?" It is the promise to accept — the naked promise. The motive to this promise need not, and cannot, be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept. In the case of *Johnson v. Collings*, 1 East, 98, Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson v. Collings*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion Le Blanc, J., lays down the rule in the words used by Lord Mansfield in the case of *Pierson v. Dunlop*; and Lord Kenyon said that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clarke v. Cock*, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true in the case of *Clarke v. Cock* the bill was made before the promise was given, and the judges in their opinions use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in *Pillans v. Van Mierop* the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is, that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

§ 141. *Rule as to agreements to accept.*

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of ex-

change, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the circuit court, and it is affirmed with costs.

Judgment affirmed.

TOWNSLEY v. SUMRALL.

(2 Peters, 170-185. 1829.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Kentucky. The original action was brought by the defendant in error against the plaintiff in error, as one of the firm of Thomas F. Townsley & Co., to recover the amount of a bill of exchange, drawn at Maysville in Kentucky, on the 27th of November, 1827, by one Richard S. Waters, on Messrs. Townsley & Co., at New Orleans, at one hundred and twenty days after date, for \$2,000, payable to Sumrall or order, which had been dishonored by the drawees.

The declaration contained various counts, some of which alleged an actual acceptance of the bill and non-payment thereof at maturity, others a promise by the drawees to accept and pay the bill when drawn, if the original plaintiff would purchase the same from the drawer. The cause was tried upon the general issue, and a verdict was found for the original plaintiff for \$2,860, upon which he obtained judgment. A bill of exceptions was taken at the trial, upon which the questions are presented which have been argued at the bar. The bill of exceptions stated that the plaintiff offered in evidence the bill of exchange and the protest of the notary public at New Orleans, to which evidence the defendant objected, but the court admitted the testimony. Evidence was then given by the testimony of John Sumrall, the plaintiff's brother, to show that in a conversation between the plaintiff and the defendant, relative to some shipments which Richard S. Waters proposed to make to the firm of Thomas F. Townsley & Co., and bills to be drawn against them, when the plaintiff said he feared the bills would not be honored and paid, Thomas F. Townsley told the plaintiff that the firm would accept the bills of Waters for \$4,000, and pay them at maturity. The plaintiff stated he wished to pay a debt in Philadelphia with the bills, and the produce to be shipped by Waters might not arrive in time to provide for them; to which Townsley replied, that if Waters would draw a bill or bills to the amount not exceeding \$4,000, such bill or bills should be accepted and paid, whether the produce arrived or not. Waters and the plaintiff had been in partnership before the conversation, but the partnership at the time it took place had been dissolved. Richard S. Waters testified that he had drawn the bill for \$2,000 upon which the suit was brought, and another for the same amount. That in a conversation with the plaintiff before the bills were drawn, the plaintiff wished him to draw for \$4,000; he said he was afraid to draw for \$4,000, and the plaintiff told him Townsley had said he would pay one draft for \$2,000 whether the produce to be shipped arrived in time or not; and he agreed to draw for \$2,000, and, after some hesitation, he drew the other bill for \$2,000; both bills being drawn in favor of Sumrall; and it was perfectly understood between them that he had no funds in the hands of the drawees, and that the bills were to be sent to Philadelphia to discharge debts due by the plaintiff and himself

as partners, to Toland and Rockhill and to others; and the plaintiff agreed to help him to meet one of the bills, if he should be unable to pay both. He gave the plaintiff the bills for \$4,000 of partnership goods taken by him at the dissolution of the partnership. That the partnership accounts were not settled; and he received no other consideration for the bills than the receipt of the \$4,000 of partnership goods. He furnished Thomas F. Townsley & Co. with produce enough to pay one of the drafts, and they paid one of them. Townsley & Co. had no funds or effects in their hands belonging to him. On the dissolution of the partnership he understood the plaintiff was to wind up the concern and pay the debts.

The defendant then offered in evidence the record of a suit of Toland and Rockhill against Sumrall and Waters, which was objected to, and the objection sustained by the court. The deposition of Langhorne was then read, stating that in 1819 he heard Waters say his credit was better abroad than at home, for Townsley had promised to accept for him for \$4,000 for Sumrall, whether his produce got down in time or not. Evidence was also given to show that, shortly after the bills of exchange were drawn, Waters became totally insolvent. The deposition of Samuel D. Lucas was read on the part of the plaintiff. He stated that he heard Townsley assure the plaintiff that the drafts of Waters to the amount of \$4,000, which Waters proposed to let the plaintiff have to be drawn by Waters on the house of Thomas F. Townsley & Co., of New Orleans, at one hundred and twenty days after date, should be paid. The plaintiff consented to take the drafts, with considerable reluctance, for fear of accident; upon which Townsley assured him the drafts should be honored, whether the produce to be shipped by Waters arrived or not. Upon the faith of Townsley's accepting for Waters, the bills were received, and the plaintiff advanced large quantities of merchandise and other articles.

The plaintiff prayed the following instruction to the jury, which was given, and to which the defendant excepted: That if they shall believe, from the evidence in this case, that the defendant Townsley promised for himself and company, to Sumrall, that they would honor, accept or pay bills drawn on them by Waters to the amount of \$4,000, and that Sumrall did immediately thereafter, or within a reasonable time, upon the credit of said promise, purchase bills drawn by Waters accordingly, to the amount of \$4,000, and that the bill in the declaration mentioned is one of the bills so purchased, then that the plaintiff upon the evidence is entitled to recover, whether the purchase was made before or after the drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration.

The defendant then asked the court to instruct the jury: 1. That if they believe from the evidence that the defendant, by parol, stated that he would accept a bill or bills to the amount of \$4,000, before the bills were drawn, and before the defendant had received the amount or any part of it, under the expectation and belief that the drawer, Richard S. Waters, would put funds into his hands to take up the bills at maturity, and that the plaintiff knew that the said Richard had no funds, but made the promise in anticipation of such funds, and that no funds to take up the bill were placed in the hands of the defendants, or either of them, to take up the bill, nor had the drawer any funds in the hands of the drawee to draw upon, that they should find for the defendant, provided the jury further find that the plaintiff and R. S. Waters, the drawer, were partners in trade, and as such were indebted on their partnership

account to Toland and Rockhill, and that the bill was drawn by the said Waters in favor of the plaintiff with a view to raise funds or to be passed in direct payment of a joint debt due as aforesaid, and that the said bill, with this object and view, and in pursuance of an agreement between drawer and plaintiff, was passed to the credit of the drawer and plaintiff to Toland and Rockhill.

2. That if they believe the said bill was drawn to pay a partnership debt, as stated by R. S. Waters, they ought to find for the defendants.

3. That if they believe the bill was drawn by Waters in favor of Sumrall, to be assigned to Toland and Rockhill in payment of a partnership debt due by Waters and Sumrall to Toland and Rockhill, and that said bill was thus assigned to Toland and Rockhill; and if they also believe that said Waters and Sumrall have not settled their partnership, that then they should find for the defendant.

4. That if they believe from the evidence that the drawer, Richard S. Waters, was informed by Townsley before he drew the bills offered in evidence that he might draw for \$4,000, and that he would accept and take up \$2,000 whether he, the said Waters, got on in time to take it up or not, and that he would accept and take up the other bill if funds were placed or forwarded to the house in New Orleans to take it up with, and that when the said Richard S. Waters drew the bills that he hesitated for fear he could not get to New Orleans in time with the means to take up both bills, until it was agreed between Sumrall and him that they would risk both bills, and if Waters was not able to take up both at maturity, that, as to the one Townsley would not accept, he, Sumrall, would assist the said Waters with funds to take it up with at maturity; and that Sumrall did, at the time of drawing the bills as aforesaid, state to Waters that Townsley promised him that he would accept one of the bills unconditionally, and the other, if in funds; and that Townsley & Co. did accept and pay at maturity one of the bills, and had not funds of Waters or of the plaintiff to pay the other at maturity, that they ought to find for the defendant.

5. That a demand of the amount of said bill at New Orleans was necessary to enable the plaintiff to maintain the suit, and that the protest of the notary is not evidence of such demand.

6. That a parol promise to pay a non-existing bill, since the statute of frauds, is not obligatory and binding.

To all which opinions of the court: 1. In permitting plaintiff to read said protest. 2. In refusing defendant leave to read said record. 3. In giving the instructions asked by plaintiff. 4. In refusing the instructions asked by defendant,—the defendant excepted.

The first question that arises is upon the admissibility of the protest of the notary public at New Orleans as proof of the dishonor of the bill. The protest is for non-payment for want of funds, and it does not appear that there had been any prior protest for non-acceptance. Bills of exchange payable at a given time after date need not be presented for acceptance at all, and payment may at once be demanded at their maturity. The objection now made does not turn upon this point, but upon the point that the present is not a foreign but an inland bill of exchange, being drawn in Kentucky and payable at New Orleans in Louisiana, and that a notarial protest is not in such cases evidence of a demand and refusal of payment. We do not think it necessary in this case to decide whether a bill drawn in one state upon persons resident in

another state within the Union is to be deemed a foreign or an inland bill of exchange. Foreign it certainly is not if by such appellation is understood a bill drawn upon a country under a totally distinct and independent sovereignty and allegiance. Inland it is not if by that appellation is understood a bill drawn in one part of a territory on another part exclusively under the same municipal laws, and exclusively governed by the same sovereign power. It would seem to constitute an intermediate case. Different tribunals in the United States, of great respectability, have, however, differed upon the question, and it may well be left for a final decision until it constitutes the very turning point of the judgment. 3 Kent's Comm., 63; *Buckner v. Finley*, 2 Pet., 586 (§ 941, *infra*).

§ 142. *A certificate of protest of foreign bills is sufficient evidence of dishonor.*

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill without any auxiliary evidence. It has been long adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants, and, being founded in public convenience, they ought everywhere to be allowed as evidence of the facts which they purport to state. The negotiability of such bills, and the facility as well as certainty of the proof of dishonor, would be materially affected by a different course; a foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonor, and be subjected to many chances of delay, and sometimes to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, therefore, being founded in public convenience, has been ratified by courts of law as a binding usage. But where parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And accordingly, even in cases of foreign bills drawn upon and protested in another country, if the protest has been made in the country where the suit is brought, courts of justice sitting under the common law require that the notary himself should be produced if within the reach of process, and his certificate is not *per se* evidence. This was so held by Lord Ellenborough in *Chesmer v. Noyes*, 4 Camp., 129.

§ 143. — *and interstate bills are considered foreign bills.*

It is not disputed that, by the general custom of merchants in the United States, bills of exchange drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of the dishonor. It is a practice founded in general convenience, and has been adopted for the same reasons which apply to foreign bills in the strictest sense. The distance between some of these states, and the difficulty of obtaining other evidence, is far greater than between England and France, or between the continental nations of Europe, where the general rule prevails. We think, upon this ground alone, the reason for admitting foreign protests would apply to cases like the present, and furnish a just analogy to govern it. There is as little doubt that such is the custom in relation to bills drawn on New Orleans, where the jurisprudence of the civil law mainly prevails, and under which acts of this sort are generally verified by notaries. The act of Kentucky of 1798, c. 57, 2 Littell's Statutes, 101, also recognizes the propriety, if not the indispensable necessity, of a protest, not only in the cases of foreign bills generally, but of all bills drawn on any persons out of the state, or within

any other of the United States, providing "that the same being returned back unpaid with a legal protest, the drawer and all others concerned shall pay the contents, etc., with legal interest from the time the said bill or bills were protested, the charges of protest, and ten per cent. advance for the damage, etc." The contract for the acceptance and honor of the present bill was, if made at all, made in Kentucky, and was to be governed by its laws; even supposing that the question whether it amounted to an acceptance or not was to be governed by the law of Louisiana, where the contract was to be executed. So that in either view of the matter, upon the general custom of merchants, or the *lex loci contractus*, we think the protest was rightly admitted in evidence. Whenever a protest is required to fix the title of the parties, or, by the custom of merchants, is used to establish a presentment or dishonor of a bill, it is competent evidence between the parties, who contract with reference to the presentment and dishonor of such bill. And there is no doubt that it was material for this purpose under some of the counts in the declaration.

§ 144. *The record of a suit between other parties is not competent evidence.*

The next objection is to the rejection of the record of the action of Toland and Rockhill v. Sumrall and Waters. This was a suit between other parties, and falls within the general rule of *res inter alios acta*, and on that account was in our judgment rightly rejected.

§ 145. *A promise to accept a bill is binding.*

The remaining objections arise from the instruction given by the court to the jury, on the prayer of the plaintiff, and to the refusal of the court to give the instructions prayed for by the defendant. The instruction given by the court upon the plaintiff's prayer is not understood to involve any other difficulty than that it states that the plaintiff would be entitled to recover, "whether the purchase was made before or after drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration." We cannot perceive any sound legal objection to this instruction. If a person undertake, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and, as an inducement to the purchase, to accept it, and the bill is drawn and purchased upon the credit of such promise for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence that the direct consideration moves to a third person, as, in this case, to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill.

§ 146. — *and is not within the statute of frauds.*

He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A. says to B., pay so much money to C. and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract. Damage to the promisee constitutes as good a consideration as benefit to the promisor. In cases not absolutely closed by authority this court has already expressed a strong inclination not to extend the of the statute of frauds so as to embrace original and distinct promises of different persons at the same time upon the same general considera-

tion. *D'Wolf v. Rabaud*, 1 Pet., 476. Then, again, as to the consideration, it can make no difference in law whether the debt for which the bill is taken is a pre-existing debt or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. Under such circumstances there is no substantial distinction whether the bill be then in existence or be drawn afterwards. In each case the object of the promise is to induce the party to take the bill upon the credit of the promise; and if he does so take it it binds the promisor. The question whether a parol promise to accept a non-existing bill amounts to an acceptance of the bill when drawn is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover although it should not be deemed a virtual acceptance, and the point whether it was an acceptance or not does not appear to have been made in the court below.

§ 147. — *is valid although it is known that the drawer has no funds with promisor.*

The instructions prayed for on behalf of the defendant, and refused by the court, present several objections to the plaintiff's right of recovery. The first is, that the plaintiff is not entitled to recover if he knew that the defendant, at the time of taking the bill, had not funds of the drawer in his hands, and if the defendant's promise was under the expectation of receiving funds, and he did not, in fact, receive them at the maturity of the bill. We are of opinion that this objection is unfounded in point of law. If the drawee have no funds in his hands, and the fact is known to the other party, and yet the inducement to take the bill is the promise of the drawee to accept it, it constitutes a valid contract between the parties, if there is a purchase of the bill upon the credit of such promise. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance.

§ 148. *The fact that the purchaser of a bill was a copartner of the drawer will not invalidate a promise to accept it.*

Another objection is that the object of taking the bill was to pay the partnership debt of the plaintiff and the drawer (who had been partners in trade), and it was passed, in pursuance of an agreement between them, to a creditor of the firm, who subsequently returned it for the dishonor. In what respect this changes the rights of the plaintiff, as to the defendant, it is somewhat difficult to perceive. There was evidence in the case to show that the plaintiff was, upon the dissolution, to discharge the partnership debts, and also that, upon the faith of this very promise of the defendant, he allowed partnership property to the full amount of the bill to pass into the drawer's hands for his own exclusive use. But, independently of this evidence, the bill itself was not a partnership bill, though the drawer and the plaintiff had been partners. On the contrary, it was to be drawn on the sole account and credit of the drawer, and was to be accepted on that account; and if the plaintiff took the bill as the sole bill of the drawer, on the credit of the defendant's promise to accept it, for a valuable consideration, the use to which he should apply it, whether in payment of joint debts or otherwise, was nothing to the defendant. It in no respect changed the nature of his own undertaking. The receiving of such a bill, with the intent to apply the same to the payment of a partnership debt, might materially

affect the plaintiff; and we see that, by the subsequent insolvency of the drawer and his parting with the partnership effects, it did seriously affect his remedy in respect to his partner. The question is not put whether, if no loss had been sustained in any way, the plaintiff would have been entitled to recover against the defendant. By becoming an indorser upon the bill he incurred a responsibility to those to whom he indorsed it very different from that which he incurred to them as creditors of the partnership. This alone was a sufficient consideration to support the promise to accept. It should be added that the application of the bill to the payment of debts constituted no part of the ground of the promise of the defendant.

§ 149. — *nor will the fact that their copartnership affairs are still unsettled.*

Another objection is that the partnership accounts remain unsettled, and, therefore, the plaintiff ought not to recover. Surely this alone is not sufficient to deprive the plaintiff of his right of action. It is perfectly consistent with this state of facts that the plaintiff should be a creditor of the firm to an extent far beyond the amount of \$4,000. There is evidence in the record from which the jury might fairly presume that such was the case. But the circumstance that the accounts of the partnership were unsettled is put as of itself sufficient to defeat the plaintiff's recovery, which it cannot be admitted to be if in any possible case, consistently with that fact, he might have sustained any loss by taking the bill upon the faith of the defendant's promise.

§ 150. — *nor will a collateral agreement between the drawer and holder, providing for the payment of such bill in case of dishonor, invalidate such promise.*

Another objection, arising out of the fourth instruction prayed for by the defendant, which is very complicated and embarrassing in its presentation, is the effect of the agreement therein supposed between the plaintiff and the drawer to risk both the bills; and if the defendant should not accept both, then that the plaintiff would assist the drawer with funds, to take up the non-accepted bill at maturity. This agreement was not, in the slightest degree, prejudicial to any rights of the defendant. Its object was to provide funds, in the event of a non-fulfilment of the promise of the defendant to accept either of the bills. It did not waive or vary the defendant's contract; and, at most, could be considered only as a collateral agreement of the parties, forming additional private inducements for the drawing of the bill.

The same instruction includes another objection, which is, that if, from the evidence, the jury should believe that the plaintiff did, at the time of drawing the bills, state to the drawer that defendant promised him that he would accept one of the bills unconditionally, and the other, if in funds; and that the drawee did not accept and pay at maturity one of the bills, and had not funds of the drawer or of the plaintiff to pay the other at maturity, that they ought to find for the defendant. This part of the instruction proceeds altogether upon the ground that the mere statement of the plaintiff to the drawer, that the promise of the defendant was conditional, was a bar to the recovery. It does not affect to state that if, in point of fact, the promise was conditional, such would and ought to be the result; but that it was sufficient that the plaintiff so told the defendant, whether the fact were so or not. In our judgment, the rights of the plaintiff are to be decided by the fact whether the promise was conditional or not, and not by the mere assertion of the plaintiff. His assertion might properly be weighed by the jury, as part of the evidence, to control or explain it; but their verdict ought to be governed by their belief of the facts, and not their belief that a particular assertion was made.

These are all the objections which have been urged at the bar; and we are of opinion that the court was right in rejecting the instructions prayed for by the defendant. The judgment is, therefore, to be affirmed with costs.

CASSEL v. DOWS.

(Circuit Court for New York: 1 Blatchford, 335-343. 1843.)

STATEMENT OF FACTS.—The defendants, Dows & Cary, citizens of New York, directed their agent, Smith, at St. Louis, to procure consignments of western produce to them, offering to accept drafts drawn by the shipper. The advice was contained in letters to Smith, of date December 12, 1845, and February 2, 1846. Under directions from Smith one Huston made a consignment of hams, and drew a draft on the defendants for \$5,000. This draft was purchased by plaintiff, after seeing the letters above mentioned, and after being assured by Smith that he had full authority. The qualified acceptance of this bill was to the effect that defendants accepted it "for so much of the amount therein mentioned as the net proceeds of one hundred and eighty-five casks of hams, against which it was drawn, shall amount to," etc. The defendants received the hams, and rendered an account for a net balance of \$3,862.51, and a receipt for a check for that amount was found on the back of the bill. Plaintiff owed the defendants \$410.35, and the court instructed the jury that the plaintiff was entitled to recover after deducting that amount, and the payment receipted for on the back of the bill.

§ 151. *The holder and owner of negotiable paper may sustain a suit in his own name, notwithstanding indorsements thereon.*

Opinion by NELSON, J.

I. The case of *Dugan v. United States*, 3 Wheat., 172, is an authority in favor of the right of the plaintiff to sustain this suit in his own name, notwithstanding the indorsements upon the bill subsequent to that of Huston. The proof shows with reasonable certainty that those indorsements were made for the purpose of transmitting and collecting the paper. They, therefore, might have been stricken out at the trial. But if otherwise, and if they had been made for value, in the usual course of business, inasmuch as it appears that the plaintiff was the holder and owner of the paper at the time the suit was brought, it was properly brought in his name; and this whether the indorsements were stricken out at the trial or not. On the plaintiff's becoming re-vested with the title to, and interest in, the bill, the indorsements, whether for value or transmission, became matters of form, and were properly disregarded.

II. The bill was presented for acceptance on the 21st of March, acceptance was refused, and it was duly protested. Afterwards, on the 11th of June, it was protested for non-payment. A qualified acceptance by the defendants appears on the bill under the latter date to the amount of the proceeds of the hams against which it was drawn, and it is insisted that this is conclusive upon the plaintiff, as he must be presumed to have taken the conditional acceptance, and to have waived the benefit of the previous refusal.

§ 152. *The protest of a bill after a qualified acceptance is evidence that the qualification is not assented to.*

There is no positive proof in explanation of the circumstances under which this conditional acceptance was written on the bill. The fact, however, that Stedman, who presented the bill for payment at that time, caused it to be

protested on the same day for non-payment, affords ground for the conclusion that he did not assent to the qualified acceptance, but, on the contrary, regarded it as a refusal of payment, and as dishonoring the paper. The subsequent receipt from the defendants of the avails of the hams, when taken in connection with the previous facts and circumstances, must be deemed to have been an application of the proceeds only as far as they would go towards payment, and not an acceptance of them in satisfaction. The receipt does not purport to be in full, and the protest which Stedman caused to be made at the time of the conditional acceptance is altogether irreconcilable with the idea that he intended to assent to that acceptance and take the proceeds in satisfaction. The conclusiveness of the receipt of the proceeds depends upon the conclusiveness of the conditional acceptance. If the latter fails, the former must also.

III. The main question in the case is, whether or not the plaintiff can maintain the suit in his own name, under the counts charging the defendants with a promise to accept drafts drawn against consignment of western produce to him by the owner. The draft in question having been drawn by Huston in pursuance of authority communicated by the defendants to Smith, their agent, there can be no doubt that Huston could have maintained the action in his own name. It is insisted, however, that the plaintiff cannot, on the ground of a want of privity between him and the defendants, and that the promise, if made at all, was made to the owner and shipper of the produce, and not to any third person who might choose to advance money upon the draft.

§ 153. *Description of bill in written authority to draw.*

The cases of *Coolidge v. Payson* (2 Wheat., 66; §§ 139-141, *supra*) and of *Boyce v. Edwards* (4 Pet., 111) are direct authorities to show that the defendants in this case are not chargeable as acceptors of the bill. To make them liable in that capacity, the letters authorizing Huston to draw should have described the bill to be accepted with reasonable certainty, so that its identity could not be mistaken by the party who should take it upon the faith of such authority. In *Coolidge v. Payson* the letters specified the particular bill to be drawn, and the indorsee, who had taken it on the faith of such authority, recovered against the defendants as acceptors. The court came to the conclusion, after a review of all the cases, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, was a virtual acceptance, binding on the person who made the promise, if the bill was taken on the credit of the letter by a person to whom it was shown. In *Boyce v. Edwards* the plaintiff failed to recover against the defendants *as acceptors*, the authority to draw having been general, as it was in the case before us. The defendants were merchants in Charleston, who gave a general letter of credit to one Anderson, of Georgia, to buy and ship cotton to them, and, on sending the bill of lading, to draw upon them for the price. The bills in question had been drawn in pursuance of this authority, and negotiated to the plaintiff, who took them on the faith of the letter of credit. In the court below the plaintiff was allowed to recover against the defendants *as acceptors*. The supreme court, after referring to the case of *Coolidge v. Payson*, and other cases affirming the same doctrine, held that the judgment of the court below was erroneous, on the ground, principally, that the letter had no reference to the particular bills to be drawn, but was a general authority to draw at any time and to any amount, upon lots of cotton shipped, and that it did not describe any particular bills in terms not to be mistaken, which was indispensable in order to make the defendants liable as

acceptors. The court further remarked that the distinction between an action on a bill as an accepted bill, and one founded on a breach of a promise to accept, seemed not to have been adverted to, but that the evidence necessary to support the one or the other was materially different; that to maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted, while in the case of the latter, the evidence might be of a more general character, and the authority to draw be collected from circumstances and extended to all bills coming fairly within the scope of the promise. The court also observed, that, as respected the rights and remedies of the immediate parties to the promise to accept, *and of all others who might take bills upon the credit of such promise*, they were as secure and as attainable by an action on the breach of the promise to accept as they could be by an action on the bill itself; and that the action might have been sustained, as the evidence stood, if the declaration had contained a count, properly framed, on a breach of the promise to accept.

The same doctrine was asserted and applied in the case of *Russell v. Wiggin*, 2 Story, 214. There the defendants gave to one Breed a letter of credit, authorizing one Endicott to value on them at London, at six months sight, at any place in India, for account of Breed, for any sums not exceeding in all fifteen thousand pounds sterling, engaging that the bills should be duly honored when presented, if drawn within twelve months from the date of the letter. The plaintiffs, to whom the letter was exhibited, took the bills in question for value, relying on the commercial standing of the defendants, and on their promise in the letter. The declaration contained a count on a promise to accept. Judge Story, after an elaborate examination of the question, both on principle and authority, came to the conclusion that the plaintiffs were entitled to recover. He referred to the case of *Boyce v. Edwards* as affirming the same doctrine, and observed that in that case the court held that if, because the bill to be drawn was not definitely described in the manner limited by the case of *Coolidge v. Payson*, the promise to accept would not operate as an acceptance in favor of the party receiving the bill, still it would operate as a promise to him to accept the bill when drawn, and thus be equally available. See, also, *Adams v. Jones*, 12 Pet., 207. Upon the foregoing view of the authorities, therefore, this suit was properly instituted in the name of the plaintiff, and may be sustained on the promise to accept, as laid in the third and fourth counts of the declaration.

New trial denied.

RUSSELL v. WIGGIN.

(Circuit Court for Massachusetts: 2 Story, 214-242. 1842.)

STATEMENT OF FACTS.—Hooper, the agent in Boston of Wiggin & Co. of London, by their authority, gave Breed a letter authorizing Endicott to draw on them to the amount of £15,000. Breed agreed with the Wiggins to remit to Wiggin & Co. sufficient funds to meet all bills which might be drawn by virtue of their credit given him, together with all charges, but he failed, and certain of the drafts were protested. Russell brings suit against Wiggin & Co., having made advances relying upon the letter of credit given Breed.

Opinion by STORY, J.

This cause has been very ably argued. There is no count in the declaration upon any accepted bill of exchange; and, therefore, the whole class of authorities, English and American, so far as respects their direct bearing upon the question whether a promise to accept a non-existing bill amounts to a positive

acceptance thereof, when drawn in favor of a holder who takes the bill upon the faith of such promise, may be at once dismissed from our consideration, although they certainly must have a very forcible bearing upon one of the questions actually raised in the present case. In the case of *Wildes v. Savage* (1 Story, 22; §§ 986-990, *infra*), I had occasion to consider those authorities somewhat at large; and the result was, that although the English authorities might not now be deemed fully to support the doctrine, that such a promise would, under such circumstances, amount to an acceptance; yet the American were direct and positive to the purpose. Indeed, although there seems little doubt what is the present inclination of opinion in England, yet there is no pretense to say that there is any positive adjudication in England in opposition to the doctrine; and I may add, that in one of the latest cases in which the subject came before the court, that eminent commercial lawyer, Lord Chief Justice Gibbs, seemed to entertain an opinion directly in favor of the American doctrine; and he distinguished the case before him on that point upon the peculiar facts. *Miln v. Prest*, 4 Camp., 393; S. C., 1 Holt's N. P. R., 181. And it would be no matter of surprise to me, that if the doctrine contended for at the present argument should be established to be the law in England (as it is affirmed by Sir Frederick Pollock and Sir William Follett, and the other learned gentlemen whose opinions have been produced at the argument), that a promise to accept a bill would create no contract, except between the drawer and the promisor, although shown, and designed to be shown to induce the holder to take it, upon the ground of a want of privity between the holder and the promisor; I say it would be no matter of surprise to me that the courts of England should, whenever the question shall again arise, go back to the doctrine of Lord Mansfield in *Pillans v. Van Mierop*, 3 Burr., 1663, and *Pierson v. Dunlop*, Cowp., 571, as founded in a wholesome, nay, necessary justice, to prevent gross frauds, and manifest and irretrievable mischiefs in the intercourse of the commercial world.

There are two questions properly arising upon the state of facts presented to this court. The first is, Where is the contract of the defendants to be deemed to be made? Or, in other words, Is it, as to its obligation, construction and character, to be governed by the law of Massachusetts, where it was signed and executed by the agent of the defendants? Or, is it to be deemed a contract made in England, where the acceptance was to be made; in which case, it is to be governed, in the like particulars, by the law of England, assuming that law to differ from the law of Massachusetts? The second question is, Whether a promise, contained in a letter of credit, written by persons who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money on, and take the bills when drawn, will be an available contract in favor of the persons to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, or is void for want of privity between them and the persons writing the letter of credit?

§ 154. *Letter of credit executed in Boston is governed by the laws of Massachusetts.*

I cannot say that I entertain any serious doubts as to either question. As to the first, the letter of credit was executed in Boston by the agent of the defendants, with full authority for the purpose; and it is, to all intents and purposes,

the same, in legal effect, as if it had been there personally signed by the defendants themselves. It then created an immediate contract between the parties in Boston, and it is to be governed, as to its obligation, construction and character, by the law of Massachusetts, and not by the law of England; if, indeed, there be any distinction between them on this subject, which I am very far from believing there is. The contract was clearly valid and binding by the law of Massachusetts. It is true that the contract is to accept bills drawn on the defendants in London, and, of course, the acceptance is there to be made. But that does not make it less obligatory upon the defendants to fulfil their promise to accept, although the acceptance, in order to be valid, must be made according to the requirements of the English law. Suppose a like letter of credit were executed in Boston, to accept bills payable in Paris, in France, where an acceptance, to be binding, must be in writing (although by our law it may be verbal), there can be no doubt that, unless there was a written acceptance in Paris, no remedy could be had upon any bill drawn in pursuance of the letter of credit as an accepted bill. But there is as little doubt upon principles of international law and public justice, that in such a case the contract, being made in Massachusetts, and being valid by the laws thereof, would be, and ought to be, held valid in all judicial tribunals throughout the world, and enforced equally in France, in England, and America, as a subsisting contract, the breach of which would entitle the injured party to complete redress for all the damage sustained by him. The case of *Carnegie v. Morrison*, 2 Metc., 331, is directly in point upon this very question; and I entirely concur in that decision.

§ 155. *Written promise to accept may be sued on by one who makes advances upon bills in reliance upon such promise.*

The second question is one upon which, until I heard the present argument, I did not suppose that any real doubt could be raised, as to the law, either in England or America. I cannot but persuade myself that the doctrine of both countries, as far as this question is concerned, is coincident, notwithstanding the opinions of the learned counsel which have been brought to the notice of the court upon the present occasion (and for which, certainly, I feel an unaffected respect and deference), and which assert that the English doctrine denies all redress, under the circumstances, to the holder of the bills, and confines the whole remedial redress to an action between the drawers and the drawees of the bills, upon the ground that there is a want of privity between the drawees and the person who takes the bills as purchaser or holder. The case of *Marchington v. Vernon*, cited in a note to 1 Bos. & Pull., 101, before Mr. Justice Buller, seems to me fully to support the contrary doctrine. Assuming, however, that there is a total want of privity between the parties in the present suit, the conclusion to which these learned jurists have arrived may be admitted fairly to follow as a result of the doctrine of the common law, although I entertain great doubt whether, under such circumstances, a court of equity would not, and ought not, to administer complete relief, as a case of constructive fraud upon third persons. But my difficulty is in the assumption that, in the present case, there is no privity of contract between the plaintiffs and the defendants. It appears to me that this is an inference not justly deducible from the facts; and I know of no authority in English jurisprudence which countenances, far less any which establishes it, under circumstances like the present. On the contrary, I have understood, and always supposed, that, in the commercial world, letters of credit of this character were treated as in the nature of negotiable instruments; and that the party giving such a letter held

himself out to all persons who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man is ever supposed to advance money upon such a letter of credit, upon the mere credit of the party to whom the letter is given; and I venture to affirm that no man ever took bills on the faith of such a letter, without a distinct belief that the drawee was bound to him to accept the bills, when drawn, without any reference to any change of circumstances which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same, of which the holder, advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or, at best, a mere contingent security, and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole objects for which letters of credit are given. Let me state one or two cases to illustrate the doctrine which, it seems to me, is applicable to letters of this sort. Suppose the present letter of credit had contained an express clause, by which the defendants should directly promise any and all persons who should advance money and take bills on the faith thereof that they would accept and pay the bills so drawn in their favor; can there be any doubt that the promise would be available in favor of the persons making such advances, and create a direct privity of contract between them and the person who gave the letter of credit? If there could be no doubt in such a case, then it seems to me that the circumstances of the present case, and, indeed, of all cases of letters of credit of a similar character, do naturally and necessarily embody an implied promise to the same extent, and, therefore, ought to be governed by the same rule; for there can, in the intendment of the law, be no just distinction between cases of an express promise and cases of an implied promise applicable to transactions of this sort. Again, suppose, when the plaintiffs were about to advance their money on their bills, with the letter of credit before them, a partner or authorized agent of the firm of Wiggin & Co. had stood by and said, "Take these bills on the faith of this letter of credit, and our house will duly accept and pay them," and, upon the faith of that statement, the money was advanced and the bill was taken; could there be a doubt that there would be a privity of contract created directly between the plaintiffs and the defendants, and that they might compel the defendants to accept and pay the bills or indemnify them for the breach thereof? And yet, stripped of its mere external form, that is the very case before the court. The letter of credit was drawn to be carried abroad, and to be shown to any person or persons who would advance funds thereon to the drawers, and it imported that if any persons to whom it was shown should advance the money and take the bills on the faith thereof, the defendants would accept and pay the bills. Their letter of credit spoke this language to all the world as expressively as if they had stood by and repeated it by their agent.

§ 156. *Letter of guaranty.*

Take the case of a common letter of guaranty where the guarantor says, in general terms, in a paper addressed to A. B., the party for whose benefit it is given, "I hereby guaranty to any person advancing money or selling goods to A. B., not exceeding £100, the payment thereof at the expiration of the credit, which shall be given therefor." Can there be a doubt that any person making

the advances or selling the goods upon the faith of the letter is entitled to treat the paper as containing a direct and immediate promise to himself to guaranty the payment, notwithstanding it is addressed to A. B.? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject; and yet transactions of this sort are of every day's occurrence, especially where the person by whom the advance is to be made is uncertain or unknown. The case of *Adams v. Jones*, 12 Pet., 207, 213, is in point to show that such a guaranty, in such general terms, will bind the guarantor in favor of any person who shall trust the party upon the faith and credit of the guaranty. There is no pretense, in such a case, to say that there is not a sufficient consideration for the promise or obligation, for the consideration need not be immediately for the benefit of the guarantor; but it will be sufficient if there be a valuable consideration moving from the guarantee at the request of the guarantor in favor of a third person for whom the benefit is designed. It is like the common case where one man, for a valuable consideration of forbearance or otherwise, undertakes to pay the debt of another. The question is not of gain to the promisor, but of loss or detriment or delay on the part of the promisee. Lord Mansfield's reasoning, in *Pillans v. Van Mierop*, 3 Burr., 1663, treats it as a clear case of a sufficient consideration; that it is a mercantile transaction, and that the very nature of it imports an undertaking by the promisor to the persons taking the bills to honor them. Lord Mansfield went further in that case, and held that the agreement to accept amounted to an actual acceptance in favor of the party, upon the ground that he advanced the money and drew the bill upon the faith of the prior negotiations and promise. Mr. Justice Yates, in the same case, said that "any damage to another, or suspension or forbearance of a right, is a foundation for an undertaking and will make it binding, although no actual benefit accrues to the party undertaking." He added: "Now here the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." In the case at bar a benefit did, in fact, accrue to Wiggin & Co., for in no other way could they have received the interest and advances intended to be obtained by their grant of the letter of credit. In *Pierson v. Dunlop*, Cowp., 571, 573, and in *Mason v. Hunt*, 1 Doug., 297, Lord Mansfield took notice of the true distinction between cases where a promise inures solely between the parties, and where it inures in favor of a third person also. "It has been truly said, as a general rule (was his language), that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement. But, if there were such circumstances, it may amount to an acceptance, although the answer be contained in a letter to the drawer." The cases of *Johnson v. Collings*, 1 East, 93, and *Clarke v. Cock*, 4 East, 56, do not, in any manner, shake the propriety of this doctrine, as to its creating a privity of contract between the parties, whether it amounts to an acceptance or not; and Mr. Justice Le Blanc, in both cases, expressly recognized Lord Mansfield's doctrine as containing the true limitations and distinctions which ought to govern in all cases of this sort. In the case of *Johnson v. Collings*, as well as in the case of *Miln v. Prest*, 4 Camp., 393, the promise to accept had not been shown to the party taking the bill, and, therefore, the bill was not taken on the faith thereof. Nor, indeed, had it been even authorized to be shown to the party, which constitutes the striking difference between such a promise and a letter of credit, the letter being *ex vi termini* designed to be shown, if necessary, to obtain the very credit or advances from

a third person. Lord Mansfield, indeed, guarded himself on this very point, and said, not that it always does create an acceptance, but that it may do so. Now, if it would, in any case, create an acceptance, *a fortiori* it would create a privity of contract, founded upon the promise to accept; for the latter must, in all cases, constitute the foundation of the former. In none of these cases was the point presented exactly under the view in which it now comes before this court. In neither of them was there a letter of credit designed to circulate and thus to preserve credit to the bills which should be drawn. And not one word, in the reasoning of any of these cases, hints at any suggestion that a letter of credit, in its commercial sense, would not create such a privity, if it was intended to be shown and used to induce any third person to advance money on the bills. If the question were entirely new, I confess that I should not entertain the least doubt that, according to the known course of mercantile transactions upon letters of credit of this sort, the giver and the receiver intended them to be a circulating medium of credit for the receiver, and that the promise to accept should be an obligatory contract with any and every person who should advance money on the bills on the faith thereof. The language of Lord Mansfield, in *Mason v. Hunt*, 1 Doug., 297, 299, is exceedingly strong for this purpose: "There is no doubt (said he) that an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and the acceptor. But an agreement to accept is still but an agreement; and, if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions." Now, it is impossible to read this language, and not to feel that, if the case were one of a letter of credit, designed by the parties to be used upon the exchange, it would necessarily create a privity of contract between the party advancing his money and the drawee, binding upon the latter. In short, the contract would be a contract, not with the drawer alone, but with any party who should advance the money on the faith of the letter. I have seen no case in England which shakes, much less which overturns, this doctrine. And, if there were, I should pause a great while before I could bring my mind to desert the clear judgment of that great judge, Lord Mansfield, never excelled as a judge in the administration of commercial jurisprudence, upon a question of such plain equity and justice, in favor of any other and subsequent adjudication by other minds. I consider a letter of credit drawn like the present, for purposes of a general nature, to be equivalent in import and intention to the following language: "Take this letter of credit, show it to any person whatsoever, and I promise any person who shall, on the faith thereof, advance you money on bills drawn within the scope thereof, that I will accept and pay those bills." I confess myself unable to perceive, upon any grounds of the common law, or of common sense and justice, why such a circulating promise should not be obligatory.

But, be the English doctrine as it may be, the present case must be governed, not by that law, but by the commercial law of America, where the contract was entered into. And it is perfectly clear, at least in the jurisprudence which is enforced in the supreme court of the United States, that a letter written within a reasonable time either before or after the date of a bill of exchange,

describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding upon the person who makes the promise. This was expressly so held by the supreme court in *Coolidge v. Payson* (2 Wheat., 66-75; §§ 139-141, *supra*), and has been fully recognized and established by that court in every subsequent case which has arisen on the subject, and especially in *Schimmelpennich v. Bayard* (1 Pet., 234; §§ 135-138, *supra*), and *Boyce v. Edwards*, 4 Pet., 111. Now, it is plain that if such a promise becomes, as it were, a circulating promise to accept the bill, when drawn, in favor of and to any party who shall take the bill upon the faith of such promise, and operates as an acceptance of the bill, it must be because the promise to accept in such a case is a promise by intendment of law made to the party who takes the bill, and then, at his election, it may be treated as an acceptance or as a promise to accept. This, therefore, alone would establish the point of a privity of contract between the party giving the letter of credit and the party advancing the money and taking the bill on the credit thereof; and it is manifestly founded on a sufficient consideration. Now, I know of no just or reasonable ground upon which a distinction can be maintained between an implied acceptance in favor of the person who makes advances, and takes the bill under such circumstances, and a promise to accept the bill. In each case it inures as a direct contract with the party, founded upon the intent and the object of the letter of credit or the written promise; and he has, and ought to have, his election, either to treat it as a positive acceptance, or as a promise to accept made directly to him through the open letter of credit addressed to him, either specially or generally, for that purpose. Such is the doctrine which for many years I have constantly supposed to be well established in the practice of the commercial world, and, therefore, never questioned in courts of justice; and upon this very doctrine my judgment proceeded in the recent case of *Baring v. Lyman*, 1 Story, 397, 414, 415; S. C., 4 Law Rep., 303. It does not, however, rest upon my single opinion, but it has been fully recognized by the supreme court of the United States. In *Townesley v. Sumrall* (2 Pet., 170, 181; §§ 142-150, *supra*), the court said: "If a person undertake, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchase to accept it, and the bill is drawn and purchased upon the credit of such promise for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another, and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence that the direct consideration moves to a third person, as in this case to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A. says to B., 'Pay so much money to C., and I will repay it to you,' it is an original, independent promise; and, if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol, because there is an original consideration moving between the immediate parties to the contract. Damage to the promisee constitutes as good a consideration as benefit to the promisor. In cases not absolutely closed by authority this court has already expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises, made by different

persons at the same time, upon the same general consideration. Then, again, as to the consideration, it can make no difference in law whether the debt for which the bill is taken is a pre-existing debt or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. Under such circumstances, there is no substantial distinction whether the bill be then in existence or be drawn afterwards. In each case the object of the promise is to induce the party to take the bill upon the credit of the promise; and if he does so take it, it binds the promisor. The question whether a parol promise to accept a non-existing bill amounts to an acceptance of the bill, when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance." In *Boyce v. Edwards*, 4 Pet. R., 111, 121, 122, 123, the court held that if, in the particular case, by reason of the bill to be drawn not being definitely described, in the manner limited by the case of *Coolidge v. Payson*, 2 Wheat., 75, the promise to accept would not operate as an acceptance of the bill in favor of the party receiving it, still it would operate as a promise to him to accept the bill, when drawn, and thus be equally available for him. The language of the court, upon that occasion, was: "The rule laid down in *Coolidge v. Payson* requires the authority to be pointed to the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application." And again: "The distinction between an action on a bill as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the bills; and this has led judges frequently to express their dissatisfaction that the rule had been carried as far as it has, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself."

The case of *Adams v. Jones*, 12 Pet., 207, 213, is equally explicit to show that a written promise made to one person may inure as a promise in favor of another person, who gives credit on the footing of that promise, where the terms of the latter are such as prove that it was intended to be shown, and to produce that very credit.

The case of *Carnegie v. Morrison*, 2 Metc., 381, 395, 396, is also an authority to the same purpose; and, indeed, it runs on all fours with the present case.

It is unnecessary for me to add that my own judgment is persuasively gov-

erned by these decisions, not merely as authorities (although that would be a decisive ground), but upon principle, as tending to further and establish commercial confidence, and to give that sanctity, circulation and faith to letters of credit which constitute the very foundations upon which they were first built, and by which alone they can be sustained in the business of modern commerce. My judgment, therefore, is that the plaintiff is entitled to recover the amount of the damages sustained by the refusal of the defendants to accept the bill in controversy.

§ 157. *Damages on a protested bill should include re-exchange.*

What should those damages be? Should they cover all the money actually paid upon the protested bills by the plaintiffs, including re-exchange, together with interest, or should the re-exchange be excluded? It is clear that the acceptor is not, ordinarily, bound to any holder to pay re-exchange upon his refusal to pay the bill, but only to pay the principal and interest. But here the drawees (the defendants) have promised to accept and pay the bill upon a sufficient consideration; and I do not perceive any ground why the defendants should not be bound to indemnify the plaintiffs against all losses, including re-exchange, which have been the natural and necessary consequence of their refusal to perform their contract made with the plaintiffs. The defendants are not sued as acceptors, but as special contractors who have broken their contract, by which breach the plaintiffs have been compelled to pay the very moneys, including re-exchange, which they now seek to recover back. It seems to me that they are entitled to the full amount paid by them, and interest upon the same from the time when it was paid. That interest should be the interest of the place where the money was payable by the plaintiffs, and, of course, where they were to be reimbursed. The case of *Riggs v. Lindsay*, 7 Cranch, 500, seems to me a clear and satisfactory authority that the plaintiffs are entitled to a full reimbursement of all the sums paid by them, including re-exchange. This also appears to have been the opinion of Mr. Justice Bayley, in his work on Bills of Exchange. Bayley on Bills, ch. 9, p. 353, 5th London ed., 1830; id., Amer. ed., p. 380. It was also directly affirmed by Lord Camden in *Francis v. Rucker, Amb.*, 672. Pothier holds that the acceptor is, in all cases, bound to pay the re-exchange to the holder in the same manner as the drawer would be (Pothier De Change, n. 117), which is carrying the rule beyond what our law seems to justify. *Napier v. Schneider*, 12 East, 420; *Woolsey v. Crawford*, 2 Camp., 445. See, also, Story on Bills of Exchange, § 459 to § 463.

For these reasons I am of opinion that the whole damages and costs, and expenses paid by the plaintiffs, including re-exchange, with interest, are to be included in the judgment for the plaintiffs.

SCUDDER v. UNION NATIONAL BANK.

(1 Otto, 406-414. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—It is not necessary to examine the question whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion that the question does not arise. Nor does it become necessary to examine the question

of pleading which is so elaborately spread out in the record. The only serious question in the case is presented upon the objection to the admission of evidence and to the charge of the judge.

Upon the merits the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz:

"\$8,125.00.

CHICAGO, July 7, 1871.

"Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of

"LELAND & HARBACH.

"*To Messrs. Henry Ames & Co., St. Louis, Mo.*"

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the 7th day of July, 1871, shipped to them at St. Louis five hundred barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for \$8,000. Leland & Harbach then drew the bill in question and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill unless accompanied by the bill of lading or other security. The clerk returned and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against five hundred barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the bank and made this statement to its vice-president, who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank. The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought. The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself. The objection relied on is that the transaction amounted, at most, to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

§ 158. *What law governs contract as to acceptance.*

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the state of Illinois, and the contract having been made in that state, the judgment is to be given according to the law of that state. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*. In Wheaton on Conflict of Laws; sec. 401 *p*, the rule is thus laid down: "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and

how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." *Miller v. Tiffany*, 1 Wall., 310; *Chapman v. Robertson*, 6 Paige, 627; *Andrews v. Pond*, 13 Pet., 78; *Lanusse v. Barker*, 3 Wheat., 147; *Adams v. Robertson*, 37 Ill., 59; *Ferguson v. Fuffe*, 8 C. & F., 121; *Bain v. Whitehaven & Furness Junction R'y Co.*, 3 H. L. Cas., 1; *Scott v. Pilkington*, 15 Abb. Pr., 285; *Story*, *Confl. Laws*, 203; *De Wolf v. Johnson*, 10 Wheat., 367.

§ 159. *Bill is made at the place where it is made payable.*

The rule is often laid down that the law of the place of performance governs the contract. Mr. Parsons, in his "Treatise on Notes and Bills," uses this language: "If a note or bill be made payable at a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated." p. 324.

For the purposes of payment and the incidents of payment this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance.

§ 160. — *presentation for acceptance or protest; rate of interest.*

The time, manner and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young v. Harris*, 14 B. Mon., 556; *Parry v. Ainsworth*, 22 Barb., 118), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule that the place of performance governs the bill. The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary to the validity of the contract. p. 317. Thus, whether a contract shall be in writing or may be made by parol is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Hatch*, 4 Zab., 319. So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Sheldon*, 12 Wend., 439. So if a note payable in New York be given in the state of Illinois for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent. interest is allowed by the laws of the former state. *Miller v. Tiffany*, 1 Wall., 310; *Depeau v. Humphry*, 20 How., [Martin?] 1; *Chapman v. Robertson*, 6 Paige, 627; *Andrews v. Pond*, 13 Pet., 65.

§ 161. *What law governs execution, interpretation and validity of contract.*

Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions.

§ 162. *Verbal acceptance is valid.*

There is no statute of the state of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; on the contrary, a parol acceptance and a parol promise to accept are valid in that state, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson v. First Nat. Bank*, 48 Ill., 39; *Mason v. Dousay*, 35 id., 424; *Jones v. Bank*, 34 id., 319. Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne v. Raikes*, 5 East, 514; *Bank of Ireland v. Archer*, 11 Mees. & W., 383; *How v. Loring*, 24 Pick., 254; *Ward v. Allen*, 2 Metc., 53; *Bank v. Woodruff*, 34 Vt., 92; *Spalding v. Andrews*, 12 Wright, 411; *Williams v. Winans*, 2 Green (N. J.), 309; *Storer v. Logan*, 9 Mass., 55; *Byles on Bills*, sec. 149; *Barney v. Withington*, 37 N. Y., 112. See the Illinois cases cited, *supra*. Says Lord Ellenborough, in the first of these cases, "A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to do the one or the other,—i. e., to accept or certainly pay,—cannot be less than an acceptance."

In *Williams v. Winans*, Hornblower, C. J., says, "The first question is, whether a parol acceptance of a bill will bind the acceptor; and of this there is at this day no room to doubt. The defendant was informed of the sale, and that his son had drawn an order on him for \$125; to which he answered, it was all right. He afterwards found the interest partly paid, and the evidence of payment indorsed upon it in the handwriting of the defendant. These circumstances were proper and legal evidence from which the jury might infer an acceptance." It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration; and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest. *Townsley v. Sumrall*, 2 Pet., 170 (§§ 142–150, *supra*); *Boyce v. Edwards*, 4 id., 111; *Goodrich v. Gordon*, 15 Johns., 6; *Scott v. Pilkington*, 15 Abb. Pr., 285; *Ontario Bank v. Worthington*, 12 Wend., 593; *Bissell v. Lewis*, 4 Mich., 450; *Williams v. Winans*, *supra*. These principles settle the present case against the appellants. It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact,

the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

The judgment must be affirmed.

RABORG v. PEYTON.

(2 Wheaton, 385-399. 1817.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an action of debt brought against the defendant in error, as acceptor of a bill of exchange, by the plaintiffs in error as indorsees. The declaration alleges that the bill was drawn, accepted, and indorsed, for value received. The only question is, whether debt lies in such a case.

§ 163. *Debt lies against an acceptor.*

The general principle has been very correctly stated by Lord Chief Baron Comyn, that debt lies upon every express contract to pay a sum certain; and he adds, also, that it lies though there be only an implied contract. Com. Dig., Debt, a. 8, a. 9. But it has been supposed that this principle does not apply to an action on a bill of exchange, even where the suit is brought by the payee against the acceptor, and *a fortiori* not where it is brought by the indorsee. It is admitted that in *Hardres*, 485, the court held that debt does not lie by the payee of a bill of exchange against the acceptor. The reasons given for this opinion were, first, that there is no privity of contract between the parties; and secondly, that an acceptance is only in the nature of a collateral promise or engagement to pay the debt of another, which does not create a duty.

§ 164. *A privity of contract exists between payee and acceptor.*

It is very difficult to perceive how it can be correctly affirmed that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another for the use of a third person, it has been settled that such a privity exists that the latter may maintain an action of debt against the bailee. *Harris v. De Bervoir*, Cro. Jac., 687. And it is clear that an acceptance is evidence of money had and received by the acceptor for the use of the holder. *Tallock v. Harris*, 3 Term R., 174; *Vere v. Lewis*, 3 Term R., 172. It is also evidence of money paid by the holder to the use of the acceptor. *Vere v. Lewis*, 3 Term R., 172, and *Bailey on Bills*, 164, 3d edition. A privity of contract, and a duty to pay, would seem, in such a case, to be completely established; and wherever the common law raises a duty, debt lies.

§ 165. *Acceptance not a collateral promise to pay another's debt.*

The other reason would seem not better founded. An acceptance is not a collateral engagement to pay the debt of another; it is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is, of itself, an express appropriation of those funds for the use of the holder. The case

may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort to the drawer but upon a failure of due payment of the bill. The engagement of the drawer, therefore, may more properly be termed collateral. Yet it has been held that debt will lie in favor of a payee against the drawer in case of non-payment by the acceptor. *Hard's Case*, Salk., 23; *Hodges v. Stewart*, Skinn., 346; and see *Bishop v. Young*, 2 Bos. & Pull., 78.

The reasons, then, assigned for the decision in *Hardres* are not satisfactory; and it deserves consideration that it was made at a time when the principles respecting mercantile contracts were not generally understood. The old doctrine upon this subject has been very considerably shaken in modern times. An *indebitatus assumpsit* will now lie in favor of the payee against the acceptor; and it is generally true that where such an action lies, debt will lie. And a still stronger case is, that an acceptance is good evidence on a count upon an *insinul computassant* (*Israel v. Douglass*, 1 H. Bl., 239), which can only be upon the footing of a privity of contract. But the most important case is that of *Bishop v. Young*, 2 Bos. & Pull., 78. It was there held, in opposition to what was supposed to have been the doctrine of former cases, that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. That decision was given with measured caution, and the court expressly declined to give any opinion upon any but the case in judgment. The case in *Hardres* was there discussed, and although its reasoning was not impugned, an authoritative weight was not attempted to be given to it. In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and after indorsement, each incurs the same liabilities. And if an action of debt will lie in favor of the payee of a note against the maker, it is not easy to perceive any sound principle upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties as the drawing of a note.

§ 166. *Every subsequent holder of a bill is a payee.*

The case has been thus far considered as if the action were brought by the payee against the acceptor. And this certainly presents the strongest view in favor of the argument. But in point of law every subsequent holder, in respect to the acceptor of a bill and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee. 3 T. R., 172; *id.*, 184; *Grant v. Vaughan*, 3 Burr., 1516. Upon the whole, we do not think that the authority in *Hardres* can be sustained upon principle; and we see no inconvenience in adopting a rule more consonant to the just rights of the parties, as recognized in modern times. In so doing, we apply the well-settled doctrine that debt lies in every case where the common law creates a duty for the payment of money, and in every case where there is an express contract for the payment of money. We are, therefore, of opinion that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor, when it is expressed to be for value received. The case at bar is somewhat stronger; for the declaration expressly avers that the bill was drawn, indorsed and accepted for value received, and the demurrer admits the truth of the averment.

This opinion must be certified to the circuit court of the District of Columbia. From the view which has been taken of the case, it is unnecessary to consider whether the statute of Virginia applies to it or not.

Certificate, accordingly.

KONIG v. BAYARD.

(1 Peters, 250-268. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit was brought in the court of the United States for the second circuit and district of New York, on a bill of exchange drawn by John C. Delprat, of Baltimore, on Messrs. N. and J. and R. Van Staphorst, of Amsterdam, in favor of Le Roy, Bayard & Co., of New York, and indorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff, for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case stated by the parties. The judges of the circuit court were divided in opinion on the following points: 1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted. 2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest. The first question is understood to be waived. It is a question which was decided by the court at the trial, and could not arise after verdict, unless a motion had been made for a new trial.

§ 167. *Right to accept and pay supra protest.*

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard & Co. to Messrs. Rougemont & Behrends, of London, to have it presented for acceptance, who inclosed it to the plaintiff in a letter, from which the following is an extract: "We beg you to have the inclosed accepted; 1st, of fl. 21,500, 60 days, on N. and J. and R. Van Staphorst, and hold the same to the disposal of 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and, in case of refusal, you will have the bill protested." The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants. Messrs. N. and J. and R. Van Staphorst addressed a letter to the defendants, dated the 26th of November, 1822, giving notice that the bill was dishonored, the drawer having no right to draw, and that they were advised by counsel not to interpose in their own names for the honor of the defendants. The letter adds: "In this predicament we applied to our friends William Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guaranty, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favor these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest." The defendants also gave in evidence a letter from the plaintiff, stating that he had intervened at the request of N. and J. and R. Van Staphorst, and under their guaranty; but that they required him to proceed against the defendants as preliminary to the performance of that guaranty. It was admitted that the bill was drawn by J. C. Delprat on his own account, and not on any shipment for a debt due from him to the defendants for advances previously made to him; and that he had given to the

defendants an order on N. and J. and R. Van Staphorst for all balances due from them to him. It is not alleged that the drawees had any funds of the drawer in their hands.

§ 168. *Where a bill is accepted supra protest at the instance of the drawee, by his agent for the honor of an indorser, who is not damaged by the circuitry of the proceedings, the acceptor may on payment recover from the indorser.*

The plaintiff in this case must be considered as the agent of N. and J. and R. Van Staphorst, and as having paid the bill at their instance. All parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors to the defendants. It is impossible to doubt that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner cannot affect a transaction which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been made, unless those persons were exposed to some inconvenience, to which they would not have been exposed had the interposition been direct. This is not the case in the present instance, since it cannot be doubted that the defendants might have availed themselves of every defense in this action of which they could have availed themselves had N. and J. and R. Van Staphorst been plaintiffs. The case shows plainly that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

JEWETT v. HONE.

(Circuit Court for Georgia: 1 Woods, 530-536. 1873.)

Opinion by Woods, J.

STATEMENT OF FACTS.—This action is brought by plaintiffs as holders, against the defendant as acceptor, of a bill of exchange, of which the following is a copy:

“\$2,587.90.

NEW YORK, June 25, 1870.

“Thirty days after date pay to the order of ourselves, twenty-five hundred and eighty-seven 90-100 dollars, with exchange on New York, and charge the same to account of

CHRISTOL & STRUTHERS.

“To Mr. Wm. Hone, Savannah, Ga.”

The bill was indorsed by Christol & Struthers and accepted by defendant. To the declaration upon this bill the defendant has pleaded the general issue, and a special plea to the effect that the acceptance was without consideration and for the accommodation of the drawers, and that the bill was given to the plaintiffs in liquidation of an antecedent debt due from the drawers to the plaintiffs, and that no injury or detriment has accrued to the plaintiffs, or benefit to the drawers or defendant, by reason of said acceptance. The facts about which there is no dispute are in substance these: On the 25th of June, 1870, Christol & Struthers were a firm doing business in the city of New York. They were indebted to the plaintiffs, John Jewett & Sons, who were pressing them for payment. Christol & Struthers, being unable to pay their indebtedness to plaintiffs, applied to the defendant, William Hone, of Savannah, for assistance, which he assented to give. To this end Christol & Struthers drew

the bill in question, which was indorsed by Christol & Struthers and accepted by Hone, who was purely an accommodation acceptor, and received no consideration for his acceptance, and Christol & Struthers agreed with him to pay the bill at maturity. The bill so indorsed and accepted was before maturity transferred by Christol & Struthers, who were "hard pressed," to the plaintiffs, who were their creditors, "in liquidation of a debt due them," and the plaintiffs "received it for the amount expressed on its face." Jewett & Sons knew when they received the draft that Hone was an accommodation acceptor.

The question presented by the case should have been raised on demurrer to the sufficiency of the plea. Such demurrer was not filed, and the point in controversy is submitted to the court upon the motion of plaintiff to exclude the evidence of the defendant tending to establish his special plea. The point for our determination is this: Can an accommodation acceptor of a bill of exchange, transferred before maturity by the drawees in liquidation of an antecedent debt, set up as a defense to an action against him upon the bill the fact that he was an accommodation acceptor, that fact being known to the holders when they received the bill?

§ 169. *State decisions upon commercial law not binding upon federal courts. Authorities.*

It is claimed by the defendant that the contract sued on is a New York contract, made and to be performed in that state, and that it must be governed by the law of that state. It is further insisted that by the law of New York, as set forth in the decisions of the courts, the facts set up in the special plea would be a good defense to this action, and we are cited to the following cases: *Wardell v. Howell*, 9 Wend., 170; *Rosa v. Brotherson*, 10 id., 86; *Hart v. Palmer*, 12 id., 523; *Root v. French*, 13 id., 570. Is this court bound by these decisions, admitting that they set forth the settled doctrine in New York? This question was raised and decided in the negative by the supreme court of the United States in *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *infra*), in which the court says, in referring to the same decisions cited in this case: It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the judiciary act of 1789, chapter 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides that "the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in cases where they apply. In order to maintain the argument it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to

the positive statutes of the state and the construction thereof adopted by the local tribunals, and to the rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character. It has never been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, when the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. . . . The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield, in *Luke v. Lyde*, 2 Burr., 883, 887, to be in a great measure not the law of a single country, but of the commercial world: *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore una eademque lex obtinebat.*"

This extract from the decision of the supreme court of the United States shows conclusively that we are not to be controlled by the decisions of the local tribunals of New York in passing upon the rights of the parties in this action, even if these decisions were uniform; but they are not. Thus, in *Warren v. Lynch*, 5 Johns., 239, the supreme court of New York held that a pre-existing debt was a sufficient consideration to entitle a *bona fide* holder, without notice, to recover the amount of a note indorsed to him, which might not, as between the original parties, have been valid; and the same doctrine was held by Mr. Chancellor Kent, in *Bay v. Coddington*, 5 Johns. Ch., 54. And the cases in 10, 12 and 13 Wendell, *supra*, have, by subsequent decisions of the supreme court of judicature of the state, been overruled. *Bank v. Babcock*, 21 Wend., 499; *Bank v. Scoville*, 24 id., 115. We think it clear, therefore, that in determining the liability of the defendant, we are to be guided by the rule of the general law merchant, and not by the shifting and conflicting decisions of any local tribunals.

§ 170. *A pre-existing debt is a valuable consideration upon which the holder of a negotiable instrument is entitled to protection against all equities between antecedent parties.*

Do the facts, then, as they appear in this case, constitute a defense to the action? We think the current and weight of authority sustain the doctrine that a *bona fide* holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *infra*); *Coolidge v. Payson*, 2 Wheat., 66; *Townsley v. Sumrall*, 2 Pet., 170 (§§ 142-150, *supra*); *Atkinson v. Brooks*, 26 Vt., 569; *Poirier v. Morris*, 20 Law & Eq., 103; *Petrie v. Clark*, 11 Serg. & R., 377; *Gibson v. Conner*, 3 Kelly, 47. In *Swift v. Tyson* the supreme court of the United States says: "It becomes necessary for us, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule as applicable to negotiable instruments. Assuming it to be true that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course

of trade and business, for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of or as security for a pre-existing debt is according to the known usual course of trade. . . . This question has several times been before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt or is contracted at the time of the transfer. In each case he equally gives credit to the instrument." In *Atkinson v. Brooks*, 26 Vt., 569, *supra*, the court says: "But it has often been claimed that there is an essential difference in principle between taking a current note or bill in payment and as security for a prior debt then due. The transactions are certainly different in form at least. But it seems to me the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly or he becomes bankrupt. If, instead of money, he gives a bill or note, either on time or at sight, whether this is, in form, payment or collateral to his debt, he gains time and saves the disgrace and ruin consequent upon stopping payment. And in either case there is an implied undertaking that he shall wait upon his debtor till the result of the new security can be known, and, in both cases, where that proves unproductive the creditor may pursue his original debt, or he may sue the prior parties on the new security. . . . According to the general commercial usage there is no essential difference in principle whether a current note or bill is taken in payment of it as collateral security for a prior debt, provided the note is in both cases truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general law merchant in enforcing payment."

In *Percival v. Frampton*, 2 Crompt., M. & R., 180, Parke, Baron, says: "If the note was given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be holders for a valuable consideration." In *Palmer v. Richards*, 1 Eng. Law & Eq., 529, it was held that it was not material whether the note or bill be deposited as security for an advance or in payment. In *Poirier v. Morris*, 20 Law & Eq., 113, Lord Campbell, C. J., in giving judgment, says: "There is nothing to make a difference between this and a common case where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." In the same case *Crompton, J.*, says: "Whether the bill was a collateral security, or whether it had the effect of suspending the judgment of the antecedent debt, is quite immaterial." Such is regarded as the settled law in England at the present day, and most of the states of the Union have virtually adopted the rule as laid down in *Swift v. Tyson*. In *Georgia, Gibson v. Connor*, 3 Kelly, 47, expressly decides that taking such paper as collateral security for a prior debt is sufficient to shut out equitable defenses. See, also, *Reddick v. Jones*, 6 Ired., 107; *Allaire v. Harts-horne*, 1 Zab., 665; *Chicopee Bank v. Chapin*, 8 Metc., 40; 3 Kent. Com., 96; *Allen v. King*, 4 McL., 128 (§§ 1041-1047, *infra*). We think that we are justified, by the authorities cited, in holding that whether or not Jewett & Sons received the bill in question in absolute discharge of their debt, or as a security merely, they are holders for value. Were they *bona fide* holders without notice? On this point there can be no doubt. It is true that they knew that Hone was an accommodation acceptor, but the paper was transferred to them to accomplish the very purpose Hone had in view in making the acceptance. They are now only calling upon Hone to do what he agreed to do when he put his name

upon the bill. To say that because Hone received no consideration from Christol & Struthers for the acceptance, and that plaintiffs knew the fact, does not release Hone, for, as we have seen, the plaintiffs took the bill for value. To hold that, because Hone was an accommodation acceptor, and the plaintiffs knew it, therefore the bill is not good, would be to strike a fatal blow at all discounts of negotiable securities for pre-existing debts. Upon such a doctrine, what would become of that large class of cases where new notes are given by the same or other parties by way of renewal or security to banks in lieu of old securities discounted by them, which have arrived at maturity?

We are of opinion, therefore, upon the whole case, that the evidence offered to sustain the defense can be of no avail, and we therefore sustain the motion to exclude it from the jury.

ANDRESSEN v. FIRST NATIONAL BANK OF NORTHFIELD.

(Circuit Court for Minnesota: 1 McCrary, 252-256. 1880.)

Opinion by NELSON, D. J.

STATEMENT OF FACTS.—This suit is brought to recover from the defendant \$2,728.49, with interest from October 1, 1878. The trial is before the court without a jury, and the following are the facts: The plaintiffs, citizens of the kingdom of Norway, are bankers, doing business at Christiania. The firm of Wilson & Jurgens, bankers in the city of La Crosse, Wisconsin, and the correspondents of the plaintiffs, sent to them a printed list of their correspondents in this country, among whom was the defendant, and authorized the plaintiffs to draw drafts on them, to be paid on account of Wilson & Jurgens. The plaintiffs drew a draft as follows:

“For \$2,724.87, gold.

CHRISTIANIA, 16th August, 1878.

“Three days after sight pay this first of exchange (second unpaid), to the order of Mr. Ole Mikkelsen, two thousand seven hundred and twenty-four dollars and eighty-seven cents, gold, value received, and place it to account of W. & J., without or as per advice from.

“N. A. ANDRESSEN & Co.

“To the First National Bank, Northfield, Minn.

“In need with Messrs. Wilson & Jurgens, La Crosse.”

The First National Bank, Northfield, had no funds of the plaintiffs, and was unknown to them, except as included among the correspondents of Wilson & Jurgens. Ole Mikkelsen, the payee in the draft, presented it to the drawee September 7, 1878, and an officer of the bank said it was all right, received it, paid \$24 upon it, issued a certificate of deposit to the payee for the balance, and made the following entries in the bank books:

	Debit.	Credit.
September 7, 1878. Certificate of deposit in favor of Ole Mikkelsen, No. —.....		\$2,700 00
September 7, 1878. Cash paid.....		24 87
September 7, 1878. Wilson & Jurgens, draft forwarded for collection	\$2,724 87	
September 9, 1878. Draft was intercepted and handed to Batavia Bank, La Crosse, for protest.		
September 10, 1878. Certificate of deposit withdrawn and canceled, and receipt given for collection.		
W. & J. draft returned.....		\$2,724 87
Certificate deposited, account canceled.....	\$2,700 00	
Bills receivable, Mikkelsen note.....	24 87	

The draft was sent to Wilson & Jurgens by the First National Bank, with a request to send gold draft on New York for amount, and on discovery of Wilson & Jurgens' bankruptcy, it was subsequently intercepted at La Crosse, and the Batavia Bank, having no interest in it, caused it to be protested at the instance of the First National Bank of Northfield. The plaintiffs had ample means, some \$4,500, on deposit with Wilson & Jurgens, when this draft was drawn. On August 29, 1878, Wilson & Jurgens were adjudged bankrupts. Their assets were in the hands of an assignee at the time the draft was presented for payment by the Batavia Bank. The draft was returned to Andresen & Co., with the protest, and the following letter from Ole Mikkelsen:

"NORTHFIELD, Sept. 18, 1878.

"*Messrs. N. A. Andresen & Co., Christiania:*

"DEAR SIRs — The draft, \$2,724.87, I bought from you on the 16th of August has been protested on the ground that Messrs. Wilson & Jurgens, of La Crosse, became insolvent. I return this to you through the First National Bank of this city, and Messrs. Knauth, Machod & Kuhne, of New York, for collection.

"I have bargained for a farm here, and hope there will be no delay in collecting the amount of the draft.

"Yours, etc.,

OLE MIKKELSEN."

The plaintiffs, believing that the defendant had not paid the draft as it asserted, and that Wilson & Jurgens had not been able to pay on account of insolvency, when returned to them, paid it. On discovering, from a correspondence with the assignee in bankruptcy and others, the facts, suit is brought to recover from defendant the amount paid. The draft on its face indicated that it was drawn for the account of Wilson & Jurgens, and if not paid for any reason by the drawee, the holder could apply to Wilson & Jurgens for payment. Defendant was not authorized to pay for the account of the drawers.

§ 171. *A payment by an acceptor cannot be revoked so as to charge a drawer.*

The directions being clear, the defendant, under the facts as found, could not pay the draft and charge the drawers. The facts proved establish an acceptance of the draft, charging Wilson & Jurgens with the amount; issuing to the payee, with his consent, a certificate of deposit for all but a small portion, which was paid in money. This was a payment as to the drawers, and when thus made cannot be revoked by the drawee so as to charge them. Any act which clearly indicates an intention to comply with the request of the drawer will constitute an acceptance, and when the draft is received, and the proceeds credited to the payee, who presents it, the drawee cannot, by a subsequent arrangement with him, cancel the payment and hold the drawer. It is true, a certificate of deposit is not in law an extinguishment of a debt or payment, unless there was an agreement to so accept it. In this case the evidence shows that Mikkelsen authorized the deposit of the balance of the proceeds of the draft not paid to him in cash, to his credit, for his benefit. The uncontradicted evidence of Mikkelsen is: "I presented the draft and they said it was all right. They asked if I wanted it right away. They paid \$24 or \$25, and gave me a note for the money I left." Had the First National Bank failed immediately after this certificate was issued and received by Mikkelsen, the loss would have been his; so that, even as between Mikkelsen and the bank, the certificate, whatever its form as to time when due, was a payment of the draft. The subsequent payment by the plaintiffs on the return of the draft, protested, was made with-

out full information of all the facts, and the effect of the letter of Mikkelsen was to mislead them. A payment thus made is not voluntary, and the amount can be recovered. Judgment for plaintiffs.

DOWS v. NATIONAL EXCHANGE BANK.

(1 Otto, 618-637. 1875.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—The National Exchange Bank of Milwaukee brought this action of trover for the alleged conversion of a quantity of wheat. The wheat was purchased by McLaren & Co., at Milwaukee, for Smith & Co., proprietors of the Corn Exchange Elevator at Oswego, N. Y. McLaren & Co. paid for the wheat and drew drafts on Smith & Co. The wheat was shipped in the name of McLaren & Co. as shippers, and by the terms of the bills of lading was deliverable to the account of W. G. Fitch, cashier, care Merchants' Bank, Watertown, N. Y. The National Exchange Bank discounted the drafts, and sent them, with the bills of lading and certificates of insurance, to the Merchants' Bank, Watertown, N. Y. The cashier of the National Exchange Bank indorsed on the bills of lading a direction to deliver the wheat to Smith & Co. on payment of the drafts. Soon after the Merchants' Bank, in response to letters from W. G. Fitch, cashier of the National Exchange Bank, signified its willingness to accept consignments on the conditions above named, and that it would charge three-eighths per cent. commissions for the trouble. On the arrival of the drafts, they were presented to Smith & Co., who paid the sight drafts, and accepted and returned the time drafts to the Merchants' Bank without objections. The wheat, on its arrival, was delivered to the Corn Exchange Elevator on the order of the Merchants' Bank, and was shipped by Smith & Co., without the knowledge or consent of the Merchants' Bank, to Dows & Co., at New York. The time drafts, remaining unpaid, were returned by the Merchants' Bank to the bank at Milwaukee. There was a verdict for the plaintiff.

Opinion by Mr. JUSTICE STRONG.

The verdict of the jury having established that the wheat came to the possession of the defendants below (now plaintiffs in error), and that there was a conversion, there is really no controversy respecting any other fact in this case than whether the ownership of the plaintiffs had been divested before the conversion. The evidence bearing upon the transmission of the title was contained mainly in written instruments, the legal effect of which was for the court; and, so far as there was evidence outside of these instruments, it was either uncontradicted, or it had no bearing upon the construction to be given to them. We have, therefore, only to inquire to whom the wheat belonged when it came to the hands of the defendants, and when they refused to surrender it at the demand of the plaintiff. It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from Smith & Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their title or the possession on any terms other than such as they might dictate. If, after their purchase, they had sold the wheat to any person living in Milwaukee or elsewhere, other than Smith & Co., no doubt their vendee would

have succeeded to the ownership. Nothing in any agency for Smith & Co. would have prevented it. This we do not understand to be controverted. Having, then, acquired the absolute ownership, McLaren & Co. had the complete power of disposition; and there is no pretense that they directly transmitted their ownership to Smith & Co. They doubtless expected that firm to become purchasers from them. They bought from their vendors with that expectation. Accordingly, they drew drafts for the price, but they never agreed to deliver the wheat to the drawees, unless upon the condition that the drafts should be accepted and paid. They shipped it, but they did not consign it to Smith & Co., and they sent to that firm no bills of lading; on the contrary, they consigned the wheat to the cashier of the Milwaukee bank, and handed over to that bank the bills of lading as a security for the drafts drawn against it,—drafts which the bank purchased. It is true they sent invoices. That, however, is of no significance by itself.

§ 172. *An invoice is not per se evidence of title.*

The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to *Shepherd v. Harrison*, Law Rep., 4 Ap. Cas., 116, and *Newcomb v. The Boston & Lowell R. R. Co.*, 115 Mass., 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee.

§ 173. *Bank taking bill of lading as security may hold the property until the drafts it discounts are paid.*

It follows that McLaren & Co. remained the owners of the wheat, notwithstanding their transmission of the invoices to Smith & Co. As owners, then, they had a right to transfer it to the plaintiff as a security for the acceptance and payment of their drafts drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiff, and handing them over with the drafts when the latter were discounted. These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation as stated in *Benjamin on Sales*, 306; and in support of it he cites numerous authorities, to only one of which we make special reference,—*Jenkyns v. Brown*, 14 Q. B., 496. There it appeared that the plaintiff was a commission merchant, living in London, and employing Klingender & Co., as his agents at New Orleans. The agents purchased for the plaintiff a cargo of corn, paying for it with their own money. They then drew upon him at thirty days' sight, stating in the body of the drafts that they were to be placed to the account of the corn. These drafts they sold, handing over to the purchaser with them the bills of lading, which were made deliverable to the order of Klingender & Co., the agents; and they sent invoices and a letter of advice to the plaintiff, informing him that the cargo was bought and

shipped on his account. On this state of facts, the court ruled that the property did not pass to the plaintiff; that the taking of a bill of lading by Klingender & Co., deliverable to their own order, was nearly conclusive evidence that they did not intend to pass the property in the corn; and that, by indorsing the bills of lading to the buyer of the bills of exchange, they had conveyed to him a special property in the cargo, so that the plaintiff's right to the corn could not arise until the bills of exchange were paid by him. That such is the legal effect of a bill of lading taken deliverable to the shipper's own order, that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, *even when the shipment has been made in the vessel of the drawee of the drafts against the cargo*, has been repeatedly decided. *Turner v. The Trustees of The Liverpool Docks*, 6 Exch., 543; *Schorman v. Railway Co.*, Law Rep., 2 Ch. Ap., 336; *Ellerslaw v. Magniac*, 6 Exch., 570. In the present case the wheat was not shipped on the vessels of Smith & Co., and the bills of lading stipulated for deliveries to the cashier of the Milwaukee bank. When, therefore, the drafts against the wheat were discounted by that bank, and the bills of lading were handed over with the drafts as security, the bank became the owner of the wheat, and had a complete right to maintain it until payment. The ownership of McLaren & Co. was transmitted to it, and it succeeded to their power of disposition.

§ 174. *Delivery of goods to a warehouseman as such does not give him a title as vendee, although he may have arranged to purchase.*

That the bank never consented to part with its ownership thus acquired, so long as the drafts it had discounted remained unpaid, is rendered certain by the uncontradicted written evidence. It sent the drafts, with the bills of lading attached, to the Merchants' Bank, Watertown, accompanied with the most positive instructions, by letter and by indorsement on the bills, to hold the wheat until the drafts were paid; and when, subsequently, the Merchants' Bank sent orders to the masters of the carrying vessels to deliver it to the "Corn Exchange Elevator, Oswego, N. Y.," they accompanied the orders with letters to Smith & Co., the proprietors of the elevator, containing clear instructions to hold the grain, and "deliver" it only on payment of the drafts. To these instructions Smith & Co. made no objection. Now, as it is certain that whether the property in the wheat passed to Smith & Co. or not depends upon the answer which must be given to the question whether it was intended by McLaren & Co., or by the Milwaukee bank, their successors in ownership, that it should pass before payment of the drafts, where can there be any room for doubt? What is there upon which to base an inference that it was intended Smith & Co. should become immediate owners of the wheat, and be clothed with a right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, cashier of the Milwaukee bank; and it is inadmissible, in view of the express orders given by that bank to their special agents, the Merchants' Bank at Watertown, directing them to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the drafts can be implied in the face of these express arrangements and positive orders to the contrary. It is true that Smith & Co. were the proprietors of the Corn Exchange Elevator, and that the wheat was handed over to the "custody of the elevator" at the direction of the Merchants' Bank; but it cannot be claimed that that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no

power to make such a delivery as would divest the ownership of their principals. *Stollenwerck v. Thatcher*, 115 Mass., 124. And they made no attempt to divest that ownership. They guardedly retained the *jus disponendi*. Concurrently with their directions that the wheat should be delivered to the elevator, in the very orders for the delivery, they stated that the cargoes were for the account of W. G. Fitch, cashier, and were to be held subject to their order. By accompanying letters to the proprietors of the elevator, they stated that the cargoes were delivered to them "to be held subject to and delivered only on payment of the drafts drawn by McLaren & Co." All this contemplated a subsequent delivery,—a delivery after the receipt of the grain in the elevator, and when the drafts should be paid. It negatives directly the possibility that the delivery into the elevator was intended as a consummation of the purchase, or as giving title to the purchasers. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailees. A man cannot hold as bailee for himself. By the act of accepting goods in bailment, he acknowledges a right or title in the bailor. When, therefore, as was said in the court below, "the proprietors of the Corn Exchange Elevator, or Smith & Co., received the wheat under the instructions of the Merchants' Bank, they received it with the knowledge that the delivery to them was not absolute; that it was not placed in their hands as owners, and that they were not thereby to acquire title." They were informed that the holders of the drafts and bills of lading had no intention to let go their ownership so long as the drafts remained unpaid. The possession they had, therefore, was not their possession. It belonged to their bailors; and they were mere warehousemen, and not vendees.

We agree that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive; and we agree that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, in other words, where there is anything to rebut the effect of the bill, it becomes a question for the jury whether the property has passed. Such was the case of *Ogg v. Shuter*, 10 Law Rep., C. P., 159. There the ordinary effect of a bill of lading deliverable to the shipper's order was held to be rebutted by the court sitting with power to draw inferences of fact. The delivery to the carrier was "free on board," and the bill of lading was sent to the consignor's agent. The goods were also delivered into the purchaser's bags, and there was a part payment. But in this case there are no circumstances to rebut the intent to retain ownership exhibited in the bills of lading, and confirmed throughout by the indorsements on the bills, and by the written instructions to hold the wheat till payment of the drafts. Nothing in the evidence received or offered tended to show any other intent. Hence there was no necessity of submitting to the jury the question whether there was a change of ownership. That would have been an invitation to find a fact of which there was no evidence. The circumstances as relied upon by the plaintiffs in error, as tending to show that the property vested in Smith & Co., cannot have the significance attributed to them.

It is certainly immaterial that the wheat was consigned to W. G. Fitch, cashier, care of the Merchants' Bank, Watertown, and that it was thus con-

signed at the request of Smith & Co., made to McLaren & Co. Had it been consigned directly to that bank, and had there been no reservation of the *jus disponendi* accompanying the consignment, the case might have been different. Then an intent to deliver to the purchasers might possibly have been presumed; but, as the case was, no room was left for such a presumption. The express direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to deliver it while the drafts remained unpaid. A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser, but not so if the bill of lading exhibits a contrary intent, if thereby the shipper reserves to himself or to his assigns the dominion over the goods shipped. *Turner v. The Trustees of the Liverpool Docks, supra*. There are many such decisions. A strong case may be found in the court of queen's bench, decided in 1840. It is *Mitchell v. Ede*, 11 Ad. & E., N. S., 888. A Jamaica planter, being the owner of sugars, and indebted to the defendant residing in London for more than their value, shipped them at Jamaica on the 4th of April on a ship belonging to the defendant, which was in the habit of carrying supplies to Jamaica to the owner of the sugars and others, and taking back consignments from him and others. On the same day he took a bill of lading by which the goods were stipulated to be delivered to the defendant at London, he paying freight. Two days afterwards (April 6th) the shipper made an indorsement on the bill that the sugars were to be delivered to the defendant only on condition of his giving security for certain payments, but otherwise to the plaintiff's agent. He also drew drafts on the defendant. At the same time he indorsed the bill of lading and delivered it to the plaintiff to whom he was indebted. The bill was never in the defendant's hands. The sugars arrived in London and the defendant paid the drafts drawn by the shipper, but did not comply with the conditions of the indorsement of April 6th. On this state of facts it was held by the court that the plaintiff was entitled to the sugars; that the shipper had not parted with the property by delivering it on board the defendant's ship, employed as it was, nor by accepting the bill of lading as drawn on the 4th of April; and that he was entitled to change the destination of the sugars till he had delivered them or the bill. In the case now in hand there never was an instant, after the purchase of the wheat by McLaren & Co., when there was not an express reservation of the right to withhold the delivery from Smith & Co., and also an avowed purpose to withhold it until the drafts should be paid. Consent to consign the wheat to W. G. Fitch, cashier, care of Merchants' Bank, amounts, therefore, to no evidence of consent that it should pass into the control and ownership of the purchasers.

It has been argued on behalf of the plaintiffs in error that the correspondence between Smith & Co. and McLaren & Co. shows that the wheat was wanted by the former to supply their immediate need; and that, therefore, it was a legitimate inference that both parties to the correspondence intended an immediate delivery. If this were so, it was still in the power of the vendors to change the destination of the property until delivery was actually, or at least symbolically made; and that the intention, if any ever existed, was never carried out, the bills of lading prove. It may be that Smith & Co. expected to secure early possession of the wheat by obtaining discounts from the Watertown bank and then by taking up the drafts. If so, it would account for their request that the drafts and bills of lading might be sent through that bank; but that has no tendency to show an assent by either McLaren & Co. or the Milwaukee bank

to an unconditional delivery of the property before payment of the drafts. Nor does the fact that any engagement to hold themselves responsible for the safe keeping of the wheat for the plaintiff, and subject to its orders until the drafts drawn against it should be paid, was exacted from the Watertown bank, have any tendency to prove such an assent. This was an additional protection to the continued ownership of the plaintiff, and the words of the engagement plainly negative any consent to a divestiture of that ownership. Without reference, therefore, to the testimony of McLaren, which was, in substance, that, before the shipments, the agent of Smith & Co. was informed that, while the shipping firm would agree to send their time drafts through any bank he might designate, and consign the property to any responsible bank Smith & Co. might designate, they would adhere to their positive business rule in such cases, and on no account consent that any property so shipped should pass out of the control of the banks in whose care it had been placed until all drafts made against it had been paid; without reference to this we think it clear that the ownership of the wheat, for the conversion of which the defendants were sued, never vested in Smith & Co., never passed out of the plaintiff. This is a conclusion necessarily drawn from the written and uncontradicted evidence; and there is nothing in any evidence received, or offered by the defendants and overruled by the court, which has any tendency to resist the conclusion. It is unnecessary therefore, to examine in detail the numerous assignments of error in the admission and rejection of evidence. None of the rulings have injured the defendants.

§ 175. *Bailees cannot convey title as vendors.*

If, then, the Exchange Bank of Milwaukee was the owner of the wheat when Smith & Co. undertook to ship it to the defendants, and when the defendants received it and converted it to their use, the right of the bank to recover in this action is incontrovertible. Smith & Co. were incapable of divesting that ownership. The defendants could acquire no title, or even lien, from a tortious possessor. However innocent they may have been (and they were undoubtedly innocent of any attempt to do wrong), they could not obtain ownership of the wheat from any other than the owner. The owner of personal property cannot be divested of his ownership without his consent, except by process of law. It is not claimed, and it could not be, that the defendants were deceived or misled by any act of the plaintiff. They are the victims of a gross fraud perpetrated by Smith & Co.; and, however unfortunate their case may be, they cannot be relieved by casting the loss upon the plaintiff, who is at least equally innocent with themselves, and who has used the extremest precaution to protect its title.

It is sufficient to add that, in our opinion, there is no just reason for complaint against the instruction given by the circuit judge to the jury, and his rulings upon the subject of damages and interest. *Judgment affirmed.*

NATIONAL BANK v. MERCHANTS' NATIONAL BANK.

(1 Otto, 92-105. 1875.)

ERROR to U. S. Circuit Court, District of Massachusetts.

§ 176. *Acceptance of a draft cannot be required if the bill of lading is detached, and a delivery thereof refused.*

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The fundamental question in this case is, whether a bill of lading of merchandise deliverable to order, when attached to a time

draft and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance for the payment. It is true there are other questions growing out of portions of the evidence, as well as one of the findings of the jury; but they are questions of secondary importance. The bills of exchange were drawn by cotton-brokers residing in Memphis, Tenn., on Green & Travis, merchants residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis; and bills of lading were taken by the shippers, marked in case of two of the shipments "To order," and in case of the third shipment marked "For Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on acceptance of the bills of exchange; but the existence of this agreement was not known by the Bank of Memphis when that bank discounted the drafts, and took with them the bills of lading indorsed by the shippers. We do not propose to inquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their indorsement and delivery pass the title of the shippers to the property specified in them, and therefore that the plaintiffs, when they discounted the drafts and took the indorsed railroad receipts or bills of lading, became the owners of the cotton, it is still true that they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance; and the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously, it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs, and their agents the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them, therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

§ 177. *Presumption where a time draft is accompanied by a bill of lading indorsed in blank.*

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other

meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. This would not be doubted, if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case, it is clear that the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit, and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor; and such is the well recognized doctrine of the law. The reason for this is, that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale, it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But, if so, the agreement is special, something super-added to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been intrusted cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date. If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will, at a future day, deliver the goods to reimburse the advances; he is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance; it is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchandise was shipped to be sold on account of the shipper

§ 178. — *where it is sent to an agent.*

Nor can it make any difference that the draft with the bill of lading has

been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. *Sweeny v. Easter*, 1 Wall., 166 (§§ 615, 616, *infra*). It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent, he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading; and the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender; and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. *Mason v. Hunt*, 1 Doug., 297. The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton.) Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles,—such as peaches, fish, butter, eggs, etc.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

§ 179. *The holder of a bill of lading, who has become such by discounting the draft, succeeds to the situation of the shipper.*

That the holder of a bill of lading, who has become such by indorsement and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only *quasi* negotiable. 1 Parsons on Shipping, 192; *Blanchard v. Page*, 8 Gray, 281. The indorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny

advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But were this not so in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument pressed upon us, that the Bank of Memphis was the purchaser of the drafts drawn upon Green & Travis, and the holder of the bills of lading by indorsement of the shippers.

§ 180. *Whether the bills of lading become security for the drafts.*

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that when transferred they became a security for the principal obligation; namely, the contract evidenced by the bills of exchange,—for the *whole* contract, and not a part of it; and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved; to wit, that the transfer of the bills of lading was made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and, that thus the bank would obtain additional promisors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen that, whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept; and that, if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged. It is said that if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true; though they did know that the acceptors had previously promptly met their acceptances, which were numerous, and large in amount. But if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not

to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time drafts against consignments; and the fact that they are given tends to show that in the commercial community it is understood that, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

§ 181. *Authorities reviewed.*

Thus far we have considered the question without reference to any other authority than that of reason. In addition to this, we think the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of *Lanfear v. Blossman*, 1 La. Ann., 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment and payable a certain number of days after sight is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused, and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the commercial court of New Orleans by Judge Watts, who supported it by a very convincing opinion. 14 *Hunt's Merchants' Magazine*, 264. These decisions were made in 1845 and 1846. In other courts, also, the question has arisen, What is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been, that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case of *The Wisconsin Marine & Fire Insurance Company v. The Bank of British North America*, 21 Upper Canada, Queen's Bench, 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wis., had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A., at Milwaukee, on B., at Toronto, payable forty-five days after date, together with a bill of lading, indorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed in 1863, in the court of error and appeals, and the judgment affirmed. 2 Upper Canada Error and Appeal Reps., 282. See, also, *Goodenough v. The City Bank*, 10 Upper Canada, Com. Pleas, 51; *Clark v. The Bank of Montreal*, 13 Grant's Ch., 211.

There are also many expressions of opinion by the most respectable courts, which, though not judgments, and therefore not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In *Shepherd v. Harrison*, L. R., Q. B., vol. iv, p. 493, Lord Cockburn said, "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention *that the handing over of the bill of lading, and the*

'acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction.' The case subsequently went to the House of Lords, 5 H. L., 133; when Lord Cairns said, "if they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper; and they are virtually paid for the goods." In *Coventry v. Gladstone*, 4 L. R. Eq., 493, it was declared by the vice-chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods, and attached to the bill of lading; and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment was exceptional, and was not established as being the usual course of business. In *Schuchardt v. Hall*, 39 Md., 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court, "Under their contract with the defendants, the latter were authorized to draw only against the cargo of wheat to be shipped by the 'Ocean Belle;' and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See, also, the language of the judges in *Gurney v. Behrend*, 3 Ell. & Bl., 622; *Marine Bank v. Wright*, 48 N. Y., 1; *Cayuga Bank v. Daniels*, 47 id., 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point determine nothing of the kind. *Gilbert v. Guignon*, L. R., 8 Ch., 16, was a contest between two holders of several bills of lading of the same shipment. The question was, Which had priority? It was not [at] all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawer had accepted without requiring the surrender of the first indorsed bill of lading; and the lord chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "If he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding; and that (according to the chancellor's view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly *inter alios*.

Seymour v. Newton, 105 Mass., 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect it was like *Gilbert v. Guignon*. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods; and all that was decided was, that, under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage *in transitu*. It is true, that, in delivering the opinion of the court, Chief Justice Chapman said, "The obvious purpose was, that there should be no delivery to the vendee till the draft should be paid." But the remark was purely *obiter*, uncalled for by anything in the case. *Newcomb v. Boston & Lowell Railroad Corporation*, 115 Mass., 230, was also the case of acceptance of

sight drafts, without requiring the delivery of the attached bills of lading; and the contest was not between the holder of the drafts and the acceptor; it was between the holder of the drafts with the bills of lading and the carrier. We do not perceive that the case has any applicability to the question we have now under consideration. True, there, as in the case of *Seymour v. Newton*, it was remarked by the judge who delivered the opinion, "The railroad receipts were manifestly intended to be held by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the bank; for it is immediately added, "They continued to be held by the bank after the drafts had been accepted by Chandler & Co. (the drawees), and until at Chandler & Co.'s request they were paid by the plaintiff; and the receipts with the drafts still attached were indorsed and delivered by Chandler & Co. to the plaintiff." In *Stollenwerck v. Thacher*, 115 Mass., 224 (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft; and it was held that the special agent, thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In *Bank v. Bayley*, reported in the same volume, p. 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice Gray said, "The drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading, or the property described therein, except upon *acceptance* of the draft." It is but just to say, however, that this remark, as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

§ 182. *Authority of agent to deliver bill of lading on acceptance of draft.*

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft. If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce, having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. *Warren v. Suffolk Bank*, 10 Cush., 582. In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the circuit court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case to say that it was a mistake to charge the jury as they were charged, that "in the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be

§ 223.

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authorized to separate the bill of lading from the bill of exchange before the bill of exchange was paid." And as to the following portion of the charge: "But if the Metropolitan Bank delivered to the defendant bank the bills of exchange with instructions for collection, with no other instructions either express or implied from the past relations of the parties, they would not be so liable to the owners of the drafts for a breach of the bill of lading on acceptance of the drafts only after payment of the bills until payment of the acceptances. The drafts were drawn at sight, it is true, was drawn at sight; but in Massachusetts such drafts are entitled to grace. What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the circuit court is reversed, and the record is remitted with directions to award a new trial.

WOOLEN v. NEW YORK AND ERIE BANK.

(Circuit Court for New York: 12 Blatchford, 359-365. 1874.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—This action was tried before the court without a jury. The plaintiffs, bankers at Indianapolis, Indiana, sent to the defendant, a bank at Buffalo, New York, on the 28th of October, 1872, a letter stating that they inclose for collection and remittance of proceeds a draft upon one Bugbee, and bills of lading for eight car loads of lumber. The draft inclosed is dated October 26, 1872, is drawn by Coder & Co. upon Bugbee, is payable fifteen days from date, and is indorsed by one Mayhew, and then, by special indorsement, by the plaintiffs to the defendant's cashier, "for collection." By the terms of the draft the drawers, indorsers and acceptor severally waive presentment for payment and notice of protest and non-payment. The bills of lading respectively set forth that Coder & Co., at times two or three days prior to the date of the draft, have shipped, at places therein specified, certain car loads of lumber to be delivered to them at Albany, New York, and are severally indorsed upon the back by Coder & Co., by Mayhew and by the plaintiffs. No business dealings had ever taken place between the plaintiffs and the defendant prior to this transaction, except a few days previously, when the plaintiffs had sent to the defendant a similar draft, drawn by and upon the same parties, with similar bills of lading and indorsements, with instructions by letter to "deliver the shipping bills on acceptance of the draft." Bugbee, the drawee, resided at Buffalo. Upon receiving the draft first mentioned, the defendant presented it for acceptance to Bugbee; he accepted it, and thereupon, at his request, the defendant delivered to him the bills of lading. Bugbee failed before the maturity of the draft. It is admitted that the lumber mentioned in the bills of lading had been purchased by Bugbee of Coder & Co., and that the draft was drawn for the purchase price of the lumber, and was discounted by the plaintiffs for Coder & Co., on the security of the bills of lading as collateral. It is also admitted that, by the ordinary course of transportation, the lumber was due at its destination eight days prior to the maturity of the draft. The plaintiffs insist that the defendant violated its duty by delivering the bills of lading before the collection of the draft, and bring this action to recover of the defendant the amount of the draft. Bills of exchange are negotiated upon the security of

ing under Huntington. They insist that they are the legal holders of the notes, and as such are entitled to avail themselves of the security given for their payment. 2d. Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title. *Pitts v. Wilder*, 1 N. Y., 525; *Gibney v. Marchay*, 34 id., 301; *Jackson v. Miller*, 6 Cow., 751; *Jackson v. McVey*, 15 J. R., 234. To show that the party went into possession under the lessors is a common instance of the admissibility of such declarations. *Jackson v. Dobbin*, 3 Johns., 223. Conceding, therefore, that Huntington was in possession of the premises, his declarations are competent only to show the character in which he claimed, as that of tenant under a lease, or tenant by virtue of an executory contract to purchase. His declarations as to the ownership or payment of the notes are incompetent upon every principle, and must be laid out of view in determining the case. Upon the remaining evidence the question stands in this wise: The Freedman's Bank establishes its title to the notes by the production of the notes, by proof that it purchased them by giving its check for \$13,786.50, the full amount of principal and interest due on the notes, dated January 24, 1870, and that it has held them from that time to the present. That the bank took the notes upon an intended purchase; that it received interest upon them in January, 1871, and again in January, 1872, is clearly proved. Eaton, the actuary of the bank, by whom the check was drawn, is dead. Huntington, with whom it is alleged an arrangement was made, is also dead. We are thus deprived of the evidence of the chief actors.

We think the truth is here. Huntington made a verbal agreement with Dodge to buy the house he had rented of him, and to pay these notes in satisfaction of the price. The evidence on this point is not free from doubt; and Huntington was certainly at liberty to repudiate the agreement, as being within the statute of frauds. But there is no evidence that he wished to do so. When the notes matured, he was not in a condition, or did not wish, to pay them. One note (\$2,000) was held by the Chatham Bank, of New York, and sent for collection to the First National Bank of Washington, of which Huntington was the cashier. Huntington's bank forwarded the note to the Farmers' and Mechanics' Bank of Georgetown, and received credit for the amount, \$2,121. This note was entered on the bank-books of Washington as due January 24th, and as being paid on that day. This was an error; it was, in fact, payable on the 22d. The note of \$4,000 was held by Mr. Robinson, who deposited it in the Farmers' and Mechanics' Bank of Georgetown, for collection, and on the 22d of January, 1870, he was there credited on his account with the amount, to wit, \$4,242. The \$7,000 note was held by Mr. Todd, and was by him deposited in the National Metropolitan Bank of Washington, for collection, and his account was in like manner credited with the amount. The record contains no further evidence in relation to the payment of this note.

§ 223. *The person with whom a note is deposited for collection is the agent of the holder, not of the maker.*

The evidence is complete and certain that Huntington did not pay the notes or advance the money by which they were taken up. The evidence is quite satisfactory that the Freedman's Bank did advance the money and take up the notes by its check for \$13,786.50, bearing date January 24th, and that it has held them since that time. There is no evidence that this check was actually drawn on that day; and it would reconcile some of the discrepancies, if we were to suppose that it bore date of the 24th, but was actually drawn on the 22d, and

on that day used in the purchase of the notes. We do not see that it is very material which way this shall be held to be. The title of the Freedman's Bank is the same in either case. There is no evidence that it had knowledge of any obligation of Huntington to take up the notes, if any such existed; and there is no evidence that Huntington did anything about procuring an arrangement for their being taken up. It dealt with the bank or banks holding the notes in the ordinary way. By law, a collecting bank is the agent of the holder of the note, and in no sense the agent of the maker. *Montgomery Bank v. Albany City Bank*, 7 N. Y., 459; 22 Barb., 627. What the holder was entitled to was his money, or the proper diligence to obtain it. If the maker had anything to say or do in the premises, it was to present himself with the money when the notes matured, pay them, and secure his obligations. Failing in this, he leaves the securities to be dealt with as others interested may choose. There would appear, therefore, in the nature and propriety of the subject, to be no objection to a transfer to a third person paying the money, instead of a technical payment and discharge of the notes. It is to be observed, also, that payment technically can only be made by a party to a bill, or by a stranger, *supra protest*. *Chitty on Bills*, 392. Such parties may either pay in satisfaction of the note, or pay and hold it as by a transfer, leaving it an existing security. *Byles on Bills*, 166; *Green v. Key*, 3 B. & Ad., 313. It can, therefore, make no difference to the holder, whether, when taken by a stranger, it is taken and held as upon a transfer, or in satisfaction of the instrument. The negotiability of a bill or note remains after maturity as before (*Byles*, 160-162), subject to the equities between the parties. The books are full of cases to the effect that an agent to whom a bill is sent for collection cannot lawfully transfer or pledge the same in payment of his own debt, and that the transferee with knowledge or after maturity gets no title as against the true owner. 1 Pars. on Bills and Notes, 119.

§ 224. *Where a note in bank is paid by a stranger he becomes the purchaser, and holds it subject to the equities between the parties.*

In cases like that before us, where the intention to continue the existence of the note and not to cancel it by payment is made evident, when the money is paid to the collecting agent appointed to receive it, and the owner of the note receives the amount due to him, the authorities sustain the transaction as a purchase. In *Deacon v. Stodhardt*, 2 Man. & G., 317, it was held that where, to a count by the executors of A., an indorser, against D., the acceptor of a bill, the defendants pleaded payment, and the evidence was that A. had placed the bill in the hands of E. to be presented, who improperly had it discounted, and to regain possession of it paid the amount to the bankers of the acceptor, thus obtained the bill and returned it to A., it was held that there was no payment. *Bosanquet, J.*, said, "It is clear that the payment of the bill by Jones was a payment not on account of the defendants (the acceptors), but that in order that Jones might regain the possession of it." *Erskine, J.*, says, "It appears that Jones, having raised money on the bill, took it up when at maturity, and then returned it to the testator, who was at liberty to proceed upon it at any future time." The bill was thus paid at maturity without the knowledge or consent of the true owner, and was then remitted to the owner, and it was held to be a valid bill in his hands.

In the *Pacific Bank v. Mitchell*, 9 Metc., 297, it was held that where the holder of a bill of exchange accepted for the accommodation of the drawer sends it to a bank for collection, and the bank, when the bill comes to maturity,

passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor, but the bank succeeds to the right of the holder, and may maintain an action on the bill against the acceptor. The plaintiffs, it was held, succeeded to the rights of the bank, and became *bona fide* holders of the bill. In *Burr v. Smith*, 21 Barb., 262, it was held that a stranger may advance the money and hold the note, if such is the clear intention of the parties at the time of the transaction. The court remark upon it as a suspicious circumstance, that the payer in that case was not called as a witness. He knew, it is said, in what character and in whose behalf he paid the money, and whose money it was with which the note was paid. In *Harbeck v. Vanderbilt*, 20 N. Y., 395, it was held that when the amount due upon a judgment is paid, wholly or in part, by one who is not a party nor bound by it, the judgment is extinguished or not according to the intention of the party paying. So held where one of the defendants in a judgment upon a joint obligation paid his aliquot portion in cash, gave his note for the remainder indorsed by a third person, and procured the judgment to be assigned to a trustee for such person without his knowledge. The judgment, it was held, remained unsatisfied for the amount not actually paid by the defendant therein, and might be enforced by the indorser as an indemnity against his contingent liability. In *Keystone Bank v. Gay*, 21 Barb., 459, the principle was laid down, that, to constitute payment, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.

Judgment affirmed.

CARPENTER v. LONGAN.

(16 Wallace, 271-277. 1872.)

APPEAL from the Supreme Court of the Territory of Colorado.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—On the 5th of March, 1867, the appellee, Mahala Longan, and Jesse B. Longan, executed their promissory note to Jacob B. Carpenter, or order, for the sum of \$980, payable six months after date, at the Colorado National Bank, in Denver City, with interest at the rate of three and a half per cent. per month until paid. At the same time Mahala Longan executed to Carpenter a mortgage upon certain real estate therein described. The mortgage was conditioned for the payment of the note at maturity, according to its effect. On the 24th of July, 1867, more than two months before the maturity of the note, Jacob B. Carpenter, for a valuable consideration, assigned the note and mortgage to B. Platte Carpenter, the appellant. The note not being paid at maturity, the appellant filed this bill against Mahala Longan, in the district court of Jefferson county, Colorado territory, to foreclose the mortgage. She answered and alleged that when she executed the mortgage to Jacob B. Carpenter she also delivered to him certain wheat and flour, which he promised to sell, and to apply the proceeds to the payment of the note; that at the maturity of the note she had tendered the amount due upon it, and had demanded the return of the note and mortgage and of the wheat and flour, all which was refused. Subsequently she filed an amended answer, in which she charged that Jacob B. Carpenter had converted the wheat and flour to his own use, and that when the appellant took the assignment of the note and mortgage he had full knowledge of the facts touching the delivery of the wheat and flour to his assignor. Testimony was taken upon both sides. It was proved that the

wheat and flour were in the hands of Miller & Williams, warehousemen, in the city of Denver; that they sold, and received payment for, a part, and that the money thus received and the residue of the wheat and flour were lost by their failure. The only question made in the case was, upon whom this loss should fall, whether upon the appellant or the appellee. The view which we have taken of the case renders it unnecessary to advert more fully to the facts relating to the subject. The district court decreed in favor of the appellant for the full amount of the note and interest. The supreme court of the territory reversed the decree, holding that the value of the wheat and flour should be deducted. The complainant thereupon removed the case to this court by appeal. It is proved and not controverted that the note and mortgage were assigned to the appellant for a valuable consideration before the maturity of the note. Notice of anything touching the wheat and flour is not brought home to him.

§ 225. *Transferee of negotiable paper before maturity presumed to have no notice of defenses to it.*

The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. Powell on Mortgages, 908; 1 Hilliard on Mortgages, 572; Coot on Mortgages, 304; Reeves v. Scully, Walk. Ch., 248; Fisher v. Otis, 3 Chand., 83; Martineau v. McCollum, 4 id., 153; Bloomer v. Henderson, 8 Mich., 395; Potts v. Blackwell, 4 Jones, 58; Cicotte v. Gagnier, 2 Mich., 381; Pierce v. Faunce, 47 Me., 507; Palmer v. Yates, 3 Sandf., 137; Taylor v. Page, 6 Allen, 86; Croft v. Bunster, 9 Wis., 503; Cornell v. Hichens, 11 id., 368. The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfilment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser, rather than a stranger." Hern v. Nichols, 1 Salk., 289.

§ 226. *Transfer of note carries mortgage with it.*

Upon a bill of foreclosure filed by the assignee, an account must be taken to ascertain the amount due upon the instrument secured by the mortgage. Here the amount due was the face of the note and interest, and that could have been recovered in an action at law. Equity could not find that less was due. It is a case in which equity must follow the law. A decree that the amount due shall be paid within a specified time, or that the mortgaged premises shall be sold, follows necessarily. Powell, cited *supra*, says: "But if the debt were on a negotiable security, as a bill of exchange collaterally secured by a mortgage, and the mortgagee, after payment of part of it by the mortgagor, actually negotiated the note for the value, the indorsee or assignee would, it seems,

in all events, be entitled to have his money from the mortgagor on liquidating the account, although he had paid it before, because the indorsee or assignee has a legal right to the note and a legal remedy at law which a court of equity ought not to take from him, but to allow him the benefit of, on the account." A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to the lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another. The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied the contract is violated, and the rights of the assignee are set at naught. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding. The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. *Jackson v. Blodget*, 5 Cow., 205; *Jackson v. Willard*, 4 Johns., 43.

It must be admitted that there is considerable discrepancy in the authorities upon the question under consideration. In *Bailey v. Smith*, 14 Ohio St., 396,—a case marked by great ability and fullness of research,—the supreme court of Ohio came to a conclusion different from that at which we have arrived. The judgment was put chiefly upon the ground that notes, negotiable, are made so by statute, while there is no such statutory provision as to mortgages, and that hence the assignee takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. To this view of the subject there are several answers. The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale*.

In *Pierce v. Faunce*, 47 Me., 513, the court say: "A mortgage is *pro tanto* a purchase, and a *bona fide* mortgagee is equally entitled to protection as the

bona fide grantee. So the assignee of a mortgage is on the same footing with the *bona fide* mortgagee. In all cases the reliance of the purchaser is upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown and latent defects." *Matthews v. Wallwyn*, 4 Ves., 118, is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgagee assigned the bond and mortgage fraudulently, and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The lord chancellor was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: "The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, *the account must be settled in that action*. In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment." The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment.

We think the doctrine we have laid down is sustained by reason, principle and the greater weight of authority. Decree reversed, and the case remanded with directions to enter a decree in conformity with this opinion.

LEE v. CHILLICOTHE BRANCH BANK.

(Circuit Court for Ohio: 1 Bissell, 825-836; 1 Bond, 887-892. 1860.)

STATEMENT OF FACTS.—Fourteen bills were drawn on E. Ludlow, cashier of the Ohio Life Ins. and Trust Company, payable to the order of the Chillicothe Branch Bank, by the name and style of Jas. B. Scott, its cashier, who indorsed them to Ludlow, thus: "Credit my account, James B. Scott, cashier." Ludlow indorsed them to Lee *et al.*, who presented them, protested them for non-payment, and gave notice thereof to the bank, against whom suit is now brought by Lee and the other holders, as plaintiffs.

Opinion by McLEAN, J.

No particular form of words is essential to an indorsement, if the words used import a transfer of the title to the bill and designate the transferee. Story on Bills, § 204.

§ 227. *Full, blank and restrictive indorsements defined.*

Indorsements are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person by name; a blank indorsement consists only of the name of the indorser (1 Jacob's Law Dictionary, 324), as where the indorser simply writes his name on the back of negotiable paper. There are also restrictive indorsements, which stop the currency of the bill, and it often becomes an important question whether the indorsement is in full, in blank or restrictive. On this depends the decision

of the important case now before us. Where the indorsement is in full or in blank, without restriction, the holder may fill up the blanks and perfect his title at pleasure.

§ 228. *Authorities upon restrictive indorsements examined.*

In the leading case of *Edie v. East India Co.*, 2 Burr., 1216, a new trial was granted, because at the trial the usage of merchants was proved, which the court held to be erroneous, and on this ground a new trial was granted. On argument the declaration was held to be good on demurrer, although the assignment on the note was alleged to have been made to Witherhead, without saying to "him and order." Every one knows the splendid reputation of Lord Mansfield for his liberal views on commercial law, which were greatly in advance of Kenyon and others, but were still, in some things, behind the present day. By some of the judges in the above case, a restrictive indorsement had never been heard of, and doubts were expressed whether the negotiability of an instrument could be restricted.

The case of *Anchor v. Bank of England*, 2 Doug., 638, was upon a bill of exchange payable to A. or order. A. indorsed it as follows: "The within must be credited to Capt. Morton Lassal Dahl, value in account." This was held by Lord Mansfield to be a restrictive indorsement, though Butler was of a contrary opinion. A majority of the court held that the indorsement was simply a request to pass the amount to Dahl's credit. Lord Mansfield said the indorser did not mean to make himself answerable, as indorser, or to enable Dahl to raise money on the bill. So in *Treutell v. Barandon*, 8 Taunt., 100, it was held that the indorsement, "pay to J. P. Rouse or order, on account for Mr. Treutell & Wurtz," was restrictive. And in *Lloyd v. Sigourney*, 5 Bing., 525, the indorsement was in these words: "Pay to Samuel Williams, Esq., of London, or his order for my use," and the court says, "Whoever reads the indorsement must perceive that its operation is limited."

It is said the indorsements in this case are capable of various constructions, and have no definite meaning. The direction to credit the account of the indorser is addressed to Ludlow, it is said, and not to the drawers; Ludlow is the drawee, but on the face of the bills his acceptance is waived, and the bills were not sent to him for acceptance, but for some other purpose, either to discount them as urged by the plaintiffs, and then credit the indorser with the proceeds, or to credit the bills in account to the indorser, or to hold them until payment by the drawers, and then credit the amount to the indorser. And it is contended that, "on the face of the instrument, it is impossible to say what was meant." The bills were drawn by certain persons at Chillicothe, Ohio, on Edwin Ludlow, of New York, as cashier of the Ohio Life Insurance and Trust Company, payable to the order of the defendant, indorsed, "credit my account, James B. Scott, cashier." The bill had some time to run, but the credit was to be given when the bill became payable. This was the ordinary course of dealing, and the court will not presume a different course without proof. The thing to be done under the indorsement was subject to no contingency. The direction to credit the account of Scott, cashier, was indorsed upon the bill, and this put an end to its negotiability. It was an appropriation of the proceeds of the note, and which rendered any other appropriation of them illegal.

§ 229. *Examples of restrictive indorsements.*

Whether an indorsement be restrictive or not depends upon the intention of the parties as expressed. "Pay to J. S. only;" "pay to A. for my account;" "pay the contents to my use;" "pay the contents to the use of a third per-

son;" "carry this bill to the credit of A., a third person;" "pay to A. B., or order, for my use;" "pay to A. B. for my account;" "pay the within to A. B., for the use of C. D.;" "pay the money to my use;" "pay the money to my servant for my use,"—these are specimens from cases where the indorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction the negotiability of the bill ceases. Had Ludlow filled up an indorsement over Scott's signature, under the restriction, it could only have been done thus,—“pay E. Ludlow, cashier, to credit my account, Jas. B. Scott;” or “pay E. Ludlow, cashier, and credit my account, Jas. B. Scott, cashier;” or “pay E. Ludlow; cashier, credit my account, Jas. B. Scott, cashier.” “‘Pay J. H. for my use, or for my account,’ shows the intent of the indorser, and is barely an authority to receive the money upon it. It imports that the indorsee receives the bill for a special purpose, and as a trustee for the party indorsing; and is equivalent to a direct notice to every person to whom it may be afterwards presented, that he has not a right to dispose of it as his own property.” Edwards on Bills and Promissory Notes, 277.

§ 230. *Courts notice usage in transmitting bills.*

Courts will take notice of a usage, in transmitting bills from one part of the country to another, for collection especially, where the forms of indorsements are influenced by the usage. Bank of Washington v. Triplett, 1 Pet., 25, 30; Bowling v. Harrison, 6 How., 248 (§§ 991-994, *infra*); Wallace v. McConnell, 13 Pet., 150. But this principle is clearly settled without the aid of usage, by judicial decision.

§ 231. *Indorsement preceded by “credit my account” is restrictive. (a)*

The words, “credit my account,” seem to be too explicit to be mistaken, especially in a commercial transaction. This implies an open account, which is to be credited, and this could only be done by payment. Entering the bill before or after it becomes due, as a credit on the account, would not be within the order, as, in a proper sense, no credit could be entered without payment. The words “credit my account, when due,” were mandatory, and could only apply to the account specified. This is too clear for controversy. To apply the proceeds of the bill to a credit on any other account than the one specified would be a fraud on the defendant, under the notice, and a court of equity would restrain such payment or give a judgment at law for its recovery.

§ 232. *Taker by restrictive indorsement a trustee for the indorser.*

Shortly before the failure of the Trust Company, Ludlow, as plaintiffs allege, indorsed the bills in question to the plaintiffs as collateral security for loans which they made to the Trust Company. A holder who takes a bill, the circulation of which was restricted by an indorsement, cannot, in good faith, sue the drawer or acceptor upon it, but holds the bill or the money raised by him as the trustee of the restraining party. “The payee or indorsee having the absolute property in the bill, and the right of disposing thereof, has the power of limiting the payment to whom he pleases; and, consequently, he may make a restrictive indorsement; thus he may stop the currency of the bill, by giving a bare authority to receive the money, as by an indorsement requesting the drawee to ‘pay to A. for my use,’ or to ‘J. S. only,’ or, ‘the within must be credited to A. B.,’ which modes prevent a blank indorsement from being filled

(a) The same point is decided in Lee v. Chillicothe Branch Bank, *1 Bond, 397. It is also held that the law does not require any particular form of words in the transfer of negotiable paper; that words which show an intention to transfer, without restriction or limitation, are sufficient.

up by the indorsee, so as to convey any interest in the bill to himself, and from making a transfer of the bill, etc.; and when made for the use of the indorser, is renewable in its nature by him like a power of attorney." Chitty on Bills, 233. An indorsement, to pay the contents to my use, or to the use of a third person, or to carry this bill to the credit of a third person, is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. Chitty on Bills, 232, note 1. The declaration is that the defendant indorsed the bills to Ludlow, and if he had filled up the instrument it would have read, "Pay to E. Ludlow, to credit my account, James B. Scott, cashier." Thus showing that the money was to be paid to Ludlow, not for himself, but for the use of James B. Scott, cashier. Or suppose the plaintiffs were to strike out Ludlow's indorsement and fill up Scott's indorsement to themselves, which they may do if Scott's is a blank indorsement. It would then read, "Pay Lee & Co., to credit my account, James B. Scott, Cash'r;" and this would show that the money, if paid, would belong to the defendant, and consequently that Lee & Co. have no right to the money. An indorsement "payable to J. S. only," or by indorsing it "the within must be credited to J. S." (*Ancher v. Bank of England*, 2 Doug., 638), or by any other words clearly demonstrating his intention to make a restrictive and limited indorsement, will be sufficient. Chitty on Bills, 232-3, and notes.

Judge Story says, "It is difficult to assert what language will amount to a restrictive indorsement, or, in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purposes to which the indorsement might otherwise entitle the indorsee to apply it. Where the indorsement is, 'pay to A. B. only,' the word 'only' makes it clearly restrictive, and does not authorize a payment or indorsement to any other party. So if a bill should be indorsed, 'the within to be credited to A. B.,' or, 'pay the within to A. B. for the use of C. D.,' it would be deemed a restrictive indorsement, so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof." Story on Bills, § 211. This leaves the question open as to what cases the lien attaches and where it does not. On this head the authorities to some extent are in conflict. Lord Hardwick says in *Snee v. Prescott*, 1 Atk., 249, "promissory notes and bills of exchange are frequently indorsed, 'pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest." If no valuable consideration appears to have been paid for the bill, none will be presumed. In *Ancher v. Bank of England*, an indorsement that the within must be credited to Captain Morton Larsen Dahl, value on account, was a restrictive indorsement, and stopped the negotiability of the bill. And Lord Mansfield said, "It does not seem to me that, after the special indorsement by Morterlin, Dahl himself could have indorsed it over." And Willes, J.: "I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is." Ashurst, J.: "I am of the same opinion. I think Dahl himself could not have indorsed it."

In *Drew v. Jacocks*, 2 Murphy (N. C.), 138, it was said, "Indorsements are of two kinds, general and restrictive; the latter precluding the person to whom it is made from transferring the instrument over to another, so as to give him a right of action, either against the person imposing the restriction, or against

any of the preceding parties." But if the bill be restrictively indorsed, the subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. Hence he can maintain no action against the restraining indorser. He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust. *Lloyd v. Sigourney*, 5 Bing., 15 Eng. Com. L., 525. This indorsement was held to be restrictive. "A bill of exchange drawn in America, on a house in London, payable to order, was indorsed by the payee generally to A., and by him in these words: 'Pay to B., or his order, for my use.' B. applied to his bankers to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B. Held that the indorsement was restrictive; that the property in the bill remained in A., and that he was entitled to recover the amount of the bill from the bankers." Chief Justice Parsons says: "It is also settled that when a negotiable security is indorsed, pay the contents to my use, or to the use of a third person, or carry this to the credit of a third person, such an indorsement is not an assignment of the security, but merely an authority to pay the money agreeably to the direction in the indorsement." *Rice v. Stearns*, 3 Mass., 225.

Chief Justice Parsons said: "The merits of this question depend on the interest which Wilson, the plaintiff, had in the bill. His right to put the bill in suit in his own name must depend upon the effect of the indorsement. It is expressly made to him for the use of the payees. Upon this indorsement, had there been no acknowledgment of value received in account, Wilson would have no property in the bill, general or special, and he could not recover upon it in his own name. But admitting, by the acknowledgment of that value received in account, it is the usage of merchants to consider the bill as transferred to the indorsee, as the factor of the indorser, who may sue it, either in his own name or in the name of the indorser, of which we give no opinion, yet the same facts may be given in evidence against the factor as against the principal." *Wilson v. Holmes*, 5 Mass., 544.

On a pretty extensive view of the authorities, it is found that, under some of the restrictive indorsements, no suit can be maintained against the indorser by the assignee. But the restrictive nature of the indorsements, which do not transfer the property in the bill, but operate as an appointment to pay the money, especially where the bill has been assigned since the transfer, makes it the safer and better course to enforce the equity against the holder of the bill. The indorsement on the bill, although it may not convey the property in the bill, gives an undoubted equity to the money directed to be paid. And this may be recovered against any one who has possession of the bill. No action can be maintained on these bills, as the name of the defendant does not appear upon them. They are drawn by certain individuals, payable to James B. Scott, cashier, and indorsed by him without any designation as to his agency. He, therefore, cannot sustain a suit on the bill, as he has not a legal title to it. He may become a guarantor on the bill.

In *Pentz v. Stanton*, 10 Wend., 271, it is held that the plaintiff cannot recover upon the bill of exchange against the present defendant; his name nowhere appears upon it; and Chitty says it is a general rule that no person can be considered a party to a bill unless his name, or the name of the firm of which he is a partner, appears on some part of it.

In *Fenn v. Harrison*, 3 Term R., 757, Buller, J., observes that in the case of bills of exchange we know precisely what remedy the holder has if the bill be not paid; his security appears on the face of the bill itself; the acceptor, the

drawer and the indorsers are all liable in their turn, but they are only liable because they have written their names on the bill. A person may draw a bill of exchange by his agent, and it will be obligatory. But the agent must sign the name of the principal, or it must appear on the face of the bill itself. The form is not important if the name of the principal appears on the bill. Story on Agency, §§ 147, 154, 155. Where a party is sued on an express contract, it must at least appear on the face of the instrument that the agent undertook to bind the principal. The appellation by which the contractor may be distinguished is of no importance, provided it be sanctioned by the principal and embraced in the power conferred on the agent. Judgment for defendant.

FIRST NATIONAL BANK v. RENO COUNTY BANK.

(Circuit Court for Kansas: 1 McCrary, 491-499. 1880.)

Opinion by McCrary, J.

STATEMENT OF FACTS.—This cause was tried before the court at the November term, 1879, and resulted in a judgment for the defendant. At the request of Judge Foster, before whom it was tried, the motion for a new trial has been argued before the full bench. The facts are as follows:

1. The plaintiff, which is a bank in Chicago, in July, 1878, became the owner, by assignment to it, of two negotiable bank checks, drawn on the defendant, which is a bank at Hutchinson, Kansas.

2. Plaintiff transmitted said checks to W. Hetherington & Co., of Atchison, Kansas, indorsing each of them as follows:

"Pay to the order of W. Hetherington & Co., Atchison, account of First National Bank, Chicago. L. J. GAGE, Cashier."

3. The said Hetherington & Co. forwarded said check to the Mastin Bank, at Kansas City, Mo., indorsed as follows:

"Pay to the order of Mastin Bank. For collection. Account of Hetherington, Exchange Bank, Atchison, Kansas."

By letter inclosing said checks the Mastin Bank was requested to receive the same "for collection and credit."

4. The Mastin Bank sent said checks by mail to the defendant, with a letter stating the same to be for collection and credit, and the defendant, before nine o'clock A. M. of August 3d, credited the amount of said checks to the Mastin Bank, canceled, and placed them on the "sticker," and on the same day charged the amount thereof to the drawers thereof.

5. The Mastin Bank did business as a bank on August 2d, but failed, and did not open its doors on August 3d.

6. The parties through whose hands said checks passed after they were indorsed to plaintiff were all bankers and doing business as collecting agents.

7. When plaintiff sent the checks to Hetherington & Co. they charged the amount thereof to them, and upon receipt of the checks Hetherington & Co. credited the amount thereof to plaintiff.

8. In like manner Hetherington & Co., upon transmitting said checks to the Mastin Bank, charged the amount thereof to the latter, and upon receiving the checks on the 1st of August, the Mastin Bank credited the amount of them to Hetherington & Co.

9. The Mastin Bank on the 3d of August made an assignment of all its effects to Kersey Coats, as assignee, for the benefit of its creditors.

10. The Mastin Bank was largely indebted to defendant when it failed, and the defendant, *having collected the checks*, applied the amount upon said indebtedness.

11. The plaintiff and Hetherington & Co. were, and for a long time had been, correspondents, as had been Hetherington & Co. and the Mastin Bank, and the Mastin Bank and defendant. The transactions, charges and credits were in the usual course of business.

12. In March, 1879, the plaintiff credited back on its books to Hetherington & Co. the amount of these checks.

13. Hetherington & Co. proved their claim against the estate of said Mastin Bank, including the amount of said checks, which claim was allowed in January, 1879, and they have since received from the assignee a dividend of twelve per cent. Such proof was not made at its suggestion, or with the knowledge of plaintiff.

14. Hutchinson, where defendant's bank is located, is more than two hundred miles from Kansas City, where the Mastin Bank was located.

§ 233. *Privity of action between owner of draft and sub-agent to collect it discussed.*

Upon these facts the question is whether defendant, when it collected the money on the checks, became the debtor of the plaintiff or of the Mastin Bank. It is insisted on the part of plaintiff that the checks were the property of plaintiff, and that due notice of its ownership was communicated to the defendant by the restrictive indorsements thereon, and that the defendant has shown no right to retain their proceeds, or to apply the same on its claim against the Mastin Bank. On the part of defendant it is insisted that plaintiff cannot recover because there is no privity between plaintiff and defendant. In the case of *Bank of Metropolis v. New England Bank*, 1 How., 234 (BANKS, § 203), it was held that if negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, *without notice that it does not belong to the former*, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, *if that balance has been allowed to arise and remain on the faith of receiving payment from such collections* pursuant to a long usage between the two banks. In that case it appeared that the paper in question was indorsed by the New England Bank of Boston to the Commonwealth Bank of Boston, for collection merely, and the latter bank sent it for collection to the Bank of the Metropolis in the city of Washington. The indorsement to the Commonwealth Bank did not show that the title was retained by the New England Bank. The Bank of the Metropolis having collected the paper and applied the proceeds to the payment of a claim held by it against the Commonwealth Bank, which, in the meantime, had become insolvent, sought to show, in justification, that for a series of years it had been in the habit of receiving such paper from the Commonwealth Bank, which was always treated as the property of that bank, and credited to it in its account current, and that the paper in question was received in that way, in the ordinary course of business, without any notification that any other party had any interest therein. The court said: "It is evident that a loss must be sustained, either by the plaintiff or defendant in error, by the failure of the Commonwealth Bank. We see no good ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give the corporation, which has proved insolvent, credit with the plaintiff in error, by the notes and bills which

it placed in its hands to be sent to Washington for collection, *indorsed in such a form as to make them prima facie the property of the Commonwealth Bank, and enable it to deal with them as if it were the real owner.*" It will be seen that the case was decided upon the ground that the paper was indorsed so as to show, *prima facie*, a perfect title in the indorsee, thus enabling the latter to use it as its own, and to get credit on the faith of absolute ownership. It is clear that had the indorsement been restricted in its character, so as to show the continued ownership of the New England Bank, the result would have been different. Of the effect of restrictive indorsements I shall speak hereafter.

In the case of *Wilson v. Smith*, 3 How., 763, it was held that if the owner of a bill send it to an agent not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at that place, and, if the sub-agent receive the contents, the owner can sue him for money had and received, although the sub-agent had no notice, when he collected the money, that the agent was not the owner. And it was also held that in such a case the sub-agent cannot retain part of the proceeds on account of a debt of the agent, *unless he has given credit on the faith that the agent owned the bill.* It is admitted that this case is decisive of the case at bar, unless it has been overruled by the recent case of *Hoover v. Wise*, 91 U. S., 308, which must now be considered. That was a suit in bankruptcy. Wise & Greenbaum owned a money demand, which they delivered for collection to a collection agency in Nebraska. That agency transmitted the claim to an attorney, who, *knowing the insolvency of the debtor*, persuaded him to confess judgment. It was held that the attorney was the agent of the collection agency which employed him, and not of the creditors, and that therefore his knowledge of the insolvency of the debtor was not chargeable to the creditors. The case undoubtedly holds that there is, in such cases, no privity between the last agent and the owner of the paper, and, therefore, if it be necessary for plaintiff, in the present case, to establish such privity between it and the defendant, this action must fail. Of course it was necessary in the case of *Hoover v. Wise* to show such privity, since that is the very foundation of the doctrine invoked in that case, that notice to the agent is notice to the principal; but in this case we are to consider whether the plaintiff's right to recover is not made out by showing that the bills collected by defendant were plaintiff's property, and that defendant had, in the restrictive indorsements on the paper itself, notice of plaintiff's ownership. That the bills were the property of plaintiff cannot be questioned. There is no pretense that it sold them to Hetherington & Co., or ever transferred any interest in them, or control over them, except the right to collect them for plaintiff's use and benefit. Is it not equally clear that defendant had notice of plaintiff's ownership? The indorsement by which plaintiff transferred the paper is in these words: "July 29, 1878. Pay to the order of W. Hetherington & Co., Atchison, account of First National Bank, Chicago.

L. J. GAGE, Cashier."

§ 234. *Indorsement "for account" is restrictive.*

This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills, and to give notice to the defendant that the plaintiff did not thereby give title to them, or to their proceeds, when collected. 1 Daniel on Negotiable Instruments, § 698, and cases cited. Such an indorsement "shows plainly that the indorser does not mean to part with the absolute property in the bill, and is, therefore, barely authority to receive the

money upon it." Edwards on Bills and Notes, § 277; *Leavitt v. Putnam*, 3 N. Y., 494. "In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof, and, if he voluntarily assents to, or aids in, any other appropriation, it will be a wrongful conversion thereof, for which he will be responsible." Story on Prom. Notes, § 143 and cases cited. Upon these principles, which are clearly recognized in *Bank of Metropolis v. New England Bank*, and in *Wilson v. Smith*, *supra*, the plaintiff in this case is entitled to recover, unless a different doctrine is established by *Hoover v. Wise*, already referred to. In that case, as already seen, the only point decided was that the attorney who collected the debt for the collection agency "was not the agent of Wise & Greenbaum, the New York creditors, in such a sense that his knowledge of the bankrupt condition of Openheimer is chargeable to them." But suppose the attorney in that case, knowing that Wise & Greenbaum were the owners of the paper, had collected the money, and had refused to pay it over, assuming the right to apply it on a claim of his own against the collection agency, would it follow from this ruling that Wise & Greenbaum would have failed in a suit to recover it?

That the court did not intend to overrule its previous decisions, above referred to, is, I think, clear from the language employed on page 314, as follows: "Nor do we think that any great difficulty arises from the case of *Wilson v. Smith*, 3 How., 763-70. That decision is based upon the case of *Bank of Metropolis v. Bank of New England*, 1 How., 234, which is the only case referred to in the opinion, and in which case the question was not raised. The question there was not one of privity, but of the right to retain under the circumstances stated." Precisely so in this case, the question is as to the right of the defendant to retain the money under the circumstances. Inasmuch as it was plaintiff's money, and defendant had notice of that fact, I think he cannot retain it. Even without such knowledge defendant would be liable. I fully approve the doctrine announced by the supreme court of Massachusetts in *Hall v. Marston*, 17 Mass., 574-79, as follows: "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action (*assumpsit*), although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise." This doctrine is not in conflict with the decision of the supreme court in *Hoover v. Wise*. The defendant's claim, that it has the right to apply the proceeds of the checks collected by it to the liquidation of its claim against the Mastin Bank, is entirely without merit. There is not a shadow of ground for holding that the defendant believed the paper belonged to the Mastin Bank. The indorsement to that bank declares in plain words that it was "for collection," so that the defendant was definitely informed that the Mastin Bank did not own the check.

It appears that the plaintiff charged the checks to Hetherington & Co. at the time of sending them to that firm for collection; but this seems to have been in accordance with a custom prevailing in such transactions. The paper sent to an agent for collection is charged to the agent, and credit is given when it is returned uncollected, or, in case of collection, when the proceeds are remitted. This, however, does not affect the title to the paper or its proceeds; that depends upon the question whether the paper is *sold* or not, except in the case of an assignment on its face purporting to be an absolute sale or transfer,

upon the faith of which an innocent purchaser buys from the assignee or advances money to him. It results from these views that a new trial must be granted, and that, upon the facts found, there must be a judgment for plaintiff.

FOSTER, D. J., dissented, citing *Hoover v. Wise*, 1 Otto, 308, in support of his views.

MARTIN v. COLE.

(14 Otto, 30-40. 1881.)

ERROR to the Supreme Court of the Territory of Colorado.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—The defendant in error was plaintiff below, and brought his action of *assumpsit* against the plaintiff in error, as indorser of a promissory note, in the district court of the first judicial district of Colorado territory, for the county of Arapahoe, the plaintiff below being the immediate indorsee. A copy of the note sued on, with the indorsements, filed with the declaration, is as follows:

"\$1,414.15.

GEORGETOWN, C. T., July 17, 1868.

"On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen $\frac{1}{10}$ dollars, for value received, at George I. Clark & Co.'s bank at Georgetown, with interest at the rate of three per cent. per month from date until paid.

(Signed)

"JOHN WEBB."

[Indorsed on back.]

"Pay to the order of Luther A. Cole. Value received.

(Signed)

"JOHN H. MARTIN."

The declaration, besides the common money counts, contained five special counts. In the first of them it is averred that, the note sued on being unpaid, on February 5, 1870, the plaintiff instituted suit thereon against the maker, at the first term of the court in the county of his residence after the maturity thereof, and at the same term, on April 7, 1870, recovered judgment thereon against him for \$2,284, together with costs; that upon said judgment he afterwards, on May 9, 1870, caused to be issued, and placed in the hands of the sheriff, an execution, which, on June 6, 1870, he made return of, showing that on May 9, 1870, he had levied the same on certain mining claims of the defendant, which, on June 1, 1870, he had sold according to law for the sum of \$5, besides the costs of the suit, amounting to \$45.75; and it is also in the same count further averred that, from the time of the rendition of the judgment against Webb, the maker of the note, he had no other property, either real or personal, subject to execution, out of which the balance of the judgment or any part of it could have been made, and that the keeping of the execution in the hands of the sheriff for the period of ninety days from its date, or the issuing of a *pluries* or other execution to collect the balance of said judgment, would have been wholly unavailing. There is also the further averment in the same count that the plaintiff used all due diligence to collect said note from the maker.

The second count of the declaration contains the averment that "at the time the said note became due and payable, and from that time up to the time of the commencement of this suit, and up to the present time, the said John Webb ever has been, and still is, insolvent and unable to pay said note, and that the

institution of a suit against the said John Webb at the time the said note became due, or at any time from the maturity of the said note until the present time, would have been, and was, and would be, entirely unavailing," etc. These averments appear to have been made with a view to meet the requirements of section 7 of an act, then in force, of the territory of Colorado, relating to bonds, bills and promissory notes, which is referred to in the brief of one of the counsel as found on page 85 of the Revised Statutes of Colorado of 1868, but which, in disregard of the rules of this court, is not set out either in the record of the case or in the brief of counsel. The volume referred to not being accessible, we find what we assume to be a republication of the same provision in the general laws of the state of Colorado, published by authority in the year 1877. It is as follows: "SECTION 7. Every assignor, or his heirs, executors or administrators, of every such note, bond, bill or other instrument in writing, shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have acted with diligence, by the institution and prosecution of a suit against the maker of such assigned note, bond, bill or other instrument of writing, or against his heirs, executors or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof: *Provided*, that if the institution of such suit would have been unavailing, or if the maker had absconded or left the state, when such assigned note, bond, bill or other instrument in writing became due, such assignee, or his executors or administrators, may recover against the assignor, or against his executors or administrators, as if due diligence by suit had been used."

The plaintiff in error, in addition to the general issue, filed a special plea to the first and second counts of the declaration, the substance of which is as follows: "And the said defendant avers that he made the said indorsement when it was so made, in blank, that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary. And this defendant avers that, relying upon the assurance of the said plaintiff that his indorsement should not be filled up so as to render him liable as indorsee thereon, he signed his name upon the back of said note, which without said assurance he would not have done." To this plea there was filed a general demurrer, which was sustained.

Afterwards, on June 6, 1874, the cause was submitted by consent of parties, without the intervention of a jury, when the court found the issues in favor of the plaintiff, and rendered judgment against the defendant for \$2,478.17 damages and costs. A bill of exceptions was taken, which sets out all the evidence given and offered in the trial of the case. From that it appears that the defendant below, Martin, being on the stand as a witness in his own behalf, was asked to state under what circumstances the note in suit was transferred by him to the plaintiff, Cole. Objection being interposed, the defendant then stated to the court that he offered to prove in defense a parol promise contemporaneous with the indorsement of the note; that he proposed to prove by the witness that the parol agreement set forth and stated in the defendant's second plea was made by the parties. The court sustained the objection, and the defendant excepted. Thereupon the defendant offered to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that

Martin should indorse his name on the note in blank to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note; to which offer an objection, interposed by the plaintiff, was sustained, and the defendant excepted.

The defendant had previously testified that his name on the back of the note was written by him, but that the words "Pay to the order of Luther A. Cole, value received," were not written at the time of the indorsement and delivery of the note, nor by him at any time. The plaintiff below read in evidence the depositions of William L. Campbell, Levi H. Shepperd, and John T. Harris, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity. Objections were made to their depositions, and overruled; to which an exception was taken. The objections, however, do not appear to be of sufficient importance to require further notice. The plaintiff also read in evidence the transcript of the record, judgment, and proceedings in the action of Luther A. Cole against John Webb, the maker of the note, together with the execution, levy and return, being the same referred to in the first count of the declaration. From that it appears that the execution was issued on May 9, 1870, returnable in ninety days from date, and actually returned on June 7, 1870, showing the levy and sale referred to in the pleadings. There was other testimony, also, tending to prove the insolvency of Webb, the maker of the note, at and after its maturity, and at the time of the bringing of this action.

An appeal was taken from the judgment of the district court of the first judicial district of the county of Arapahoe to the supreme court of Colorado territory, in which, at the February term, 1875, errors were assigned, and the judgment was affirmed in that court on March 28, 1876. To reverse that judgment is the object of the present writ of error.

The agreement set out and relied on in the plea was that "the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary." And the defendant averred that "he, relying upon the assurance of the said plaintiff that his indorsement would not be filled up so as to render him liable as indorser thereon, signed his name upon the back of said note, which without said assurance he would not have done." As the indorsement in blank, admitted by the defendant to have been made by him, without being filled up by the plaintiff at all, rendered him liable for the payment of the note as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential, and could not, in law, result in any actionable injury; for filling up the blank indorsement in the manner in which it was done neither added to nor subtracted from the liability which the defendant assumed by merely writing his name on the back of the note. The defendant below, however, further offered at the trial to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof under a plea of the general issue; and waiving any objection on that account, the re-

jection by the court below of this offer fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove, as a defense, that, as part of the transaction, it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

§ 235. *Parol evidence is not admissible to show a blank indorsement was intended to be without recourse.*

It has never been contended that such a defense, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper acquired before maturity in the usual course of business and without notice; for the protection of such a title is of the essence of the policy of the law merchant, and inheres in the very definition of negotiability. Hence, in that case, a collateral but contemporaneous written agreement between two prior parties to a bill or note would not affect its validity in the hands of the holder more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations, as was decided by this court in *Davis v. Brown*, 94 U. S., 427. The question is between them alone, and is whether the same effect will be given to such an agreement not reduced to writing. The ground of decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper. Accordingly, Mr. Justice Washington, in *Susquehanna Bridge and Bank Co. v. Evans*, 4 Wash., 480, after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said in his charge to the jury: "The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was, therefore, properly admitted." It is upon this distinction between contracts, express and implied; that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the supreme court of Pennsylvania, in *Ross v. Espy*, 66 Pa. St., 481, 483, that "the contract of indorsement is one *implied* by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an *express* agreement."

So in an early case in New Jersey, *Johnson v. Martinus*, 9 N. J. L., 144, it was held by the supreme court of that state that parol evidence was competent to overcome the implied contract which results from a blank indorsement, on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection or immunity. This case, however, was expressly overruled by the same court in *Chaddock v. Vanness*, 35 id., 517, in which it is plainly indicated that the distinction attempted to be made in some of the cases, between indorsements in full and those which are in blank, is untenable.

§ 236. *Nature of the contract of indorsement.*

The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not

in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full. It is spoken of by Wharton (*Law of Evidence*, etc., sec. 1059) as a contract *at short-hand*. The same view is taken in Daniels on Negotiable Instruments, sec. 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that, "in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him." If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it, in the relation of the parties to each other in the two cases.

The rule is tersely stated in Benjamin's Chalmers's Digest of the Law of Bills of Exchange, etc., art. 56, p. 63. "The contracts on a bill, as interpreted by the law merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect." Citing *Abrey v. Crux*, 5 Law Rep., C. P., 37.

The rule as declared by Mr. Justice Washington in the case cited was expressly rejected by this court in *Bank of United States v. Dunn*, 6 Pet., 51, one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement; citing the language of the court in *Renner v. Bank of Columbia*, 9 Wheat., 581, 587 (§§ 754-759, *infra*): "For there is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." The authority of this case on this point has never been questioned in this court, the explanation and qualification in *Davis v. Brown*, *supra*, having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted because it was in writing and part of the transaction.

The case of *Bank of the United States v. Dunn*, *supra*, is cited as an authority upon the point in *Phillips v. Preston*, 5 How., 278, 291 (§§ 603-607, *infra*), because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports." It is also referred to in terms and followed in *Brown v. Wiley*, 20 id., 442. In delivering the opinion of the court in that case, Mr. Justice Grier used this language: "When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some

precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain, or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See *Thompson v. Ketcham*, 8 Johns., 190."

The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law as constituting the operation and effect of the contract. In *Specht v. Howard*, 16 Wall., 564, Mr. Justice Swayne, delivering the opinion of the court, quotes from *Parsons on Notes and Bills*, 501, that "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note cannot be permitted to vary, qualify or contradict, to add to or subtract from, the absolute terms of the written contract." The same quotation forms part of the opinion in *Forsythe v. Kimball*, 91 U. S., 291, with the addition that, in the absence of fraud, accident or mistake, the rule is the same in equity as at law. The same principle, upon the authority of these cases, was affirmed by this court in *Brown v. Spofford*, 95 id., 474 (§§ 391-396, *infra*), and is assumed to be the law in *Cox v. National Bank*, 100 id., 704 (§§ 792-800, *infra*), and *Brent v. Bank of Metropolis*, 1 Pct., 89 (§§ 788-791, *infra*).

In view of this line of decisions, the question, as it arises in this case, cannot now be considered an open one in this court. It coincides with the rule adopted and applied in most of the states, but the cases are too numerous for citation. They will be found collected, however, in *Bigelow, Bills and Notes*, 168; *Byles, Bills* (6th Am. ed.), *Sharswood's note*, 157; 1 *Daniel, Negotiable Instruments*, secs. 80, 717 *et seq.*; 2 *Wharton, Evidence*, sec. 1058 *et seq.*; *Benjamin's Chalmer's Digest of the Laws of Bills of Exchange*, art. 56, p. 63. Of course there are many distinctions which, upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here further than to say that the limitations of the rule are perfectly consistent with it, and its application in this, as in other proper cases, will not be considered as encroaching upon them.

§ 237. *Necessity of suing maker before indorser.*

The opinion of the supreme court of Colorado territory, affirming the judgment of the district court, expressly declines to pass upon the question whether the evidence showed that the property of Webb, the maker of the note, was exhausted or not, because no exception was taken to the finding and judgment of the court. Our attention is called by counsel to a stipulation filed in the supreme court of Colorado by which the omission to insert the exception agreed to have been taken at the time in the bill of exceptions was intended to be cured; which, it seems, could not have come to the knowledge of that court. But the consideration of the exception does not avail the plaintiff in error. The record shows abundant evidence to sustain the finding complained of. Even if the point made were well taken, that where, under the statute of Colorado re-

quiring a prosecution of the maker to the end of an execution, it is necessary that the execution should be kept in force for the full period given by law for its return, in order to establish due diligence, nevertheless, in the present record, there is shown, in our opinion, evidence to justify a finding in favor of the plaintiff below, even although no execution had been issued against the maker of the note. It clearly appears that it would have been unavailing on account of his insolvency. In *Wills v. Claffin*, 92 U. S., 135 (§§ 579-581, *infra*), under a statute of Illinois containing a provision identical with that in the Colorado statute, from which, indeed, the latter is said to have been copied, it was held that if the maker of the note was insolvent, so that a suit against him would be unavailing, the failure to institute it would furnish no defense to the indorser. That, indeed, is the plain language of the law itself. We find no error in the record.

Judgment affirmed.

KING v. HAMILTON.

(Circuit Court for Oregon: 12 Federal Reporter, 478-481. 1882.)

Opinion by DEADY, D. J.

STATEMENT OF FACTS.—This action is brought by the plaintiff, a British subject, against the defendant, a citizen of Oregon, upon a promissory note alleged to have been made by the defendant on January 29, 1879, and delivered to "Mrs." John Pollock, "for the sum of £500, money of the united kingdom of Great Britain and Ireland," payable in one year after date, with interest at the rate of five per centum per annum; which note was afterwards duly transferred to the plaintiff, and is still unpaid. The complaint concludes with a prayer for judgment against the defendant for said sum of £500 and interest, or "its equivalent in money of the United States." Nothing is alleged as to where the note was made or made payable.

§ 238. *A note payable in pounds sterling is payable in money, and is negotiable.*

The defendant demurs because (1) the complaint does not state facts sufficient to constitute a cause of action; and (2) it does not appear that the note was made "for value." Upon the argument of the demurrer the point made by counsel for defendant was that the note was not made for "money," but a commodity, and therefore it was neither negotiable nor presumed to have been made upon a sufficient consideration, but that the same must be alleged as in the case of an ordinary simple contract. In support of the demurrer counsel cites *Com. v. Haupt*, 10 Allen, 38; *Edwards, Bills*, 128; *Byles, Bills*, 92; *Robinson v. Hall*, 28 How. Pr., 342; *Abb. Law Dict.*, "Money." The rule that bills and notes must be for the payment of "money" only is admitted. *Story, Bills*, § 43; *Byles, Bills*, 92; *Chitty, Bills*, 133; *Daniel, Neg. Inst.*, § 50. But it is equally well established that they may be made payable in the "money" of any country — in its coins, "such as guineas, ducats, Louis-d'ors, doubloons, crowns or dollars; or in the known currency of a country, as pounds sterling, livres, tournoises, francs, florins, etc.; for in all these cases the sum of money is fixed by the par of exchange or the known denomination of the currency with reference to the par." *Story, Bills*, § 43; *Daniel, Neg. Inst.*, § 58; *Edwards, Bills*, 137-8; *Black v. Ward*, 27 Mich., 191; *Thompson v. Sloan*, 23 Wend., 74. It follows that a note payable in pounds sterling or British sovereigns is payable in "money" just as much and as certainly as if it was payable in dollars. The case is different from a note made payable in "currency,"

which may be "money" only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money. As was said in the court in *Thompson v. Sloan*, *supra*, a bill or note payable in money of a foreign denomination is negotiable, "for it can be paid in our own coin of equivalent value, to which it is always reduced by recovery. A note payable in pounds sterling and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially." It is also said in the books that the plaintiff in such case should allege and prove the value of the sum expressed in foreign money in the money of the United States, which has not been done here. But I apprehend that this is now unnecessary.

§ 239. *Value of English money fixed by statute.*

By section 2 of the act of March 3, 1873 (17 St., 603; section 3565, Rev. St.), it is provided that "in all payments by or to the treasury, the sovereign or pound sterling" shall "be deemed equal to \$4.8665;" and this rule is further declared applicable to the appraisement of imported merchandise when the value of the invoice is expressed in pounds sterling, "*and in the construction of contracts, payable in sovereigns or pounds sterling;*" and this valuation is declared to be the par of exchange between Great Britain and the United States. The provision concerning contracts payable in sovereigns or pounds sterling is new in the legislation of the United States.

§ 240. *Not necessary to prove value of the English pound sterling.*

In the *Collector v. Richards*, 23 Wall., 246, this act came before the supreme court, and the opinion of Mr. Justice Bradley is instructive upon the subject under consideration. It seems to have been taken for granted that the pound sterling is money, and known as such to the court independently of the act of congress; and money, too, that can, in a judicial proceeding, be converted into money of the United States upon proof of the par of exchange. He says: "Although the sovereign or pound sterling, as a coin, has only existed since the year 1817, the amount of pure gold contained in the pound sterling (estimating the guinea at 21 shillings) has been 113.001 grains ever since the year 1717; and as the United States dollar contains 23.22 grains of pure metal, it only requires a process of simple division to show that the value of the sovereign is precisely what the second section of the act determines it to be. This intrinsic value of the pound sterling, as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British empire during the period of our own colonial history, of which all our courts were required to take judicial notice; and its continuance to the present time is a public fact as well established as any other act of the British government." The contract sued on here is a contract for the payment of "money," and not a "commodity." It is also a contract for the payment of pounds sterling, and therefore within the purview of the act of 1873, *supra*, which establishes the value of this foreign coin in money of the United States. It is not required to aver or prove what the law establishes, and therefore, in giving judgment for the plaintiff in this action, it is only necessary to convert the £500 into dollars at the rate of 4.866½ of the latter to one of the former. Beyond a doubt, then, this note was made for "money," and for a sum certain, because a note for any number of pounds sterling is only another form of expression for the equivalent in dollars, which equivalent is now prescribed by statute.

The case of the Com. v. Haupt, 10 Allen, *supra*, in which the annual report of the mint was taken as the value of the pound sterling (\$4.8448), arose under the act of 1857 (11 St., 163), and was decided prior to the passage of the act of 1873. The demurrer is overruled.

HOWENSTEIN v. BARNES.

(Circuit Court for Kansas: 5 Dillon, 482-486. 1879.)

Opinion by FOSTER, J.

STATEMENT OF FACTS.—The defendants made two certain promissory notes, as follows:

"\$2,040.20.

MEDINA, KAS., March 4, 1877.

"Thirty days after date we promise to pay to the order of Powers, Lynde & Co., two thousand and forty and $\frac{2}{100}$ dollars, at the First National Bank of Kansas City, Missouri, with interest at twelve per cent. per annum after maturity until paid, and ten per cent. attorney's fees if suit be instituted on this note. The drawers and indorsers hereof jointly and severally hereby waive demand, protest, and notice of non-payment of this note; value received.

"BARNES & HAYNES."

The other note was like this, excepting the date and amount, being dated January 30, 1877, and for the sum of \$2,020. Both of these notes were by the payee indorsed and transferred to the First National Bank of Kansas City, within six days after their respective dates, said bank discounting the notes at their face, less the interest for the time they were to run, and placed the money to the credit of Powers, Lynde & Co., who afterwards checked it out. The defendants, a few days before the respective notes fell due, remitted the money to pay the same to Powers, Lynde & Co., not knowing that they had transferred the notes. Afterwards the First National Bank failed, and Howenstein was duly appointed receiver, and he brings this suit to recover against the makers. These notes appear to have been made in Kansas, and delivered to the payees at the place where they were made. They were made payable in Missouri, at the First National Bank of Kansas City, and were indorsed and transferred to said bank before maturity.

§ 241. *In Kansas the negotiability of a promissory note is not destroyed by a provision for paying attorney's fees in case of suit.*

The supreme court of Kansas has decided that such notes are negotiable instruments. *Seaton v. Scovill*, 18 Kan., 435 (5 Cent. Law Jour., 184). The supreme court of Missouri has decided that they are not negotiable instruments. *First National Bank v. Gay*, 63 Mo., 34 (3 Cent. Law Jour., 465). Neither of these decisions is founded on any statutory provision, but both rest upon constructions of the general principles of the law merchant. The defendants insist, however, that, as the contract was to be performed in Missouri, the parties are presumed to have contracted with reference to the law as decided by the supreme court of that state.

§ 242. *Rules for interpreting contracts.*

The purpose of interpretation in any case is to ascertain the intention of the contracting parties. But if the intention of the parties cannot be determined from the language of the instrument itself, it is to be sought for in the situation of the parties and the subject matter of the contract, aided by certain rules of construction which are presumed to be in accordance with the inten-

tions of the parties. Story on Bills, sec. 143; Edwards on Bills, p. 166. Undoubtedly the place of payment was fixed, in this case, for the convenience of the payees in the notes, as they resided in Kansas City, and held business relations with the bank where payment was to be made. There seems to be some uncertainty as to what rule governs in the construction and interpretation of contracts made in one state to be performed in another. It has been held that the law of the place of performance is to control as to the construction and interpretation of the contract; and, again, it has been as clearly held that a contract legal by the laws of the place where made is valid, and will be enforced in other jurisdictions. Story on Promissory Notes, 179; Tilden v. Blair, 21 Wall., 247 (§§ 389, 390, *infra*).

§ 243. *Performance of a contract is governed by the law of the place of performance. Its validity by the law of place where made.*

From the authorities which I have been able to examine, the true rule of construction is this: Any interpretation or construction applicable or incidental to the performance should be governed by the law of the place of performance, and such matters of construction or interpretation as go to the execution and validity of the contract are determined by the laws of the place where the contract was made. This is the rule established by the supreme court in the case of Scudder v. Union National Bank, 91 U. S., 406; 2 Cent. L. J., 827 (§§ 158-162, *supra*). Now, if this case is such a one as calls for the application of this rule of construction, I should say the laws of Kansas would control, because the question is simply this: Are these writings promissory notes? The supreme court of Kansas says they are; the supreme court of Missouri says they are not. They were made in Kansas, and the laws of that state must determine their legal effect. It is a question touching their validity, and goes back to the execution of the papers. It is not reasonable to suppose that the contracting parties intended, by making these notes payable in Kansas City, to restrict their negotiability. If such had been the purpose, a stroke of the pen over the words "*the order of*" would have effected that object completely. Suppose the payees had transferred these notes, while in Kansas City, to a citizen of Kansas, could it be urged against him, because the courts of Missouri hold the paper non-negotiable, that he could not recover in the courts of Kansas? I think not.

§ 244. *By the general commercial law, a note stipulating for an attorney's fee in case of suit is negotiable.*

But it seems to me this case rests upon the general commercial law of the country, and this court is not bound to speculate upon the effect of these conflicting decisions of Kansas and Missouri. Mercer County v. Hackett, 1 Wall., 96. Both of them cannot be good law; one is right and the other is wrong. The parties are presumed to have contracted with reference to the law as it really is; and it really is the same in both states, for it is a part of the common law of the land, and this court must base its decision on that law. And it seems to me the only way the defendants can be relieved from liability would be to hold that, under the commercial law of this country, these contracts are not promissory notes, because not drawn for an amount certain, by reason of the provision for an attorney fee. And in support of that proposition there are several very respectable authorities. First National Bank v. Gay, 63 Mo., 34 (3 Cent. L. J., 465); Samstag v. Conley, 64 Mo., 476; Woods v. North, 84 Pa. St., 407; Lowe v. Bliss, 24 Ill., 168. On the other side, there are many equally respectable authorities. Gaar v. Louisville Banking Co., 11 Bush, 180; Sperry v. Horr, 32

Ia., 184; *Stoneman v. Pyle*, 35 Ind., 103; *Wyant v. Pottorf*, 37 Ind., 512; *Walker v. Woolen* [Indiana], 4 Cent. L. J., 248; *Seaton v. Scovill*, 18 Kan., 435, 5 Cent. L. J., 184, and cases therein cited. The reasoning upon which the Kentucky, Iowa and cases following, rest their decisions appears to me to be correct, and the conclusion reached is more in accordance with the advanced views of the present time, and with the general principles established by the supreme court of the United States in *Mercer County v. Hacket*, 1 Wall., 95, and other cases, sustaining the negotiability of municipal bonds.

§ 245. — *the amount to be paid on maturity is certain.*

The sum of money for which these notes were made is fixed and certain. The amount due at the maturity of the paper—the date when the makers promised to pay—was in no manner indefinite. At all times during the period these notes would have been negotiable were the provision for an attorney fee omitted—*i. e.*, until they were due,—they called for a definite and fixed sum of money, and it was only on the contingency there should be a breach of the promise and a suit brought to enforce it that it imposed a further liability. These notes stipulated for interest at twelve per cent. per annum *after maturity*. Here is a further liability if not paid when due, and if we are to look beyond the day of payment fixed in the note, what prophetic vision can foretell what exact sum would be due when the note goes to judgment, or is voluntarily paid before judgment; but no one would contend but it is nevertheless a negotiable promissory note.

§ 246. *The party most in fault must suffer.*

It is a hard case for the defendants to be compelled to pay these notes again, and it would also be hard for the creditors of the bank to have to lose the amount; but one party or the other must suffer, and in equity the one most in fault should be the loser. There was a want of caution by the defendants in sending the money direct to Powers, Lynde & Co. before due, without knowing they still held the notes, and being different from the place of payment named in the paper. Undoubtedly they had implicit confidence in the payees, and believed them to be honest men, and so sent the money directly to them in good faith; but that confidence was misplaced, and the defendants are the losers by it. Judgment must go for the plaintiff.

BRADLEY v. LILL.

(Circuit Court for Illinois: 4 Bissell, 473-476. 1866.)

STATEMENT OF FACTS.—Action on a promissory note for a certain sum, and fifty-one cents in exchange, dated at Chicago and payable in New York. The statute of Illinois, referred to by the court, provided that contracts, etc., made within the state, or between citizens of the state, reserving a legal rate of interest, might be made payable in any other state or territory, or in London, and that such contracts should be governed by the law of Illinois. It was claimed that the note was governed by the law of Illinois, although it did not bear interest on its face, and that the provision for exchange rendered the amount uncertain, and that the note was, therefore, not negotiable.

§ 247. *Illinois interest act not applicable.*

Opinion by DRUMMOND, J.

The statute of February 12, 1857, does not apply to this case, because that contemplates a case where there was an amount of interest fixed by the agreement of the parties, in which event, if the rate was legal according to the laws

of Illinois, the contract might be enforced, notwithstanding the money was made payable in another state or country, and the rate of interest greater than there allowed.

§ 248. *The fact that a note includes exchange will not render it non-negotiable.*

This court has always held that the fact that a note is made payable in exchange does not prevent its being a promissory note, and with all due respect to the supreme court of this state, I cannot concur in the opinion expressed in the case of *Lowe v. Bliss*, recently decided. 24 Ill., 168. An instrument of writing by which A., at Chicago, promised to pay to B. within a certain time \$1,000 with the current rate of exchange on New York at maturity, is a promissory note, notwithstanding the rate of exchange was not specified. I admit that under the general law a note must be payable absolutely, in money. In the example given \$1,000 was the sum payable; the exchange, like interest, was an *incident* merely to the principal sum, and it was not the less on that account an agreement to pay a fixed sum. If a note be executed in England, payable "with interest," and a suit be brought on it here, the amount of the verdict or judgment is not a mere matter of computation, but proof must be introduced of the rate of interest in England; and the amount of the verdict or judgment, even after the proof is made, is greater or less, depending upon the fact whether the verdict is rendered to-day, next week or next year, the amount of interest increasing regularly by efflux of time; but when the proof is in, and the time established, then the amount becomes a matter of computation. So, when the proof as to exchange is in, and the time fixed, then also the amount is a matter of computation. In the one case the principal amount and the time and rate fixed by evidence control and determine the aggregate sum, and equally so in the other. If this suit were brought in the courts of this state, being a note payable in New York, the amount for which judgment would be rendered would have been ascertained, not from the face of the note itself, but by evidence before the court or jury of the law of New York as to interest. It would be only when that was done that the amount could become a matter of computation.

§ 249. *Federal courts are not bound to follow the decisions of the state supreme court upon questions of commercial law.*

This court, therefore, till overruled by the supreme court of the United States, adheres to the view that it has always taken of this point, that an instrument of this kind is a promissory note. This is a commercial question, and this court is not bound to follow a decision of the supreme court of this state on this branch of the law; the more especially when it is contrary to the opinion of the whole mercantile community, as shown by uniform practice, and contrary also to the general opinion of the profession. Demurrer overruled.

MICHIGAN BANK v. ELDRED.

(9 Wallace, 544-554. 1869.)

ERROR to U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—This suit was brought by the bank against the firm of Eldreds & Balcom, on a note in the handwriting of and signed by F. E. Eldred. Service was had upon Anson Eldred, a member of the firm, and he was the only defendant who appeared in the suit. Further facts are stated in the opinion.

§ 250. *Requisites of a promissory note.*

Opinion by MR. JUSTICE CLIFFORD.

Promissory notes given for the payment of money, without any condition or contingency, and payable to order or bearer, are as much commercial instruments as bills of exchange, and the title to the same, and their transfer from one person to another, are governed and regulated by the same rules of commercial law. Authorities may be found where it is held that it is not essential to the character of a promissory note or bill of exchange that it should be negotiable, and that other words besides the words "or order," or the words "or bearer," may be employed to express the quality of negotiability; but it is not necessary to discuss those topics, as the inquiry before the court has respect to the execution, transfer and title of a negotiable promissory note in the ordinary form. *Wells v. Brigham*, 6 Cush., 6; *Raymond v. Middleton*, 29 Penn. St., 530; *Story on Bills*, § 60.

STATEMENT OF FACTS.—Examined carefully, the pleadings and evidence exhibit the following facts, which are material to the present investigation: Claiming title to the note in question, the plaintiffs instituted the present suit against the defendant and one Uri Balcom and Elisha Eldred, alleging that they were copartners in trade under the firm name of Eldreds & Balcom. They, the defendants, were engaged in business both in Chicago and Milwaukee, and the record shows that they were sued as indorsers of the note described in the declaration. Only one of their number, to wit, the defendant, resided in that state, and he only was served with process. Besides a special count against the defendants as the indorsers of the note, the declaration also contained the common counts, to which was annexed a copy of the note, as notice that the note would be offered in evidence under those counts. Process having been served, the present defendant appeared, and pleaded the general issue, and the parties went to trial, and the verdict and judgment were for the defendant. Exceptions were duly taken by the plaintiffs to the rulings and instructions of the court, and they sued out this writ of error, and removed the cause here for re-examination. Some further reference to the facts proved at the trial is necessary, in order that the precise nature of the questions presented in the bill of exceptions may be understood. Founded as the declaration was upon a promissory note, it was only necessary for the plaintiffs, under the general issue, to prove the execution of the note, the signature of the indorsers, the demand of payment of the maker, the dishonor of the note, and notice of the dishonor, and non-payment to the indorsers. Having proved those facts, they introduced the note in evidence, of which the following is a copy:

\$4,000.

DETROIT, June 12, 1861.

Sixty days after date I promise to pay to the order of Eldreds & Balcom four thousand dollars at the Michigan Insurance Bank, value received.

(Signed)

F. E. ELDRÉD.

Indorsed on the back of the note is the name of the firm to which the defendant belongs, to wit, Eldreds & Balcom, and the allegations of demand, protest and notice of dishonor and non-payment were fully proved.

Witnesses were examined upon both sides, from whose testimony, as reported in the bill of exceptions, it appears that the maker of the note was engaged in business at Detroit, in the state of Michigan; that he and the firm of which the defendant is a member entered into an arrangement to interchange accommodation indorsements for business purposes; that the understanding was that

the firm should indorse whatever paper he, the maker of that note, should find it necessary to use in his business, and that he, in consideration thereof, should indorse their paper intended for discount, to such an extent as they might desire. Pursuant to that arrangement the respective parties indorsed numerous blank notes for each other, and it appears that the senior partner of the firm indorsed at one time some fifty or fifty-five blank notes of the kind, and that the defendant knew what was done, and advised that the indorsements should be made. Packages of such blank notes, signed by the maker of the note in controversy, were sent by express to that firm for their indorsement, and when they were indorsed in blank they were returned through the same channel to the party by whom they were forwarded, and it appears that the note described in the declaration is one of the notes indorsed by the senior partner of the firm. Approved as the arrangement was by the defendant, he has no cause for complaint; and it also appears that the maker of the note borrowed money of the plaintiffs, and that he indorsed the note to them as collateral security in the regular course of business.

Depositions were also introduced by the defendant, and he offered in evidence the third article in the copartnership agreement of the indorsers of the note, which reads as follows: "That neither of the parties shall employ any of the moneys, goods or effects belonging to the said copartnership, *or engage the credits thereof*, except for the benefit of the said joint business." Seasonable objection was taken by the plaintiffs to the introduction of that article as evidence, upon the ground that it was irrelevant and incompetent, but the court overruled the objection and the same was read to the jury, and the plaintiffs then and there excepted to the ruling of the court. Instructions, supposed to be pertinent to the issue, were then given by the court to the jury, to which no exceptions were taken, but the court also instructed the jury to the effect that if the note in suit was never actually negotiated to the bank, but was got up by the maker of the note, and was accepted by the bank, in pursuance of a corrupt agreement between the maker of the note and the bank to defraud the defendant, then the plaintiffs cannot recover; to which instruction the plaintiffs then and there excepted.

§ 251. *Evidence restricting authority of partner to indorse in firm name inadmissible against bona fide holder.*

Objection, in the first place, is taken by the plaintiffs in argument to the ruling of the court in admitting in evidence the third article of the copartnership agreement. Attempt is made to sustain that ruling, upon the ground that the evidence tended to show that the partner who indorsed the note with the firm name was unauthorized "to engage the credit" of the firm except for the joint business of the company; but there are two decisive answers to that suggestion: (1) That the indorsements were made in pursuance of a previous understanding and arrangement between the firm and the maker of the note, and the evidence reported in the bill of exceptions shows that the defendant advised his partner to indorse the parcel of notes which contained the one in controversy. (2) That the plaintiffs had no knowledge of the contents of the articles of copartnership, nor of any fact or circumstance showing, or tending to show, that the indorsement was made without authority. On the contrary, the maker of the note, examined by the defendant, testified that the indorsement on the note described in the declaration was made by one of the partners of the defendant; that he, the witness, transferred the note to the plaintiffs as security for a loan made at the time the note bears date; that he had an arrangement with that

firm that they should indorse his notes and that he would indorse their notes; that the indorsements were made in blank, and were filled up by the respective makers as they wanted to use the notes in their business, and that the note in controversy was indorsed in that way with the knowledge of the defendant as well as the other partners. Unaccompanied by evidence showing, or tending to show, that the plaintiffs had knowledge of the restriction contained in the copartnership agreement, or the subsequent introduction of such evidence, it is quite clear that the article of the copartnership agreement read to the jury was irrelevant and incompetent, as it clearly appeared that the plaintiffs were indorsers for value at the date of the note in the usual course of business, without notice of any equities between the antecedent parties. Such a party is regarded, in the commercial law, as a *bona fide* holder of the negotiable instrument, and the rule is irrepealably established by the decisions of this court that the indorser, under those circumstances, takes the title unaffected by any equities between the antecedent parties to the instrument, and may recover thereon, although, as between the antecedent parties to the same, the transaction may be without any legal validity. *Goodman v. Simonds*, 20 How., 363 (§§ 420-425, *infra*); *Murray v. Lardner*, 2 Wall., 110; *Bank of Pittsburgh v. Neal*, 22 How., 96 (§§ 405-407, *infra*); *Swift v. Tyson*, 16 Pet., 15 (§§ 382-386, *infra*); *Goodman v. Harvey*, 4 Ad. & Ell., 870.

§ 252. *Power to fill up blanks. Rights of bona fide holders.*

Bills of exchange or promissory notes may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferable by delivery; and the settled rule of law is, that if such a bill or note, so indorsed or made payable to bearer, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen and is subsequently negotiated for a valuable consideration to a third person, who receives it in the usual course of business, without knowledge of the condition annexed to the possession of the instrument, or of the means by which the possession was acquired, his title is wholly unaffected by any such breach of trust, or by any such unauthorized or felonious acquisition or appropriation of the note, and may recover the amount against any of the prior parties to the instrument. *Chitty on Bills*, ed. 1842, 257; *Belmont Branch Bank v. Hoge*, 35 N. Y., 65; *Hoge v. Lansing*, 35 id., 136. Nothing can be inferred adverse to the authority of the member of the firm to make the indorsement from the fact that the blanks in the note were not filled up when he received it from the maker, as it is fully proved that the maker of the note was authorized by the arrangement between him and the firm to fill up the blanks and insert the date and the amount of the notes as he found it necessary to use the same in his business, and that defendant, as one of the partners, had knowledge of that arrangement. Suppose, however, there was no proof of such knowledge on the part of the defendant, still it is well settled law that where a party to a negotiable bill of exchange or promissory note containing blanks intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be indorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as between such party to the bill or note and innocent third parties holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent

of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent. *Mitchell v. Culver*, 7 Cow., 336; *Goodman v. Simonds*, 20 How., 361; *Violett v. Patton*, 5 Cranch, 142 (§§ 553-555, *infra*); *Russel v. Langstaffe*, 2 Doug., 514. So, where a party signs his name to a blank paper, as a means of accommodating another person, he thereby authorizes that person to whom he delivers the paper, and for whose accommodation he signed it, to fill up the instrument; and the conclusion of law is, that the filling up the instrument under those circumstances, inasmuch as it is done by the authority of the party who signed the paper, is his act, and that as between him and innocent holders of the instrument after it is filled up, he is bound by his signature, if the instrument was negotiated for value before it fell due, and in the usual course of business. *Bank v. Kimball*, 10 Cush., 373; *Collis v. Emett*, 1 H. Black., 313; *Montague v. Perkins*, 22 Eng. Law & Eq., 516.

§ 253. *Presumption as to time of indorsement.*

Testimony was introduced by the plaintiffs to show that the indorsement of the firm name on the back of the note was made before the same was negotiated to them as security for the discounts to the maker, but the introduction of such evidence was unnecessary, as the presumption of law, in the absence of opposing testimony, is that such an indorsement, if without date, was made at the time the bill or note was executed, and before the same was negotiated to the holder. *Ranger v. Cary*, 1 Metc., 369; *Balch v. Onion*, 4 Cush., 559; *Rice v. Isham*, 1 Keyes, 44.

§ 254. *Instruction; evidence must warrant.*

II. Apart from that ruling of the court, the plaintiffs also contend that the instruction given to the jury, as recited in the bill of exceptions, is erroneous, and that the judgment should be reversed on that account, even if it be held that the ruling of the court in admitting in evidence the third article of the copartnership agreement is correct. Contradicted as the first assumption of the instruction is by the testimony of the maker of the note, it does not seem to require any extended argument to show that it is unfounded, especially as it finds no support in any fact or circumstance introduced in evidence by either party. Discounts were obtained of the plaintiffs by the maker of the note, and he negotiated the note in controversy to the plaintiffs as security for such loans, transferring the note to them at the time the loans were made. Parties sometimes obtain discounts on such paper by indorsing their own name on the note, but it is a regular course of business frequently adopted and equally legitimate for a party to give his own note for the amount of the loan, and to negotiate a note like the one in question to the lender as collateral security; and, whether the business is transacted in the one way or the other, the title of the lender of the money to the note negotiated as security for the loan is equally valid to the amount of the money loaned. *Chicopee Bank v. Chapin*, 8 Metc., 40; *Stoddard v. Kimball*, 6 Cush., 469; *Blanchard v. Stevens*, 3 id., 162; *Atkinson v. Brooks*, 26 Vt., 569. But the second assumption of the instruction is even more unjustifiable than the first, as it imputes concerted action, and a corrupt agreement between the maker of the note and the plaintiffs to defraud the defendant, when in point of fact there is not a particle of evidence in the record to sustain the charge, or which has any tendency to support any such theory. When a prayer for instruction is presented to the court, and there is no evidence in the case to support the theory of fact which it assumes, the

prayer for instruction should be denied, and if given by the court it is error, as the tendency of such an instruction is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. *Goodman v. Simonds*, 20 How., 359 (§§ 420-425, *infra*). It is clearly error in a court, said Chief Justice Taney, in *United States v. Breitling*, 20 How., 252, to charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered. Such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead, and may induce them to indulge in conjectures instead of weighing the testimony.

§ 255. *Agent may change date of note.*

Reference is made to the fact that the word June is written over the word August in the date of the note, showing that the date originally was August instead of June, as it now is; but the conclusive answer to that suggestion is that the maker of the note testifies that he wrote the word June as it now is in the date of the note before he negotiated the note to the plaintiffs, and as he was the agent of the firm in filling up the note, the defendant, as between him and the plaintiffs, has no cause of complaint.

Judgment reversed, and the cause remanded, with directions to issue a new venire.

§ 256. *Power; seal.*—A power to indorse notes need not be under seal. *Bank of Washington v. Pierson*, 2 Cr. C. C., 685. See § 280.

§ 257. *Power; continuance of, to renewal notes.*—A power from H. to sign for him any note for the renewal of notes on which he was a drawer or indorser, held a continuing power to indorse notes subsequently given, to renew notes indorsed by the attorney in the name of the principal to renew notes indorsed by the principal himself. *Ibid.*

§ 258. *Special indorsement destroys negotiability.*—A special indorsement for the use of the indorser destroys the negotiability of a bill. *Brown v. Jackson*, * 2 Wash., 24; S. C., 1 Wash., 512. See §§ 214, 215.

§ 259. *Restrictive indorsement.*—If a bill be indorsed by a restricted indorsement—e. g., to the indorsee *only*, or for the use of the indorser,—but be in fact transferred in payment of a pre-existing debt or for other valuable consideration, the indorsee, notwithstanding such restricted indorsement, possesses all the rights of a general indorsee as between him and the indorser, however it may be as to the drawer and either of the parties to the bill; and the indorsee will not release the indorser by looking to the drawer or drawee for payment. *Ibid.* See §§ 214, 215.

§ 260. *An indorsement, "Pay A., or order, for account National Bank Georgetown," makes A. the agent of the bank to collect the money, and neither parol proof of agreement nor of custom is admissible to change this effect.* *White v. National Bank*, 12 Otto, 658.

§ 261. *United States Bank may discount paper.*—The United States Bank was not prohibited from discounting promissory notes, nor from receiving such notes for debts due it; and on discounting commercial paper it might deduct legal interest from the face of it, by way of discount. *Fleckner v. United States Bank*, 8 Wheat., 838. See BANKS, §§ 20-27.

§ 262. *Transfer generally.*—A promissory note, not payable to bearer, does not pass by mere delivery. It must be indorsed. Without an indorsement the holder cannot, either by statute or common law, sue upon it in his own name. *Bradley v. Trammel*, * Hemp., 164.

§ 263. *Quartermaster's vouchers.*—Quartermaster's vouchers are transferable, although not negotiable paper. The purchaser takes them subject to all equities which exist against the party to whom they were issued. *Lawrence v. United States*, * 8 Ct. Cl., 252.

§ 264. *The assignment of quartermaster's vouchers by the nominal claimants thereof is not rendered void by the act of congress of February 26, 1853 (10 Stat. at L., 170).* That act does not apply to claims which may be litigated in the court of claims. *Ibid.*

§ 265. *Deed of trust incident to notes.*—A deed of trust is incident to the notes which it secures, and passes with a transfer of them. *New Orleans Canal & Banking Co. v. Montgomery*, 5 Otto, 16.

§ 266. What negotiable under law merchant.—The words “promissory notes negotiable by the law merchant” in the act of congress approved March 13, 1875, means notes which in the hands of *bona fide* purchasers for value before maturity are subject to no equities in favor of the maker. *Gregg v. Weston*, 7 Biss., 360.

§ 267. The words “or order,” or their equivalents, are not essential to the negotiability of a note. *Bank of Sherman v. Apperson*, 4 Fed. R., 25 (§§ 412-415).

§ 268. Payment of a bill by an indorser does not destroy its negotiability. *McCarty v. Roots*,* 21 How., 432.

§ 269. United States treasury notes, payable at a definite future time to the holder or bearer, are negotiable commercial paper. The fact that the holder had an option to convert them into bonds does not change their character, although if this option were exercisable by the United States it would have this effect. If they were optionally payable in bonds, or other negotiable paper, they would not be promissory notes. *Vermilye v. Adams Ex. Co.*, 21 Wall., 138.

§ 270. Printed notes, signed by the maker above the printed words which indicate where they are payable, with coupons attached, are negotiable. *Turnbull v. Thomas*, 1 Hughes, 172.

§ 271. Bonds, with interest coupons attached, payable to bearer and secured by mortgage, are negotiable. *In re Leland*, 6 Ben., 175.

§ 272. Due bill assignable.—A due bill is embraced by a statute relating to “bonds, bills and promissory notes,” and is assignable even by an agent. *Griffin v. Nokes*,* *Hemp*, 72. See § 284.

§ 273. Assignment after death.—Bills held by the drawee for the purpose of raising money for the drawer may be assigned, after the death of the drawer, to one who advanced money upon them. *Perry v. Crammond*,* 1 Wash., 105.

§ 274. Certificate of deposit negotiable.—A certificate of deposit as follows: “No. 959. Mississippi Union Bank, Jackson (Miss.), February 8, 1840. I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, \$1,500, for the use of Henry Miller, and payable only to his order upon the return of this certificate. \$1,500. Wm. B. Grayson, Cashier,” is negotiable under a statute making promissory notes negotiable, and an indorsee may recover upon it against his immediate indorser. *Miller v. Austen*,* 18 How., 218. See §§ 87, 88.

§ 275. “Value received,” not essential.—Words “value received” are not essential to a bill of exchange or other negotiable instrument. *Benjamin v. Tillman*,* 2 McL., 213.

§ 276. “*Ne varietur*” does not affect negotiability.—The facts that a note was given for the purchase of real property, and that it had the words “*ne varietur*” written across it, do not render it non-negotiable. *Fleckner v. U. S. Bank*, 8 Wheat., 338 (BANKS, §§ 20-27); *Brabston v. Gibson*, 9 How. 263 (§§ 433-440).

§ 277. Note payable to maker.—A note payable “to the order of myself,” and indorsed by the maker, is negotiable paper, payable to bearer. Any holder may sue upon it at maturity. Fraud must be shown to put the holder on proof of consideration. *Adams v. White*,* 2 Pittsb. R., 21.

§ 278. Accommodation bill.—An accommodation bill, taken up by one of the indorsers, may be assigned by him as collateral security for a pre-existing debt, and the assignee may sue the original payee. *McCarty v. Roots*,* 21 How., 432. See §§ 5, 7, 40.

§ 279. Attorney's-fee clause.—A stipulation in a note promising to pay a reasonable attorney's fee in case the holder is put to the expense of collecting the note by law does not render the note non-negotiable. *Wilson Sewing M. Co. v. Moreno*, 6 Saw., 35; *Bank of British North America v. Ellis*, 6 Saw., 96 (§§ 1439-43). See §§ 218, 219.

§ 280. Uncertainty; payable in “office notes.”—An instrument payable in “office notes” of a bank is not a promissory note. It is not transferable by indorsement. Not being under seal it is not assignable under the statute. An indorsee of it cannot sue upon it in his own name. *Irvine v. Lowry*, 14 Pet., 293. See § 256.

§ 281. Including taxes.—A note for a principal sum, with interest semi-annually, together with an attorney's commission of five per cent. for collecting, in case suit be instituted, and together with all taxes and charges in the nature thereof that might be levied upon the note or upon the mortgage accompanying it, held to possess transferable qualities, but not to be negotiable. *Farquhar v. Fidelity I. T. & S. D. Co.*,* 18 Alb. L. J., 330. See §§ 218, 219, 279.

§ 282. A note payable in New York funds, or their equivalent, is indefinite, and is not negotiable under the statute of Anne or similar statutes in force in this country. *Hasbrook v. Palmer*,* 2 McL., 10. See § 286.

§ 283. The recital of the consideration in the face of a note does not at all affect its negotiable character. But a recital that the note was subject to the conditions of an agreement relating to the purchase of land might affect its negotiability. *Bank of Sherman v. Apperson*, 4 Fed. R., 25 (§§ 412-415).

§ 284. Due-bill.—A due-bill, payable to plaintiff himself, and not to his order, is not negotiable and not entitled to days of grace. *McLain v. Rutherford*,* *Hemp.*, 47. See § 272.

§ 285. Including exchange; uncertainty.—A promissory note, made at Detroit and payable in Detroit, with eight per cent. interest and current exchange on New York, is not a negotiable instrument, because not for a sum certain. *Russell v. Russell*,* 1 *McArth.*, 263. See § 219.

§ 286. Current bank paper; uncertainty.—A note payable in current bank paper is not negotiable. *Fry v. Rousseau*,* 3 *McL.*, 106; *Weed v. Snow*, 3 *McL.*, 265. See § 282.

§ 287. Reducing note to judgment.—Negotiability is destroyed by reducing a note to judgment. *Martin v. Kercheval*,* 4 *McL.*, 117.

§ 288. A written agreement that an indorser shall not be held liable as such must be construed together with the indorsement, and makes the latter equivalent to an indorsement without recourse. *Davis v. Brown*, 4 *Otto*, 423 (§§ 1410-1415). See § 216.

§ 289. *Lex loci*.—In Indiana the indorsement of a note is a new and distinct contract, governed by the law of the state where the indorsement is made, and not by the law of the state where the note is executed. *Mott v. Wright*, 1 *Biss.*, 53 (§§ 582-584). See § 113.

§ 290. A guaranty indorsed on a negotiable instrument, not limited to any particular person nor restricted in its terms, is negotiable with the instrument and accompanies it in the hands of every holder. *Toppan v. Cleveland, etc., R. Co.*, 1 *Flip.*, 74. See §§ 211, 212.

§ 291. Filling up blanks and striking out indorsements.—The holder may fill up a blank indorsement to himself. *Martin v. Kercheval*,* 4 *McL.*, 117. See § 220.

§ 292. The holder may fill up the indorsement with a promise to pay in case of the insolvency of the maker. *Offutt v. Hall*,* 1 *Cr. C. C.*, 504.

§ 293. An agent for collection may fill a blank indorsement to himself and sue in his own name. *Orr v. Lacey*,* 4 *McL.*, 243.

§ 294. An indorsement for accommodation may be filled up at the trial. *Bank v. Roberts*,* 2 *Cr. C. C.*, 15; *Stettenius v. Myer*,* 4 *Cr. C. C.*, 349.

§ 295. A blank indorsement may be filled up at the bar after the jury are sworn, and when so filled up will be *prima facie* evidence of a good consideration. *Vowell v. Lyles*,* 1 *Cr. C. C.*, 428.

§ 296. A note payable to A., or order, was indorsed by A. and B., the name of B. being written above A.'s. *Held*, that the indorsements could not be filled up at the trial so as to make an assignment from A. to B., and from B. to the plaintiff, so as to authorize a recovery against B. *Cooke v. Weightman*,* 1 *Cr. C. C.*, 439.

§ 297. The holder of a note, being the payee therein, may strike out subsequent indorsements and sue upon it in his own name. *Conant v. Wills*,* 1 *McL.*, 427; *Leavitt v. Cowles*, 2 *McL.*, 491.

§ 298. In a suit by payee against maker, plaintiff may strike out the indorsements after the jury are sworn. *Oneale v. Beall*,* 2 *Cr. C. C.*, 569; *Stettenius v. Myer*,* 4 *Cr. C. C.*, 349.

§ 299. Where a promissory note was indorsed in blank by the plaintiff (who was the payee) and another person, the plaintiff was permitted to strike out his own indorsement after the note had been offered in evidence and objected to on account of such indorsement. *Blue v. Russell*, 3 *Cr. C. C.*, 102.

§ 300. An indorsement in full cannot be stricken out at the trial. *Craig v. Brown*,* *Pet. C. C.*, 171.

§ 301. An indorsee may fill up prior blank indorsements. *United States v. Barker*, 2 *Paine*, 340 (§ 1011).

§ 302. Delivery of a bill of exchange signed and indorsed in blank only authorizes the receiver, as between himself and the drawer and indorsee, to fill up the bill or indorsement according to the authority given him. *Davidson v. Lanier*, 4 *Wall.*, 447 (§§ 1319-24).

§ 303. The holder of a negotiable instrument who makes an early blank indorsement payable to himself does not thereby discharge all subsequent indorsers from liability as such, the same as if he had stricken their names from the note. *Bank of British North America v. Ellis*, 6 *Saw.*, 96 (§§ 1439-43).

§ 304. Unfilled blanks; no indorsement.—United States treasury notes of March 3, 1865, read upon their face: "The United States promise to pay to the order of — one thousand dollars." On the back was written, "Pay secretary of the treasury, for redemption. W. Co." *Held*, the blank on the face not being filled up, the writing on the back was not such an indorsement as rendered them negotiable by delivery merely. *United States v. Vermilye*, 10 *Blatch.*, 280. See § 91 *et seq.*

2. Parties.

SUMMARY — Cashier may indorse, § 305.— President of railroad, § 306.— Real parties to a note may transfer it, § 307.

§ 305. The cashier of a bank possesses, *prima facie*, authority to transfer and indorse negotiable securities held by the bank for its use and in its behalf. No special authority for this purpose need be proved, and, if any restriction of the cashier's authority is relied upon by the bank, it must be shown, together with notice thereof, to those doing business with the bank. *Wild v. Bank of Passamaquoddy*, §§ 308, 309. See § 322.

§ 306. A railway president may indorse and assign the notes and mortgages of the company given to aid in its construction. His indorsee before maturity will take the paper free of equities between the maker and the company. *Irwin v. Bailey*, §§ 310-312. See § 318.

§ 307. A promissory note payable to the order of several persons, one of whom inceptively refused to be a payee of it, and who was treated by the drawer and other payees, both in the delivery of the note and in its negotiation, as no party and having no interest in it, can be transferred by the indorsement of the real payees so as to give the ownership of it to the indorsee, and a right of action upon it by him against the maker, without any indorsement by the nominal payee. *Pease v. Dwight*, §§ 313, 314.

[NOTES.— See §§ 315-330.]

WILD v. BANK OF PASSAMAQUODDY.

(Circuit Court for Maine: 3 Mason, 505-507. 1825.)

STATEMENT OF FACTS.—This was an action on a bill of exchange by an indorsee against the bank as indorser. The bill became the property of the bank by successive indorsements, and was indorsed by the cashier of the bank, and came to plaintiff's hands by a subsequent indorsement. The bill was protested and notice given to the bank. It was urged in defense, (1) that the cashier had no authority to indorse the bill; and (2) that plaintiff delayed more than a year after protest and notice in returning the bill to defendant and demanding payment, and that the drawers had failed in the meantime.

§ 308. *Authority of bank cashier to indorse and transfer negotiable paper.*

Opin. on by STORY, J.

My opinion is, that neither of the objections is well founded in law. The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show that it has interposed a restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to show it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, cannot be presumed to be conversant of it.

§ 309. *Delay to return bill to indorser.*

As to the other point, the defendants were, in point of law, fixed by due notice of the non-acceptance of the bill. The rights of the plaintiff were then complete. He was not bound to present the bill to them for payment within

any particular time, nor is he bound to prove how, or when, and by what circuitous routes, the bill was in fact returned to him. If the defendants had any interest in a speedy return, it was their duty to make inquiries and take up the bill as soon as possible. But as to the plaintiff, I do not know that an omission to demand payment and produce the bill for any period short of that of the statute of limitations would operate as a bar to a recovery. If the bill were suppressed from fraud (of which there is no pretense in this case), it might give rise to another sort of inquiry, the effect of which it is unnecessary to consider. There is no principle within my knowledge that requires the holder of a bill to demand payment of a prior indorser within any particular period, after the latter has been once fixed by due notice of the non-acceptance.

Verdict for plaintiff.

IRWIN v. BAILEY.

(Circuit Court for Illinois: 8 Bissell, 523-527. 1879.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The defendant executed a promissory note on the 7th of March, 1856, payable to the Racine & Mississippi Railroad, or order, for \$4,000, in five years from May 10, 1856, with ten per cent. interest, payable annually. This note was secured by a mortgage, and was given to the railroad company to enable it to raise money for the construction of the road. It was agreed on the part of those who represented the railroad company, that a certain indemnity should be given to the defendant by which he should be relieved from apparent liability existing upon the note and mortgage; and certain representations were made by them at the time, or before the note was executed, which constituted the inducement for the plaintiff to execute the note and mortgage; and it may be assumed that upon the faith of these representations the papers were executed and delivered to the railroad company. The railroad company took the note and mortgage and attached them together, with a bond on its own part, and an assignment, as it was claimed, of the note and mortgage contained in the bond, being in a form, as it was supposed, to enable the company to raise money upon it; and accordingly, as the evidence shows, in 1857 money was obtained. The weight of the evidence, I think, is, that the money was raised upon the note and mortgage and the bond, and that they were transferred to the City of Glasgow Bank for value received. The bank thus became the holder of the note and mortgage. This was before the note became due, and of course, unless it had notice of any equities which might exist between the maker of the note and the railroad company, it would not be bound by them. There is no evidence whatever that the City of Glasgow Bank had such notice, and consequently it cannot be bound or affected in any way by those representations. Then, after the bank became the equitable owner of this note, mortgage and bond of the railroad company, it was transmitted to the plaintiff, and he was instructed to represent the bank. At this time the note was not indorsed; that is to say, it had no memorandum written upon it, which, so far as the indorsement of the railroad company was concerned, would constitute a legal transfer of the property, unless that transfer was made by virtue of the assignment of the railroad company, attached with the note to the mortgage.

§ 310. *Power of president of railroad company to indorse a note.*

It is not necessary to decide what was the effect of the assignment contained in the bond, because when the plaintiff received the note it was transmitted.

with the bond and mortgage to Messrs. Strong & Fuller, of Racine, in 1858 or 1859, before the note was due. The note not containing the formal indorsement of the railroad company, Mr. Fuller took it to the president, and he indorsed the note in blank, as president of the railroad company. Now, the question is, whether he had the right to make this indorsement transferring the legal ownership of the property to any third person, or to make the note transferable by delivery. It seems to me, under the evidence, that he had that right. He was the financial agent, or one of them, of the company, to make negotiations of the assets of the company, to raise money upon them, and accordingly, under this authority, this particular note, bond and mortgage were transferred to the City of Glasgow Bank, and full consideration received. There is no evidence indicating that the power which was thus given to Durand, as president of the company, was revoked, and in view of the fact that the bank had become the equitable owner of the note, bond and mortgage, whatever view we may take of the effect of the assignment of the bond, undoubtedly Mr. Durand had the right to carry out, in good faith, the contract that had been made with the bank, and to indorse the note. This conferred upon the bank the ownership of the note, making it thus the legal indorsee of the note, as it previously had been the equitable owner.

§ 311. *Right of indorsee to sue in his own name though he may have no actual personal interest in the note.*

It is to be observed that at this time the plaintiff was the agent of the bank. The legal effect of the indorsement was, that it transferred the note to the bank, and thus, if the plaintiff had any interest in it, he was simply the indorsee, holder, or bearer, as the agent of the bank. This was before the note had matured, and I can have no doubt, under the evidence in this case, that the plaintiff was clothed with all the equities of the City of Glasgow Bank, and that he can sustain his right to sue and to recover upon the equities and legal rights of the bank. The plaintiff, under what I consider the well-settled principles of law, had the right as the agent of the bank, after the maturity of the note, to bring a suit upon it, and the fact that he has no interest whatever in the note, and paid nothing for it, cannot deprive him of the right, provided it was transmitted to him for that purpose, and the suit was brought as the agent and by the consent of the bank. These being the principles of law, it is immaterial what statements may have been made by the agents of the railroad company at the time this note was executed. It was a negotiable note, transferred to the railroad company, and payable to its order. The defendant trusted to the representations of the railroad company. If they were untrue, or a fraud was practiced upon him, it was he who trusted the company. He transferred the note and mortgage, and the rule is well settled, that, when one of two innocent persons must suffer, he must suffer who has enabled a third person to negotiate a security and to obtain money upon it. So as between the bank and the defendant, the latter must suffer, and not the bank which has paid value for this note, and without any knowledge of any circumstances calculated to throw doubt upon it.

§ 312. *An indorsee for value without notice is not affected by fraud between the original parties.*

The evidence has been allowed to go in with very great latitude; scarcely any restriction has been placed upon it by the court, the case having been tried without the intervention of a jury. Counsel were informed that whatever evidence there was that might have any bearing on the issue would be admitted,

subject to the legal rights of the parties. Consequently all the evidence relating to what is alleged to have been a fraud practiced by the agents of the railroad company upon the defendant has been admitted, subject, of course, to be controlled and limited by the legal discretion of the court when the testimony was all before it. And the testimony being thus before the court, and as the facts in relation to the execution, transfer and delivery of the note to the City of Glasgow Bank prove that value was paid for it, and that the bank had no knowledge whatever of any of the alleged frauds or misrepresentations, I think all of the evidence relating thereto is immaterial, and really inadmissible as against the bank, or as against the plaintiff as its agent. The release referred to in the pleadings was given long after this suit was instituted, and can have no legal effect as against the plaintiff. The plaintiff is therefore entitled to recover in this case, and the issue and judgment of the court will be accordingly.

PEASE v. DWIGHT.

(6 Howard, 190-200. 1847.)

ERROR to U. S. Circuit Court, District of Michigan.

STATEMENT OF FACTS.—This was a suit on a note made payable originally to Walter Chester, and Pease, Chester & Co. It was averred in the declaration that Walter Chester was made a payee solely for the purpose of procuring his indorsement, and that he had no interest in the matter; that the note was delivered to Pease, Chester & Co., and indorsed by them alone. There was a demurrer because it was not averred that the note was indorsed and delivered by Walter Chester. Judgment for plaintiff.

Opinion by MR. JUSTICE WAYNE.

We think that the only point presented by the record in this case for the decision of the court was rightly ruled by the circuit court.

§ 313. *Nominal payee need not indorse a note to transfer title to it, and indorsee of real payee may sue upon it.*

That point is, whether a promissory note, payable to the order of several persons, one of whom inceptively refused to be a payee of it, and who was treated by the drawer and other payees, both in the delivery of the note and in its negotiation, as no party and having no interest in it, can be transferred by the indorsement of the real payees, so as to give the ownership of it to the indorsee, and a right of action upon it *ex directo*, under the statute of 3 and 4 Anne, c. 9. The statute is that "any person, to whom a promissory note that is payable to any person or his order is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money, either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange." The statute requires a transfer to be made by the indorsement of the person to whom the note is payable, and the interpretation of it is that, where a note is payable to the order of several persons not in partnership, all must separately sign their names as indorsers; the object being that, before an indorsee shall recover the contents of the note in his own name, he shall show he has acquired a property in it by a transfer from those who were the original payees, or from others who were their indorsers. The statute is not merely a form, requiring all the payees to indorse, but a substantial requisition, upon the presumption that all the payees upon the face of the paper have an interest in it, and that they have indorsed it. We

have, then, the rule, and the reason of the rule. And it seems to us that to permit it to comprehend a case of an undertaking between the real parties, because a name had been mistakenly inserted, or had been inadvertently left upon the face of the paper, when the note was delivered to the real payees by the drawee, would be to wrest the statute out of its meaning, and to sacrifice the substantial intention of it merely to form. The statute meant to deal with real parties. The omission to erase the name in such a case does not lessen the drawer's obligation to pay his note to the real payees, or their right of action upon it against the drawer as a note of hand. If, then, the real payees shall indorse the note to a third person, they are within the words of the statute as indorsers; and the indorsee, in an action against them or the drawer, may be permitted to prove the real character of the undertaking, by showing that the name of a person had been inadvertently left upon the paper as a payee, who had refused to be such, and who had been waived as a party to the note, both by the drawer and the real payees, when the contract had been completed between them by the delivery of the note. In the case before us, the declaration recites the particular circumstances under which the note was made and indorsed. The demurrer admits them. That is, that the paper had been indorsed by the real payees of it, but not by the nominal payee, who never was an actual payee nor ever had any interest in the note by being in any way a party to it. It would really be going very far to say that the statute giving the indorsee a right of action for such sum of money, either against the person signing such note, or against any of the persons who indorsed the same, did not mean it to be exercised because a person's name was upon the face of the paper who never had been a party to it. No such decision has been made. It may be because no case of this kind has ever occurred before. We can find none like it. In the absence of all authority against our conclusion, we must take upon ourselves the responsibility of announcing it as an original application of the statute to this case, and for any case of a like kind which may occur, without intending it to go further.

§ 314. *Who may transfer a note by indorsement.*

We think, however, that the interpretation is sustained by what has been the practice under the statute in some other particulars,—that it is within the spirit of the principle upon which the statute has been administered. For instance, the statute requires the indorsement of a note to be made by the person to whom it is payable, and one of several partners may indorse in the partnership name; but though a note be made payable to a partnership a transfer in the name of one partner alone will pass the partnership interest, if it be proved that it has been the practice of the firm to indorse for them in the name of one only. *South Carolina Bank v. Case*, 8 Barn. & Cress., 436. So if one partner transfer in the name formerly used by the partnership. *Williamson v. Johnson*, 1 Barn. & Cress., 146; 2 D. & R. 281. Also, where, a bill is drawn upon a firm, and one partner writes "Accepted," adding only his own name, it will bind the firm, if they were in partnership at the time of the acceptance. An indorsement by the cashier of a bank of a note payable directly to the bank is good, upon the ground that he represents the interest of the bank in it, though he is not officially or otherwise a payee upon the face of the note. In *Goddard v. Lyman*, 14 Pick., 268, it is said a negotiable note payable to three persons may be legally transferred by indorsement by two of them to the third payee and a stranger; and, if this were doubtful, the indorsement of the third payee to the stranger will clearly pass the property to

him. In *Snelling v. Boyd*, 5 Monroe, 173, it is said one of several joint holders of a bill of exchange may transfer the whole interest in it by indorsement. Where the maker of a promissory note indorsed the same, for his own benefit, in the payee's name, by virtue of a parol authority for that purpose, communicated to him by the payee, it was held to be well indorsed, and that the payee was liable upon such indorsement in the same manner as if it had been made by himself in his own hand. *Turnbull v. Trout*, 1 Hall, 336. The foregoing, it will be perceived, are all of them cases in which parol proof has been admitted to show the character of the agencies by which notes or bills have been transferred or accepted, without any one of the notes having been indorsed within the exact letter of the statute, though all of them are within its spirit.

But we rely altogether, in this case, upon the fact that the note was transferred by the indorsement of those who were its real payees, by those who had the absolute property in it. We think the true meaning of the statute is, that such as have the property in the note have the right to indorse, though there shall be a name upon the paper of another person, which was inserted by mistake as a payee, or inadvertently left in when the note was delivered; and that in an action by the indorsee, he should be permitted to prove such a fact. Upon this point of the right of those to indorse who have the absolute property in a bill or note; we will cite what was said by the learned Chief Justice Willes, in the conclusion of his opinion in the case of *Stone v. Rawlinson*, Willes, 559: "On the strength of this case, I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill, made payable to one or his order, may assign it as he pleases, within the provision of the statute, and such assignee may maintain an action in his own name; the executor or administrator of a person to whom such bill is made payable has the absolute property in it, and therefore he may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name." This was said in answer to an objection that an executor or administrator cannot assign a promissory note made payable to a person or order, so as to enable the indorsee to bring an action in his own name. So, a bill or note made payable or indorsed to a *feme sole*, who afterwards marries, or where it is made during the coverture, the right of transfer vests in the husband, so as to give his indorsee a right of action upon it in his own name, and the husband may be sued as an indorser. Neither the case of the executor nor that of the husband is within the letter of the statute, but both are according to the spirit and intention of it, to permit indorsements to be made by those who have a property in promissory notes, so as to enable their indorsee to maintain an action in his own name.

The judgment of the circuit court is affirmed.

§ 315. Husband's indorsement enough.—A promissory note, payable to the order of the wife, and secured by mortgage to her and her heirs and assigns, was, together with the mortgage, transferred by the husband and wife, through their attorney. *Held*, that until foreclosed, the mortgage as well as the note was a mere chose in action; and the indorsement of the note and assignment of the mortgage by the husband alone would have been sufficient to transfer interest therein. *Bayerque v. Haley*, McAl., 97.

§ 316. Title; holder may declare nature of his title.—Where a negotiable note by partners was indorsed in blank, and, together with a due-bill by the same makers, was delivered to A., who afterwards became the administrator of the makers, *held*, that A. had the sole right to say whether he held as owner or as administrator. *Matheson v. Grant*, 2 How., 263.

§ 317. Joint payees must all indorse.—A note payable to the order of C., and P. C. & Co., was indorsed in blank by P. C. & Co. and by J. *Held*, that the interest of the promisees in the note was joint; that, not being a partnership, they must each transfer the note; and that

¶ **C.** having failed to indorse it, the holder could not recover upon it. "Only one-half of the note was transferred by the indorsement of P. C. & Co., and this does not give a right to them, or to any subsequent assignee, to sue on the note. Recourse against the maker cannot thus be divided and suits multiplied. The plaintiff seeks by this action to recover the full amount of the note against the defendants, as indorsers. But as he holds but one-half of the note under the assignment, the indorsement at most can only be evidence of that amount." *Per curiam: Dwight v. Pease*, * 3 McL., 94. See § 313.

§ 318. **By president.**—An indorsement by the president of an insurance company as "A., president," held sufficient to bind the company. *State Bank of Ohio v. Fox*, 3 Blatch., 481. See § 303.

§ 319. **Executrix.**—An executrix's authority to indorse notes owned by her testator can be proved only by the will or an authenticated copy thereof. *Russell v. Russell*, * 1 MacArth., 263. An administrator may negotiate a note that is payable to him. *Bank v. Apperson*, 4 Fed. R., 25 (§§ 412-415).

§ 320. **Cashier—Inures to bank.**—An indorsement to the cashier of a bank is an indorsement to the bank. *Bank of United States v. Davis*, * 4 Cr. C. C., 533.

§ 321. **Taking note—United States treasurer—Authority.**—The treasurer of the United States, in receiving a note or bill on behalf of his government and indorsed to him as treasurer, is presumed to act within the scope of his employment. *Dugan v. United States*, * 3 Wheat., 172.

§ 322. **If a bank cashier indorse a note payable to himself as cashier and send it to another bank in an official letter for discount, it amounts to a request to such other bank to discount it on behalf of the first bank, which is presumed to be the owner of the note.** *Blair v. First National Bank*, 2 Flip., 111 (§§ 617-619). See § 305.

§ 323. **A bank cashier may indorse notes belonging to the bank.** *Lanning v. Lockett*, 10 Fed. R., 453; *Blair v. First National Bank*, 2 Flip., 111. But has no power to indorse accommodation paper. *Ibid.*

§ 324. **Secretary or president.**—If the by-laws of a company provide that its secretary shall indorse its paper, the president's indorsement will not pass title to it, to one who knows of the by-law. *Leavitt v. Connecticut Peat Co.* 6 Blatch., 139.

§ 325. **Miscellaneous.**—A *bona fide* holder of a bill may write over a blank indorsement the name of any person to whom the bill shall be paid, and he will not by so doing become an indorser of the bill. *Evans v. Gee*, 11 Pet., 80 (§§ 1178-83).

§ 326. **The drawer of an order upon one person in favor of another is not an assignor of it to such other person, and the fact that such drawer could not sue upon the order in the federal courts will not preclude the payee from doing so.** *Kemble v. Lull*, 3 McL., 272 (§§ 11-14).

§ 327. **A promissory note payable to the maker "or order," and indorsed by him, passes by delivery and not assignment, and the circuit courts have jurisdiction of an action thereon by a holder residing in another state.** *Towne v. Smith*, 1 Woodb. & M., 115.

§ 328. **A stranger who pays a note, intending not to extinguish but to continue it in existence is a purchaser of it, the negotiability of which remains after as before maturity, subject to the equities between the parties.** *Dodge v. Freedman's S. & T. Co.*, 3 Otto, 379 (§§ 221-224).

§ 329. **An insurance company may hold or negotiate commercial paper.** *Alexander v. Horner*, 1 McC., 634 (§§ 1467-71).

§ 330. **Neither parol proof nor evidence of custom is admissible to show that an indorsement to one as agent was intended to be a transfer to him as owner.** *White v. National Bank*, 13 Otto, 658 (§§ 1186-88).

3. Assignment of Fund.

SUMMARY—When a draft operates as an assignment, §§ 331, 332.—Effect of bill of exchange, § 333.—Assignment of chose in action, § 334.—Checks; certified, §§ 335-337.

§ 331. **A draft does not operate as an assignment of funds in the hands of the banker on whom it is drawn until accepted by the bank and charged to the drawer.** *Rosenthal v. Mastin Bank*, §§ 333, 339. See § 351.

§ 332. **The assignment of a fund by the maker of a draft, of which the drawee was notified before the presentation of the draft, entitles the assignee to the fund in preference to the holder of the draft.** *Ibid.*

§ 333. **A bill of exchange drawn for the whole of a particular fund is an equitable assignment of such fund, even before acceptance, and it binds the drawee after notice. But where it is drawn for only a part of the fund, it does not amount to an assignment of or a lien on**

such fund until accepted, unless the drawee is under obligation to accept. *Mandeville v. Welch*, §§ 340-344.

§ 334. Where a chose in action is assigned by the owner, he will not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And this is true whether the assignment be good in law or in equity. (*Welch v. Mandeville*, 1 Wheat., 235.) *Ibid*.

§ 335. The payee of an unaccepted check cannot maintain an action upon it against the bank on which it is drawn. But he may if the check is certified or otherwise accepted. *First Nat. Bank v. Whitman*, §§ 345-348.

§ 336. Unless a bank accept or certify to a check drawn upon it, a holder thereof cannot recover upon it in an action against the bank. *Semble* that, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, the plaintiff could recover on the count for money had and received. *Bank of the Republic v. Millard*, §§ 349, 350.

§ 337. Checks drawn on public depositaries by an officer of the government, in favor of a public creditor, are subject to the same laws which govern other checks. *Ibid*.

[NOTES.— See §§ 351-360.]

ROSENTHAL v. THE MASTIN BANK.

(Circuit Court for New York: 17 Blatchford, 318-324. 1879.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.— This is a suit in equity, brought by the plaintiff, a citizen of New York, against the Mastin Bank, a Missouri corporation, and Kersey Coates, a citizen of Missouri, and the Metropolitan National Bank, a banking corporation established under an act of congress and doing business in the city of New York. The suit was brought in the supreme court of New York, and was removed into this court by the plaintiff. The facts of the case are these: On the 1st of August, 1878, the plaintiff, at Kansas City, Missouri, paid to the Mastin Bank, which was located there, the sum of \$2,000, in exchange for which said bank delivered to him a draft dated at Kansas City, August 1, 1878, and signed by its cashier, addressed to the Metropolitan National Bank, New York, and containing this direction: "Pay to the order of Max Rosenthal nineteen hundred and ninety-eight dollars." At that time the Metropolitan National Bank had in its hands the sum of \$1,998 belonging to the Mastin Bank. Said draft was presented to the Metropolitan National Bank on the 5th of August, 1878, by the plaintiff, and payment of it was demanded, but said bank refused to pay it, or to pay the \$1,998, and the draft was protested and notice of such presentment, refusal and protest was given to the Mastin Bank. The Metropolitan National Bank then had, and ever since has had, and now has, the said sum of \$1,998 in its possession. After such demand and refusal the plaintiff commenced a suit in the supreme court of New York for the city and county of New York, against the Mastin Bank, in which suit moneys belonging to the Mastin Bank in the hands of the Metropolitan National Bank were attached, and thereupon the latter bank gave to the sheriff a certificate, dated August 5, 1878, which said: "We hold twenty-three hundred dollars from funds to the credit of the Mastin Bank, Kansas City, Mo., in matter of attachment of Max Rosenthal, plaintiff, for nineteen hundred and ninety-eight dollars." On the 17th of October, 1878, the plaintiff recovered judgment in said suit for \$2,133.15. On the next day the sheriff, in behalf of the plaintiff, demanded the amount of said judgment from the Metropolitan National Bank, but said bank refused to pay it, stating that the money was claimed by the defendant Coates as assignee of the Mastin Bank, by virtue of an assignment made August 3, 1878, at Kansas City, by the Mas-

tin Bank to said Coates. Coates claims said \$1,998 by virtue of such assignment. The assignment is dated August 3, 1878, and assigns to said Coates "all of the lands, tenements, goods, chattels, effects and credits of the said the Mastin Bank, of every kind and nature, wheresoever situate, to have and to hold the same, unto him, the said Kersey Coates, and his heirs, successors and assigns, in trust for the use and benefit of all the creditors of the said the Mastin Bank, in proportion to their respective claims, as by the law in case of voluntary assignments made and provided." By a paper at the foot of said assignment, dated the same day and signed by said Coates, he accepted said trust. The assignment and acceptance were recorded on the same day. The Metropolitan National Bank was notified of said assignment on the 5th of August, 1878, by a telegram. The bill claims that, by the delivery of the draft to the plaintiff, the Mastin Bank transferred to him \$1,998 out of its moneys which were then in the hands of the Metropolitan National Bank, and that he is the owner of the said \$1,998. By a stipulation all of the defendants waive the right of a trial at law, and the plaintiff agrees that the sheriff will not bring any action against the Metropolitan National Bank by reason of any of the matters in issue in this suit. The prayer of the bill is, that the said sum of \$1,998 may be adjudged to be the property of the plaintiff, and may be paid by the Metropolitan National Bank to the plaintiff, free from any claims or liens thereon of the defendant Coates, or any of the other defendants. The Mastin Bank and Coates have put in a joint and several general demurrer to the bill for want of equity, and the Metropolitan National Bank has also demurred generally to the bill for want of equity.

§ 338. *An unaccepted draft is not operative as an assignment.*

The question presented for decision is, whether the Metropolitan National Bank ought to pay the \$1,998 which it owes as a debtor to the plaintiff. It is contended for the plaintiff, that he could have sued the drawee on the draft before its acceptance, and even before presenting it to the drawee, and that the assignment to the defendant Coates, after the drawing of the draft and before it was presented to the drawee, did not carry to Coates the title to the \$1,998, or affect the right of the plaintiff thereto; that Coates took the property of the assignor under the assignment, subject to all the equities existing against it in favor of the plaintiff; that Coates succeeded only to the rights of the assignor; and that the drawing of the draft operated as an assignment to the plaintiff of \$1,998 then in the hands of the drawee. It was decided by the supreme court of the United States, in *Bank of Republic v. Millard* (10 Wall., 152; §§ 349, 350, *infra*), that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it, in the absence of proof that it was accepted by the bank, or was charged against the drawer. In that case the court say: "It is no longer an open question in this court, since the decision in the cases of *The Marine Bank v. Fulton Bank* (2 Wall., 252; BANKS, §§ 205, 206) and of *Thompson v. Riggs*, 5 id., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but, when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall, from time to time, draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully dis-

cussed by Lords Cottenham, Brougham, Lyndhurst and Campbell, in the house of lords, in the case of *Foley v. Hill*, 2 Clark & F., 28, and they all concurred in the opinion that the relation between a banker and customer who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character; and the great weight of American authority is to the same effect. As checks on bankers are in constant use, and have been adopted by the commercial world generally, as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the *status* which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer, if payment is refused, but can he, also, in such a state of case, sue the bank? It is conceded that the depositor can bring *assumpsit* for the breach of the contract to honor his checks, and, if the holder has a similar right, then the anomaly is presented, of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty, and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the bank and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it, at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (Gardiner, J., in *Chapman v. White*, 2 Seld., 417), is a chose in action, and his check does not transfer the debt, or give a lien upon it, to a third person, without the assent of the depository. This is a well-established principle of law, and is sustained by the English and American decisions. *Chapman v. White*, 2 Seld., 412; *Butterworth v. Peck*, 5 Bosw., 341; *Ballard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wend., 373; *Dykers v. Leather Mfg. Co.*, 11 Paige, 616; *National Bank v. Eliot Bank*, 5 Am. L. Reg., 711; *Parsons on Bills and Notes*, ed. of 1863, pp. 59 to 61, and notes; *Parke, Baron*, in argument, in *Bellamy v. Majoribanks*, 8 Eng. L. & Eq., 522, 523; *Wharton v. Walker*, 4 Barn. & Cress., 163; *Warwick v. Rogers*, 5 Mann. & G., 340; *Byles on Bills*, chapter Check on a Banker; *Grant on Banking*, London edition, 1856, 96. The few cases which assert a contrary doctrine it would serve no useful purpose to review." The decision in the case cited is for this court the law of this case. So far, then, as this suit is a suit on the draft against the drawee, to recover the amount of the draft, it cannot be maintained, for the draft was not accepted by the drawee, nor was it charged by the drawee against the drawer. The draft was a draft or check in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request. Under the settled law of New York, where

the draft was payable, this was not an assignment of the funds of the drawer in the hands of the drawee. *Atty.-Gen. v. Continental Life Ins. Co.*, 71 N. Y., 325, 330, 331. Before the draft was accepted the drawer could withdraw the deposit or countermand the draft.

§ 339. *Preference given to assignee of a fund as against the holder of a draft upon such fund.*

In this case, before the draft was presented to the drawee, the drawer assigned to the defendant Coates the entire debt due to it from the drawee, being a sum larger than the amount of the draft, as would appear from the certificate given to the sheriff by the drawee, and including the \$1,998 which the plaintiff claims to recover from the drawee in this suit. The validity of this assignment, as a lawful instrument under the laws of Missouri, is not attacked or impeached by any pleading or evidence in this case. The assignment is one of "all of the lands, tenements, goods, chattels, effects and credits" of the Mastin Bank, "wheresoever situate," "in trust for the use and benefit of all the creditors of the said the Mastin Bank, in proportion to their respective claims, as by the law, in case of voluntary assignments, made and provided." The debt from the Metropolitan National Bank to the Mastin Bank was a debt due from a bank located in this state, and was property in this state belonging to the Mastin Bank. The assignment from the latter bank to Coates, being a voluntary conveyance, valid by the laws of Missouri, as must be assumed, operated to transfer to the assignee the debt due to the assignor from the Metropolitan National Bank, and, as such assignment was prior in time to the attachment of the plaintiff, the latter cannot hold the debt attached, as against the claim of the defendant Coates under the assignment. It does not appear that the assignment to Coates is invalid under any statute or other law of this state. *Ockerman v. Cross*, 54 N. Y., 29.

There is nothing in the terms of the certificate given by the Metropolitan National Bank to the sheriff which gives to the plaintiff any greater rights than he otherwise would have had. The attachment was against money due as a debt to the Mastin Bank, and the certificate merely set apart so much money to answer the plaintiff's claim, if established. Nor is it material that Coates did not receive payment of the debt from the Metropolitan National Bank before the attachment was levied. There is nothing which shows that the attachment was levied, or that the draft was even presented before the drawee was notified of the assignment. The demurrers are allowed, with costs to the defendants, to be taxed, with leave to the plaintiff to move, on notice, on payment of such costs, within twenty days after service of a copy of the order to be entered on this decision to amend the bill.

MANDEVILLE v. WELCH.

(5 Wheaton, 277-289. 1820.)

ERROR to the Circuit Court for the District of Columbia.

STATEMENT OF FACTS.—Covenant by Welch, for use of Prior, against Mandeville, a member of the firm of Mandeville & Jamesson. Plea of release by plaintiff. Replication of assignment and notice before release. There was offered in evidence certain articles of agreement, with a memorandum thereon, stating a certain sum to be due to Welch. Also three bills of exchange, drawn by Welch in favor of Prior, and against Mandeville & Jamesson, "for value received," corresponding in amount and dates with the amount indorsed on the articles of agreement. Also an account rendered from Mandeville & Jamesson

to Welch, stating a balance due corresponding with the amount indorsed on the articles. It was proved that this account was delivered by Welch to Prior. The court instructed the jury to the effect that Prior could not maintain the suit in the name of Welch, if the sums for which the bills were drawn amounted to less than the sums payable to Welch, and were known by Welch to be less, unless the jury should find that the bills were drawn for the full and valuable consideration expressed on their face, paid by Prior to Welch.

Opinion by MR. JUSTICE STORY.

Two questions arise upon the instruction to the jury: 1. Whether the bills were *prima facie* evidence that value had been paid for them by Prior to Welch? 2. Whether, under all the circumstances of the case, Prior was an assignee in equity, entitled to maintain the present action?

§ 340. *Bill imports a valuable consideration.*

Upon the first point, we are of opinion that the law was correctly laid down by the court below. The argument of the defendant's counsel admits that, where a bill imports on its face to be for "value received," it is *prima facie* evidence of that fact between the original parties; but it is stated that it is not evidence of the fact against third persons. We know of no such distinction. In all cases where the bill can be used as evidence either against the parties, or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. In this respect, bills of exchange and negotiable notes are distinguished from all other parol contracts, by authorities which are not now to be questioned. Chitty on Bills (2d ed.), 12, 62; 1 Wils. Rep., 189; Burr., 1516; Salk., 25; 1 Bos. & Pul., 651.

§ 341. *Right of assignor of chose in action to interfere in suit to collect it.*

The other question requires more consideration, though it does not in our judgment present any intrinsic difficulty. It has been long since settled, that, where a *chose in action* is assigned by the owner, he shall not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference whether the assignment be good at law or in equity only. This doctrine was fully recognized by this court when this case was formerly before us. Welch v. Mandeville, 1 Wheat., 235. It was then applied to a case where the whole *chose in action* was alleged to have been assigned; and it was certainly then supposed that the doctrine in courts of law had never been pressed to a greater extent.

§ 342. *An assignment of a part of a chose in action is not valid without the debtor assents to it.*

We are now called upon to press it still further, so as to embrace cases of partial assignments of *choses in action*. It is contended on behalf of the plaintiff, in the first place, that the facts of this case establish, by legal inference, that the articles of agreement were entirely assigned in equity to the plaintiff. If this ground fails, it is in the next place contended that an assignment was made of the debt due by the articles, to the extent of \$7,500, the amount of the bills drawn on Mandeville and Jamesson, and that this, *per se*, authorizes Prior to sustain the present action.

§ 343. — *a deposit of title papers does not constitute an equitable mortgage without an intent to give security thereby.*

In support of the first position, it is argued that, the bills being *prima facie* evidence of an equivalent advance made by Prior, the possession by the latter

of the articles of agreement, and the delivery to him of the account signed by Mandeville and Jamesson, afford a legal presumption that the articles and account were delivered to him as security for the payment of such advance, and thereby he acquired a lien on them like that acquired by the delivery of title deeds, as security for a debt, which lien has always been deemed to be equivalent to an equitable mortgage. It may be admitted that, according to the course of the authorities in England, and as applicable to the state of land titles there, a deposit of title deeds does, in the cases alluded to, create a lien, which will be recognized as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title deeds. It may also be admitted that a deposit of a note not negotiable, as security for a debt, will entitle the creditor, after notice to the maker, to enforce in equity his lien against the depositor, and his assignees in bankruptcy. Such was the case cited at the bar from Atkyn's Reports, *Ex parte Byas*, 1 Atk., 124. But in cases of this nature, the doctrine proceeds upon the supposition that the deposit is clearly established to have been made as security for the debt; and not upon the ground that the mere fact of a deposit, unexplained, affords such proof. In the case at the bar, it was not proved that the articles were delivered by Welch to Prior, at all, much less that they were delivered as security for the bills. The delivery of the account is certainly an equivocal act, and might have been as a voucher of the right of Welch to draw on Mandeville and Jamesson. There is this further deficiency in the proof, that the bills do not appear ever to have been presented to the drawees for acceptance, which not only rebuts the presumption from the face of the bills that they were received for value, since a *bona fide* holder could not be supposed guilty of such fatal laches; but draws after it the auxiliary presumption, that they were in the hands of Prior as agent, and, therefore, that he had not any assignment of the articles as security. And it may be added that the suit commenced in chancery, by Prior, for this very debt, and afterwards discontinued, does not assert any assigned title in himself, but proceeds against Mandeville and Jamesson as the mere debtors of Welch. Under such circumstances, this court cannot say that the instruction of the circuit court was correct, that the jury ought to infer that Prior was an assignee, entitled to sue for the whole debt due upon the articles.

§ 344. — *effect of bill of exchange as an assignment of a debt.*

The ground, then, that there was a deposit of the articles as collateral security, failing, we are next led to examine the position of the defendant's counsel, that there was a partial lien or appropriation of the debt due from Mandeville and Jamesson under the articles to the extent of the sum due on the bills, which is equivalent to an equitable assignment of so much of the debt. It is said that a bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true, where the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be in its own nature negotiable or not; for in such a case, the acceptor, by his assent, binds and appropriates the funds for the use of the payee. And to this effect are the authorities cited at the bar. *Yeates v. Groves*, 1 Ves. Jr., 280; *Gibson v. Minet*, per Eyre, C. J., 1 H. Bl. 569, 602; *Tatlock v. Harris*, 3 Term R., 174. In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and, after notice to the drawee, it binds the fund in his hand. But where the order is drawn either on a general or a particular fund, for a part only, it

does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. So that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But, in the present case, there is no proof of any presentment of the bills, much less of any acceptance by the defendant, to establish even a partial assignment of the debt. And if there were, it would still be necessary to show that there was an assignment of the articles, as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the pleadings, the plaintiff undertakes to establish an assignment of the whole debt due by the articles; and if he fails in this, there is an end to his recovery. So that, in whatever view we contemplate the facts of this case, or the law applicable to it, the plaintiff has not shown any sufficient title to sustain his replication to the fourth plea.

Several other objections have been taken at the bar to the plaintiff's right of recovery, which, under other circumstances, would have deserved serious consideration; but, as upon the merits of the case, as they are apparent upon the record, the judgment of this court is decidedly against the plaintiff, it is unnecessary to give any opinion upon those objections.

Judgment reversed.

FIRST NATIONAL BANK *v.* WHITMAN.

(4 Otto, 343-347. 1876.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This action is brought against the First National Bank of Washington to recover the amount of a check drawn upon it by Mr. Spinner, treasurer of the United States, for \$3,414, dated March 9, 1867. The check is in this form, viz.:

"Draft No. 9,243 on War Warrant No. 915.

"\$3,414.]

TREASURY OF THE UNITED STATES,

WASHINGTON, March 9, 1867.

"Pay to the order of Mrs. E. S. Kimbro, three thousand three hundred and fourteen dollars. No. 9,243. Registered March 9, 1867.

"Issued on requisition No. —. \$3,414.

"S. B. COLBY,

Register of the Treasury.

"F. E. SPINNER,

Treasurer of the United States.

"To the First National Bank of Washington, D. C."

§ 345. *Status of funds deposited by United States treasurer in a national bank.*

It was indorsed in the name of Mrs. Kimbro without authority, and the amount of it was paid by the bank to an unauthorized holder. It appears from the testimony of Mr. Tayler, first comptroller of the treasury, that the funds of the government deposited by the treasurer in a national bank are treated by the government, for the purposes of keeping accounts, as in the treasurer's own charge and custody; that they are charged to him, and that payments made are credited to him, and that he is chargeable precisely as if the funds had been in his own office, and that he had power to make the check in question. We may, therefore, simplify the case by eliminating from its consideration all reference to the United States, and consider the transaction as between Mr. Spinner, as an individual, and the bank as his depositary, and Mrs. Kimbro, as the payee of his check.

§ 346. *Rights of payee of unaccepted check to sue upon it.*

The question is this: Can the payee of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn, upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon principle and authority, that the payee of a check unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis in delivering the judgment of this court in *Bank of Republic v. Millard*, 10 Wall., 152, leaves little to add upon this subject by way of illustration or authority. In that case a paymaster of the army made his check on the Bank of the Republic to the order of Captain Millard for \$859, due to him for arrears of pay as an officer of the army. The bank paid the amount of the check upon a forged indorsement of Millard's name. Recovering the check and exposing the forgery, Millard demanded payment to himself, and, upon refusal, brought his action against the bank. This court held that the action could not be maintained, upon the principle that there was no privity between the bank and Millard. The bank's contract was with the paymaster only, and to him only was its duty. It received no money from Millard. It never promised Millard to pay him any money. It had no money belonging to him. It received money from the paymaster, upon an agreement that it would return it to him when called for by him in person, or that it would pay it upon his checks. But it made no such agreement, or any agreement, with Millard. For a failure of duty in this respect it was responsible to the paymaster, with whom it made the contract, and to no one else. If the check was not paid, the arrears of pay to Millard were not paid, and his claim upon the government or the paymaster was not impaired by the giving of the check, which, being presented in due time, was not paid. He was still entitled to demand his arrears. That case is a perfect and complete authority upon the question stated. See, also, *Artuer v. Bank*, 46 N. Y., 82. Nor is this principle confined to checks or bills. Thus, in *Ashley v. Dixon*, 48 N. Y., 430, it was held that if A. be under a contract to sell property to B., and C. persuade A. to sell the property to him, no action lies by B. against C. There is no privity of contract between C. and B., but the remedy of the latter is against A. only.

§ 347. — *accepted or certified check.*

It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by

a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merchants' Bank v. State Bank*, 10 Wall., 604; *Espy v. Bank of Cincinnati*, 18 id., 604. It may accomplish the same result by writing upon it the word "good," or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. *Cook v. State Bank of Boston*, 52 N. Y., 96. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *Bank v. Leach*, 52 N. Y., 350; *Meads v. Merchants' Bank*, 25 id., 143; 9 Met., 311; 2 Duer, 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee. It is said that this fact of a contract between the payee and drawee exists in the present case. The testimony of Mr. Arnold is referred to, to the effect that in April, 1867, the bank made its weekly statement to Mr. Spinner of deposits received and payments made, returning the draft of Mrs. Kimbro as paid on the 22d of that month, and that in the statement the amount of the draft was entered to the credit of the bank.

§ 348. *Payment of a check upon a forged indorsement is neither a lawful payment nor an acceptance of the check.*

There is no suggestion in the evidence that either the bank or Mr. Spinner knew that the indorsement of the payee was unauthorized. The bank, we assume, would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive it. We assume, also, as we are bound in justice to it to do, that it would not ask Mr. Spinner to give credit for a payment that it knew to have been illegally made, and that it would not attempt to deceive him into the belief that a pretended indorsement was a real one. It comes to this, then, that, upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is, that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bank-book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit. *Story, Eq. Pl.*, secs. 799-801; *Story, Eq. Jur.*, secs. 523, 527; *Buchlin v. Chaplin*, 1 Lans., 443; *Bruen v. Hone*, 2 Barb., 586; *Bullock v. Boyd*, 2 Edw., 293. We cannot perceive that such a mistaken recognition of the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft.

It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner prescribed. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the

claim against it. The bank supposed that it had paid the check, but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer, and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before. We cannot recognize the argument that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent. Without discussing the other questions argued, we are of the opinion, for the reasons given, that the plaintiff below was not entitled to recover.

Judgment reversed, and cause remanded for a new trial, or for such further proceedings as the parties may be advised to take.

BANK OF REPUBLIC *v.* MILLARD.

(10 Wallace, 152-153. 1869.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—The United States were indebted to Millard, upon his leaving the military service, for arrears of pay as captain. The paymaster gave his check upon the bank, a national depository, in settlement of the account, having sufficient funds to his credit. This check was paid by the bank on a forged indorsement of Millard's name. Millard, having recovered the check and shown the forgery, demanded payment of the bank, which was refused, and this suit was brought.

§ 349. *Acceptance of check necessary to bind bank.*

Opinion by MR. JUSTICE DAVIS.

The only question presented by the record which it is material to notice is this: Can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer? It is no longer an open question in this court, since the decision in the cases of *The Marine Bank v. Fulton Bank* (2 Wall., 252; BANKS, §§ 205, 206), and of *Thompson v. Riggs* (5 id., 663; BANKS, §§ 152-156), that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits; but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell, in the house of lords, in the case of *Foley*

v. Hill, 2 Clark & F., 28, and they all concurred in the opinion that the relation between a banker and customer who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character; and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the *status* which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused; but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring *assumpsit* for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one precise for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (Gardiner, J., *Chapman v. White*, 2 Seld., 412), is a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions. *Chapman v. White*, 2 Seld., 412; *Butterworth v. Peck*, 5 Bosw., 341; *Ballard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wend., 373; *Dykers v. Leather Manuf'g Co.*, 11 Paige, 616; *National Bank v. Eliot Bank*, 5 Am. L. Reg., 711; *Parsons on Bills and Notes*, edition of 1863, pp. 59, 60, 61, and notes; *Parke, Baron*, in argument in *Bellamy v. Majoribanks*, 8 Eng. L. & Eq., 522, 523; *Wharton v. Walker*, 4 Barn. & Cress., 163; *Warwick v. Rogers*, 5 Mann. & G., 374; *Byles on Bills*, chapter "Check on a Banker;" *Grant on Banking*, London edition, 1856, 96.

The few cases which assert a contrary doctrine it would serve no useful purpose to review. Testing the case at bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that

the bank promised the plaintiff to pay the money again to him on the presentation of the check by him for payment. *It may be*, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand.

§ 350. *Government checks are subject to the same laws which govern other checks.*

It is hardly necessary to say that the check in question having been drawn on a public depository by an officer of the government in favor of a public creditor, cannot change the rights of the parties to this suit. The check was commercial paper and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents. *United States v. Bank of Metropolis*, 15 Pet., 377 (§§ 127-134, *supra*). As soon as the deposit was made to the credit of Lawler as postmaster, the bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

Judgment reversed and a venire de novo awarded.

§ 351. *Draft an equitable assignment.*—A bank having collected money belonging to A. sent him a draft (or check) payable to order, drawn upon C. Before the draft was presented for payment, the bank became insolvent and made an assignment, and C. having notice of the assignment refused payment of the draft, although holding more than enough of the funds of the bank to pay it. There being no controversy as to the rights of the drawee, *held*, that the draft operated as an equitable assignment. *German Savings Institution v. Aday*, 1 McC., 503.

§ 352. Drafts drawn by a creditor upon his debtor operate in the hands of a holder for value as an equitable assignment of the debt, which has priority over an attachment issued against the drawer subsequently, but before the drawee had notice of the drafts. *King v. Goraline*, 4 Cr. C. C., 150; *S. P., Miller v. Hubbard*, 4 Cr. C. C., 451. See § 46.

§ 353. *Unaccepted bill.*—A bill of exchange, though not accepted, protects the fund against which it is drawn against a subsequent attachment. *Corser v. Craig*,* 1 Wash., 426.

§ 354. A. made advances to B. on bills of lading of a cargo. It was agreed that the cargo was to be sold by D. and the proceeds returned to A., who was to take his advances out of them and pay the remainder to B. B. gave C. a draft on D., payable "out of proceeds of consignment." D. did not accept it, and gave A. notice of its presentation. A. received the proceeds of the sale of the cargo, and paid B.'s draft on D., taking a bond of indemnity. *Held*, that the draft not having been accepted, the proceeds came into A.'s hands unincumbered by any appropriation or assignment which could bind it or him in respect to it. *McLoon v. Linquist*, 2 Ben., 9.

§ 355. An unaccepted draft on a bank in which the drawer has funds is not an equitable assignment of those funds to the amount of the draft, so as to give the holder of the draft a priority over other creditors of the drawee, when the latter goes into bankruptcy. *Bank of Commerce v. Russell*, 2 Dill., 215.

§ 356. *Maker as garnishee.*—While a promissory note, indorsed in blank by the payee, was in the hands of a purchaser for value, an attachment issued at the suit of the creditors of the holder, and the maker of the note was summoned as garnishee. After the service of the writ, the note was passed to a third party, for value, and without notice. *Held*, that the attachment could not be sustained, and that the bearer of the note on the day of payment was entitled to recover the money from the drawer. *Ludlow v. Bingham*, 4 Dal., 47.

§ 357. The mere presentation of an ordinary bill of exchange, drawn upon a balance in the drawee's hands, which balance is less than the face of the draft, and without acceptance by the drawee, does not operate as an equitable assignment to the amount of such balance in favor of the payee or holder, and creates no lien in his favor. *Randolph v. Canby*,* 11 N. B. R., 296.

§ 358. A check is an equitable assignment of so much of the drawer's funds as will pay it. Equity will enforce such assignment against the bank (drawee), although no action at law is sustainable on a check against the bank on which it is drawn. And if the drawer become insolvent and the bank (drawee) pay over his funds in its hands to his assignee, the holder of such check may recover upon it in equity against the assignee, notwithstanding he may have proved his claim under the check before the assignee, and have received dividends upon it. The two remedies are concurrent. *First Nat. Bank v. Coates*, * 3 McC., 9. See §§ 48, 200, 335.

§ 359. The simple drawing of a check, without presentation, acceptance or payment, does not transfer the fund drawn on, to the amount of the check, from the drawer to the holder of the check. *Strain v. Gourdin*, * 11 N. B. R., 156.

§ 360. A bank is not liable to any save the drawer of a check upon it for the amount thereof, except when it has accepted the check by certification or otherwise. *Essex Co. Nat. Bank v. Bank of Montreal*, 7 Biss., 193 (§§ 1053-58). See §§ 201, 286.

IV. BONA FIDE HOLDER.

[See §§ 1, 7, 40, 117, 212, 230, 306, 328.]

SUMMARY — *General doctrine*, §§ 361-363, 365, 371. — *Equities between payee and accommodation acceptor*, § 364. — *In Alabama*, § 366. — *Right to surrender stock and cancel note*, § 367. — *Accepting a note as collateral*, § 368. — *Holder of second of a set*, § 369. — *Nature of contract; fraud*, § 370. — *Facts not amounting to notice*, §§ 372, 373. — *Purchaser must have actual notice*, §§ 373, 374. — *Protected only as to amount paid before notice of fraud*, § 375. — *Notice that a bank had refused to discount a note*, § 376. — *Maker in possession of an indorsed note*, § 377. — *Proof of misappropriation of funds*, § 378. — *Transfer with written guaranty*, § 379. — *Notes secured by mortgage*, §§ 380, 381.

§ 361. A *bona fide* indorsee for value, without notice, and before maturity, is not affected by equities between the antecedent parties. *Swift v. Tyson*, §§ 332-333. See §§ 24-34.

§ 362. A *bona fide* holder of negotiable paper indorsed before it is due holds it clear of any claim in favor of the maker against the payee existing before or at the date of the indorsement. In such case the remedy of the maker is against the payee. But if the paper is indorsed after maturity the indorsee takes it at his own risk, subject to any demand in favor of the maker against the payee. *Fossitt v. Bell*, §§ 387, 388.

§ 363. Where a note is actually indorsed before maturity by the payee and delivered to a third person to hold for the benefit of the payee's creditor, such creditor takes the note free from all claims or set-offs held by the maker against the payee, although the note be not actually delivered to the creditor by the third person until after maturity. *Ibid*.

§ 364. Equities between the payee and an accommodation acceptor are not chargeable to a purchaser of such paper for value in good faith, and without notice. *Tilden v. Blair*, §§ 389, 390. See §§ 5, 278.

§ 365. A *bona fide* purchaser for value of a promissory note before maturity and without notice is not affected by any equities between the parties to the paper. *Brown v. Spofford*, §§ 391-396.

§ 366. In Alabama "bills and notes payable in money at a certain place of payment therein designated" are negotiable instruments governed by the commercial law, and in the hands of a *bona fide* holder are not "subject to all payments, set-offs and discounts had or possessed against the same previous to notice of the assignment." *Oates v. National Bank*, §§ 397-404.

§ 367. One who buys stock in a corporation, giving his note in payment for it, it being agreed by the company that the maker of the note may, at its maturity, surrender the stock and receive back his note, has an undoubted right, as against the company, but not as against a *bona fide* purchaser of the note before maturity, to surrender the stock and cancel the note as agreed; especially if he has been induced to buy it by false representations of the company's officers as to its financial status. *Ibid*.

§ 368. A creditor who accepts a negotiable note before maturity, indorsed in blank as collateral security, the consideration being an extension to the debtor, is a holder for value, and not affected with equities between the prior parties. *Ibid*.

§ 369. A. intrusted B. with four sets of bills of exchange (each set composed of two bills) accepted by A. in blank. B. filled up four of the bills (one of each set), as directed, but did not return the other four to A., as directed, and subsequently filled out and negotiated two of them. *Held*, that one who purchased these two bills *bona fide* could recover upon them from A.; the words "second of exchange, first unpaid," written upon them, being held no notice to him that they were negotiated by B. without authority. *Bank of Pittsburgh v. Neal*, §§ 405-407.

§ 370. A. subscribed for stock in a railway company and gave his note, secured by mortgage on his farm, to pay his subscription. The company agreed that, if A. would assign to it his right to any dividends he might become entitled to as a holder of the stock, the company would save him harmless from any liability for interest or principal on his notes. Subsequently, the company assigned the notes and mortgage as collateral security to B., who sued A. upon the notes. A. set up the agreement in defense, and also that the notes and mortgage were obtained from him by false representations. *Held*, that mere expressions of opinion or recommendations were to be distinguished from false representations or statements; that neither the false representations nor the contract between A. and the company were good defenses against B., unless notice thereof be proved against him; and that such notice was not to be inferred from the fact that B. knew of the purpose for which the notes and mortgage were given; and *held* further, that, although the indorsement by the company to B. was informal, it was cured by the subsequent indorsement of the note by the president of the company before the note matured. *Cooper v. Laber*, §§ 408-411.

§ 371. Only actual knowledge of a defense to a note can defeat a *bona fide* holder's action upon it in a United States court. *Bank of Sherman v. Apperson*, §§ 412-415.

§ 372. The face of the note conveyed knowledge that there was a contract for land which lay in Arkansas; that the payee was an administrator. The holder knew that the administrator pledged the note for a loan very much smaller than the face value of the note, at an enormous rate of interest. *Held*, that these facts were not enough to give notice of probable defenses to the note, such as that the consideration of the note had failed by reason of a failure of title and diminution in quantity of the land, and that, by the contract of purchase, the money was not to be paid until the title was satisfactory. *Ibid*.

§ 373. A promissory note for \$30,000 was given by A. to B. B. transferred and indorsed it to C., who indorsed it generally in blank to D. Payments of interest were acknowledged by entries on the back of the note, purporting to be acknowledgments of "C. by D." In the margin of the note was the following: "This note secured by trust deed of even date herewith, duly stamped." D. was in fact the agent of the vendor of the property covered by the trust deed and note, and it appeared probable from the evidence that D. was not in fact the owner of the note, but merely the agent of C. to collect it. Nevertheless he indorsed in blank and transferred it to E. as collateral for a loan of money. E. took it before maturity, in good faith and without any notice other than might have been derived from the foregoing facts. *Held*, that there was nothing upon the note nor anything in the indorsements upon it to notify E. that it did not belong to D., and that E. was equitably and legally owner of the note. One who purchases negotiable paper not due, from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. He can lose his right only by actual notice or bad faith. *Swift v. Smith*, §§ 416-419.

§ 374. The refusal of a person to discount a bill does not prove that he is suspicious of the title of the one who offers it for discount, nor is the lack of a date in the bill, at the time it is offered, material. Neither is knowledge that the one who offers the bill is embarrassed in his business a reason for suspicion as to his title to it. Nor in any case is the holder of negotiable paper, acquired before maturity, affected by suspicious circumstances, but only by actual notice or knowledge of antecedent infirmities of title. *Goodman v. Simonds*, §§ 420-425.

§ 375. A. purchased of B. the notes of C. for \$10,000, paying therefor \$500 cash, and agreeing subsequently to pay the balance of the consideration. Before he did so, however, he was notified that the notes were obtained by fraud. In a suit upon the notes, *held*, that A. was a *bona fide* purchaser only to the extent of the \$500 paid before notice of the fraud, and that he could only recover this sum; that portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects one acting *bona fide*; if the \$500 had been agreed upon as the full consideration of the notes, and had been paid without notice of the fraud and before maturity of the notes, A. might have recovered their full amount. *Dresser v. Missouri, etc., R. R. Const. Co.*, § 426.

§ 376. A note was made payable to the cashier of a bank. On the left hand side of the paper it was marked "credit Diego M'Voy." This was also signed by the makers, whose intention was that the bank should discount the paper and pass the proceeds to the credit of M'Voy, who was the factor of one of them. The bank refused to discount it, and put upon it a pencil mark that showed it had been offered and refused for discount. M'Voy then negotiated it to other parties for his own benefit. *Held*, that such parties took the note with notice and could not recover upon it. *Fowler v. Brantley*, § 427.

§ 377. The fact that the maker is in possession of a note before maturity, indorsed by another, is notice that the indorsement is for the accommodation of the maker, and a bank which dis-

counts such a note for the maker is chargeable with such notice; and if the indorsement is that of a firm, the bank is put upon inquiry as to whether it was authorized by all the partners. *Lemoine v. Bank of North America*, §§ 428-431.

§ 378. A. was contractor to build a railway. B. was sub-contractor. A. retained fifteen per cent. of B.'s compensation as security for the performance of B.'s contract, but B., desiring more money with which to pay his employees, applied to A., who agreed to let him have \$8,000, if he would procure from C. an acceptance for that sum to be delivered to A. and retained by him as security for the execution of B.'s contract. C. signed the acceptance, which was delivered to A., who negotiated it in the usual course of business, for value and without notice of any equities, *inter partes*, to D., the plaintiff, who sues C. for the amount of it. Neither illegality of consideration, nor fraud in the inception of the instrument, was charged or pretended, nor was it alleged that the acceptance had been lost or stolen before the plaintiff received it for discount. *Held*, that evidence was not admissible to show that the first holder, A., appropriated the acceptance to a use other than that for which it was delivered to him, and that proof of such misappropriation was not sufficient to impeach D.'s title, he having discounted the note before maturity for value and without notice. *Collins v. Gilbert*, §§ 432-436.

§ 379. The A. bank gave the B. bank a note, secured by collaterals, for a sum of money, to be held by the B. bank as a fund against which the A. bank might draw as occasion required, it being agreed that the B. bank should not negotiate the note. Nevertheless, the B. bank, just before failing, transferred it to the C. bank, writing upon the back of it a guaranty of payment at maturity, which guaranty was signed by the president of the B. bank. *Held*, that this guaranty was not an indorsement of the note, nor was the transfer of the note such a negotiation of it as made the C. bank a taker of the paper without notice, and that in an action by the C. bank against the A. bank on the note, the latter might defend by showing that it had funds on deposit with the B. bank sufficient to pay the note. *Trust Company v. National Bank*, § 437.

§ 380. Notes secured by mortgage were given and indorsed for a valuable consideration, without notice to the taker of any defense to them. The property was subsequently redeemed from the mortgage. *Held*, that the redemption was no defense to an action upon the notes. *Brabston v. Gibson*, §§ 438-440.

§ 381. The principle that when a vendor recovers the possession of land by virtue of the power of redemption, he takes it free of all incumbrances created by the purchaser, has no application to negotiable paper, though given for a thing purchased which the vendor has a right to redeem. *Ibid*.

[NOTES.— See §§ 441-505.]

SWIFT v. TYSON.

(16 Peters, 1-23. 1842.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.— This cause comes before us from the circuit court of the southern district of New York upon a certificate of division of the judges of that court. The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor upon a bill of exchange dated at Portland, Maine, on the 1st day of May, 1836, for the sum of \$1,540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity. At the trial the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a *bona fide* holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in

the record, but it does not seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the state of Maine which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the circuit court thereupon divided in opinion on the following point or question of law: whether, under the facts last mentioned, the defendant was entitled to the same defense to the action as if the suit was between the original parties to the bill, that is to say, Norton or Norton and Keith and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

§ 382. *Bona fide holder not affected by equities.*

There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper before it is due is not bound to prove that he is a *bona fide* holder for a valuable consideration without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defense satisfactory proofs of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

§ 383. *Whether in New York a pre-existing debt is a valuable consideration for indorsing a note, discussed.*

In the present case the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration; that is, for a pre-existing debt; and the only real question in the cause is whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say under the circumstances of the present case, for, the acceptance having been made in New York, the argument on behalf of the defendant is that the contract is to be treated as a New York contract, and, therefore, to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the thirty-fourth section of the judiciary act of 1789, c. 20. And then it is further contended that, by the law of New York as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren v. Lynch*, 5 Johns., 239, the supreme court of New York appear to have held that a pre-existing debt

was a sufficient consideration to entitle a *bona fide* holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in *Bay v. Coddington*, 5 Johns. Ch., 54. Upon that occasion he said that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his commentaries. 3 Kent Com., § 44, p. 81. The decision in the case of *Bay v. Coddington* was afterwards affirmed in the court of errors, 20 Johns., 637, and the general reasoning of the chancellor was fully sustained. There were, indeed, peculiar circumstances in that case which the court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others again insisting that a pre-existing debt was not sufficient. From that period, however, for a series of years, it seems to have been held, by the supreme court of the state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the court of errors. The cases cited at the bar, and especially *Roosa v. Brotherson*, 10 Wend., 85; *The Ontario Bank v. Worthington*, 12 id., 593, and *Payne v. Cutler*, 13 id., 605, are directly in point. But the more recent cases, *The Bank of Salina v. Babcock*, 21 Wend., 499, and *The Bank of Sandusky v. Scoville*, 24 id., 115, have greatly shaken, if they have not entirely overthrown, those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can, at the present time, be treated as finally established; and it is certain that the court of errors have not pronounced any positive opinion upon it.

§ 384. *Federal courts not bound by state laws, except statutes relating to real estate and other purely local matters.*

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the judiciary act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to

which they apply. That section provides "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr., 882, 887, to be in a great measure not the law of a single country only, but of the commercial world. "*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una, eademque lex obtinebit.*"

§ 385. *Pre-existing debt a good consideration for indorsing a note.*

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities be-

tween the antecedent parties of which he has no notice only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of or as security for a pre-existing debt is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts. This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of *Coolidge v. Payson*, 2 Wheat., 66, 70, 73 (§§ 139-141, *supra*), and *Townslay v. Sumrall*, 2 Pet., 170, 182 (§§ 142-150, *supra*), are directly in point.

In England the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans v. Van Mierop*, 3 Burr., 1664, the very point was made and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion Lord Mansfield, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the court that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental *dicta* have been sometimes relied on to establish the contrary, such as the *dictum* of Lord Chief Justice Abbott in *Smith v. De Witts*, 6 Dowl. & Ry., 120, and *De la Chaumette v. Bank of England*, 9 Barn. & Cress., 208, where, however, the decision turned upon very different considerations. Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "*in toto* or in part, cannot

be insisted on, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valid consideration." Bayley on Bills, pp. 499, 500, 5th London ed., 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction that it is not intended to apply solely to cases where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish that a transfer as security for past and even for future responsibilities, will, for this purpose, be a sufficient, valid and valuable consideration. Thus, in the case of *Bosanquet v. Dudman*, 1 Starkie, 1, it was held by Lord Ellenborough, that, if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, *bona fide*, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in *Ex parte Bloxham*, 8 Ves. Jr., 531, as equally applicable to past and to future acceptances. The subsequent cases of *Heywood v. Watson*, 4 Bing., 496, and *Bramah v. Roberts*, 1 Bing. New Ca., 469, and *Percival v. Frampton*, 2 Crompt., M. & R., 180, are to the same effect. They directly establish that a *bona fide* holder taking a negotiable note in payment of or as security for a pre-existing debt is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In *Brush v. Scribner*, 11 Conn., 388, the supreme court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bona fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed that whatever constitutes a valid and valuable consideration, in other cases of contract, to support titles of the most solemn nature, is held *a fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt that a *bona fide* holder, for a pre-existing debt of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the circuit court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the circuit court.

§ 386. *Negotiable paper taken as collateral security is not taken in due course of trade.*

Opinion by MR. JUSTICE CATRON.

Upon the point of difference between the judges below, I concur that the extinguishment of a debt, and the giving a *post* consideration, such as the record

presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction of a doctrine into the opinion of this court, aside from the case made by the record, or argued by the counsel, assuming to maintain that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise; and that they will yield to a mere expression of opinion of this court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court, probably, would, and I think ought, to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion even was it called for by the record.

FOSSITT v. BELL.

(Circuit Court for Ohio: 4 McLean, 427-430. 1848.)

Opinion by LEAVITT, J.

STATEMENT OF FACTS.—This suit is brought on a note drawn by the defendant for \$1,174.41, payable to Britton Leming, or order, twenty days after date, dated 2d of February, 1847, and indorsed by Leming to the plaintiffs. The defendant has pleaded a set-off to this note, in substance as follows: that before the indorsement of the note to the plaintiffs, Leming was indebted to Bell in the sum of \$750, on a note dated 1st of May, 1847, payable to E. Holmes one day after date, and in the further sum of \$750, on a note dated 1st January, 1847, payable to said Holmes the 1st of June in that year, both indorsed to Bell by Holmes. The matter in controversy between these parties is whether these notes constitute a legal set-off in the present action. And this depends wholly on the date of the indorsement of the note on which this action is brought. It is very clear, if the plaintiffs became the owners of this note for a good consideration, before its maturity, and without notice of any offset against it by the defendant, the latter cannot avail himself in this action of Leming's note to Holmes, indorsed by Holmes to him.

§ 387. *Rights of indorsee before and after maturity.*

It is well settled that the *bona fide* holder of a negotiable note, indorsed before it is due, holds it clear of any claim in favor of the maker against the payee, existing before or at the date of the indorsement. In such a case, the remedy of the maker is against the payee. The reverse of this principle obtains, if the note is indorsed after maturity. Then the indorsee takes it at his own risk, subject to any demand in favor of the maker against the payee. It will be for the jury to decide the question of fact, involving the actual date of the indorsement of the note in question. It would appear from the evidence that this note became the property of the plaintiffs under the following circumstances, as set forth in the deposition of Joseph R. Gitchell. He testifies that in January, 1847, Leming sent for the witness; that he went to Leming's house, and found him sick and confined to his room. Leming expressed a wish

to secure certain creditors, and especially the plaintiffs in this suit; and for this purpose transferred, for the special benefit of the plaintiffs, an account against the defendant amounting to \$1,300, executing at the same time an order for the payment of the account to them. The defendant, it seems, recognized this transfer, and on the 1st or 2d of February, 1847, paid in cash on the account transferred for the security of the plaintiff the sum of \$135, and gave his note, payable to Leming, for the balance, \$1,174.41. This is the note on which this suit is brought — it bears date 2d of February, 1847, and is payable in twenty days. Leming, on that day, indorsed the note in blank and delivered it to Gitchell for the use and benefit of the plaintiffs. Gitchell acted as the friend and agent of plaintiffs, but without any previous understanding or conference with them in regard to this transaction. He states that the note was delivered to the plaintiffs or their agent in the beginning of May, 1847.

§ 388. *Note assigned by debtor to creditor, and given to creditor's agent.*

From the evidence before the jury, there seems to be nothing disclosed impeaching this transaction as fraudulent. Leming, who was a *bona fide* debtor of the plaintiffs, evinced a proper desire that they should be paid, and for this purpose transferred his claim against Bell, as before stated. Subsequently, on the 2d of February, 1847, Bell gave his note for the balance then due on that account, payable to Leming or order, in twenty days, and this note on the same day was indorsed by Leming, and placed in the hands of Gitchell, to be held by him for the benefit of the plaintiffs. There is no evidence that Leming was, at this time, insolvent or even embarrassed in his circumstances; and there is, therefore, no ground to presume an intention on his part to give a fraudulent preference to the plaintiffs over the other creditors. Nor is there any pretense that he was not justly indebted to the plaintiffs to the amount of this note. If the jury are satisfied that the note on which this suit is brought was fairly indorsed to the plaintiffs, on the 2d of February, 1847, and on that day became the property of the plaintiffs, through the agency of Gitchell, though not delivered to them till the beginning of May following, it will result, from the principles of law before laid down, that they are entitled to a verdict for the amount of the note and interest. The notes of Leming to E. Holmes, insisted on as a proper matter of set-off against the plaintiffs' claim, were indorsed by Holmes to the defendant on the 1st of May, 1847 — more than two months after the maturity of the note indorsed by Leming to the plaintiffs. These notes cannot, therefore, be set off in this suit. It would seem, from the evidence, that they were transferred to the defendant upon the condition that they could be set off against the note on which this suit is brought. From this it is to be inferred that the defendant entertained doubts whether they could be so used, at the time they were transferred to him. He has no ground of complaint that they do not constitute a set-off in this action. By the terms of the agreement between the defendant and Holmes, the former has a clear right to return the notes to Holmes; or, if he prefers that course, he can seek his remedy by suit against Leming. In either case, he will not be a sufferer. Verdict for the plaintiffs.

TILDEN v. BLAIR.

(21 Wallace, 241-249. 1874.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—The draft in this case was drawn by Pelton, a resident of Chicago, on Tilden & Co., who resided in the state of New York.

The draft was accepted by the drawees for the accommodation of Pelton. The drawees received no consideration and had no funds to protect the draft. The draft was dated at Chicago, but by the acceptance was made payable in the city of New York. It was returned to Chicago, indorsed by Pelton to Coventry, and the latter sold it in Chicago to Blair. Blair had no notice of the arrangement with Tilden & Co.

§ 389. *Negotiable paper governed by the law of the state where negotiated, although accepted elsewhere.*

Opinion by MR. JUSTICE STRONG.

That the contract upon which the suit was brought was made in Illinois must be considered as established by the findings of the circuit court. It is true the defendants formally accepted the draft in New York, and promised to pay at a bank in New York, but there was no operative acceptance until the draft was negotiated. They sent it back to Illinois, where it had been drawn, for the purpose of having it negotiated there. Pelton, the drawer, for whose accommodation the acceptance was given, was thus constituted the agent of the acceptors to give effect to their action. While the draft remained in his hands it was no binding contract. He had no rights as against the defendants, but he was empowered to negotiate the draft, and thereby to initiate a liability not only of himself, but also of the defendants. It was only when the instrument was negotiated that it became an accepted draft. It has long been settled that the liability of an acceptor does not arise from merely writing his name on the bill, but that it commences with the subsequent delivery to a *bona fide* holder, or with notice of acceptance given to such holder. Byles on Bills, 151. That this is so has often been asserted in judicial decisions, and often in New York. *Cook v. Litchfield*, 5 Seld., 279; *Lee v. Selleck*, 33 N. Y., 615; *Hyde v. Goodnow*, 3 Comst., 271. The doctrine is most reasonable. It is, therefore, quite immaterial, under the facts of this case, that the defendants resided in New York, and that they *there* wrote their acceptance upon the draft. In legal effect they accepted the draft in Chicago, when by their authority the drawer negotiated it, and thus caused effect to be given to their undertaking. Nor is the law of the contract changed by the fact that the acceptance was made payable in New York. The place of payment was doubtless designated for the convenience of the acceptors, or to facilitate the negotiation of the draft. But it is a controlling fact that before the acceptance had any operation—before the instrument became a bill, the defendants sent it to Illinois for the purpose of having it negotiated in that state—negotiated, it must be presumed, at such a rate of discount as by the law of that state was allowable. What more cogent evidence could there be that it was intended to create an Illinois bill? The case is exactly the same as it would be if the defendants had been residents of Chicago when the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract, and that the rights and liabilities of the parties must be determined according to the law of that state. By its statutes persons may contract to receive ten per cent. interest upon any debt due them, whether it be verbal or written. If they stipulate for a higher rate they forfeit the interest, but the statute expressly allows the recovery of the principal. The contract is not declared to be void. Only so much of it is void as exacts the excessive interest. And by a legislative act passed February 12, A. D. 1857, it is enacted as follows, viz.: “When any contract or loan shall be made in this state, or between

citizens of this state and any other state or country, bearing interest at any rate which was or shall be lawful according to any law of the state of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other state or territory of the United States, or in the city of London, in England, and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the state of Illinois, and shall not be affected by the laws of the state or country where the same shall be made payable." Provisions very similar to these are also made by the statute of February 12, 1857. Gross' Statutes, 371-2.

§ 390. *Bona fide purchaser not chargeable with equities between original parties to bill.*

If, then, the contract is, as we think it must be regarded, an Illinois contract, and if, therefore, the rights of the plaintiff are to be determined by the laws of that state, there can be no doubt he was entitled to judgment, and to judgment for the full face of the draft, with interest from the time it fell due. Even if the contract had been usurious, he would have been entitled to a judgment for all that the circuit court allowed him, for, as we have seen, the contract would not have been void, the statute expressly declaring that when usury is taken the principal debt may be recovered, while the interest reserved may not be. The case would be quite different if the law of the state made void an instrument usuriously negotiated. There was, however, no usury. And where a note or a bill is not made void by statute, mere illegality in its consideration will not affect the rights of a *bona fide* holder for value. *Norris v. Langley*, 19 N. H., 423; *Converse v. Foster*, 32 Vt., 828; *Conkling v. Underhill*, 3 Scam., 388. The plaintiff in this case was a *bona fide* purchaser of the draft. At the time of his purchase he had no notice of any equities in the drawer, or in the acceptors. There was nothing on the face of the instrument to awaken suspicion that it was accommodation paper, or that it had not been regularly and lawfully negotiated. He bought it from bill brokers, after it had been indorsed by the drawer and payee, and also by Carpenter, an apparent indorsee of the payee. That his purchase was not corrupt; that it was perfectly lawful under the law of Illinois, can admit of no question. *Sherman v. Blackman*, 24 Ill., 347; *Hemenway v. Cropsey*, 37 Ill., 357. And this is the rule everywhere unless the note or bill is declared by statute to be void in its inception. The plaintiffs in error, therefore, have no cause of complaint. The circuit court gave judgment against them for the sum which the plaintiff had paid for the draft, without interest. The judgment was only too favorable to them. It should have been for the full amount of the acceptance, with interest from the time it fell due, and had the case been brought here by the plaintiffs below we should direct such a judgment. But the present writ presents to us only the assignments of error made by the defendants, and as they are unsustainable, we can do no more than affirm the judgment given.

BROWN v. SPOFFORD.

(5 Otto, 474-485. 1877.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Brown & Son made their notes payable to one of themselves, and the payee indorsed them in blank and delivered them to Cake, president of a coal company, with whom the firm had business relations. From that company the notes passed in due course of trade (as was alleged), and be-

fore maturity, to Spofford. At maturity the notes were duly protested for non-payment, and two suits were brought upon them. The defense was, that at the time the notes were made a written agreement was entered into with Cake, president, etc., to the effect that the notes were collateral for other securities, and upon their payment the notes were to be delivered to Brown & Son. Defendants offered to prove that plaintiffs gave their own note for those of Brown & Son, and that Cake said that the company compromised to indemnify plaintiffs and would take up the Brown notes at their maturity. This testimony was excluded. There were judgments in each case against defendants. Further facts appear in the opinion of the court.

§ 391. *Rights of holder of indorsed paper.*

Opinion by MR. JUSTICE CLIFFORD.

Promissory notes payable to order may be transferred by indorsement, or when indorsed in blank or made payable to bearer, they are transferable by mere delivery, and the possession of such an instrument, indorsed in blank or made payable to bearer, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same, and nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder, supported by that evidence. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 343; *Collins v. Gilbert*, 94 U. S., 753 (§§ 432-436, *infra*); *Noxon v. De Wolf*, 10 Gray (Mass.), 343; *Magee v. Badger*, 34 N. Y., 247. Sufficient appears to show that the plaintiffs claim to recover of the defendants the amount of five promissory notes, set forth in the record, each dated January 8, 1872, payable to the order of Austin P. Brown in one, two, three, four and five months from date, amounting in the aggregate to the sum of \$11,336.64. Due indorsement of the notes was made by the payee, and the plaintiffs also claim to recover the costs and fees of protest and notice to the makers for non-payment. Service was made, and the defendants appeared and pleaded the general issue and two special pleas, which are fully set forth in the record.

§ 392. *Special pleas not necessary, when.*

Issue was joined by the plaintiffs upon the first plea of the defendants, and to the second plea the plaintiffs replied, and denied the same in fact and in substance, and all and singular the matters therein set forth, and alleged in further reply that they became the holders of the notes in the regular course of mercantile dealings for a full, fair and valuable consideration, before the maturity of the notes and without any notice or knowledge of the matters set forth and alleged in the defendants' second plea. They also deny and traverse all the allegations and averments contained in the defendants' third plea. Special pleas in such a case are unnecessary, as every such defense, where the action is *assumpsit* upon promissory notes, is admissible under the general issue.

Delay ensued, and at a subsequent term the parties went to trial, and the verdict and judgment were in favor of the plaintiffs, in the sum of \$11,300.47, with costs and interest. Exceptions were taken by the defendants, as appears by the record. Six notes, it seems, were given by the defendants, all of the same date, one of which was not due when the suit was instituted to recover the amount of the first five. On the 2d of August, 1872, the plaintiffs sued the other note, which was signed and indorsed like the other five, and was for the sum of \$2,267.32 for value received. Service was made, and the defendants appeared and filed three pleas, of the same legal effect as those filed in the preceding case. Replications were also filed by the plaintiffs, of the same

legal import as those which they filed in the suit to enforce payment of the first five notes. Proper issues being joined, the parties went to trial; and the verdict and judgment were for the plaintiffs, in the sum of \$2,269.85, with costs and interest, as therein provided. Separate judgments were rendered in the two cases; but the defendants were allowed to file eight bills of exceptions to the rulings of the court in each of the cases, which were subsequently signed and sealed by the presiding judge, each of the bills of exceptions having respect to the trial in the respective suits as if the same had been previously consolidated and the verdicts had been rendered at the same time by the same jury. Both judgments were removed into this court by one writ of error.

Certain errors are assigned here as applicable to the judgment in each of the respective cases, in substance and effect as follows: 1. Evidence was offered by the defendants to prove the alleged agreement between them and the company, which was excluded by the court, and they assign for error that the court erred in excluding that evidence. 2. That the court erred in holding that the agreement between the company and the defendants offered in evidence would not affect the right of the plaintiffs to recover in the suits. 3. That the court erred in holding that if the plaintiffs received the notes before maturity, without notice of the alleged agreement, the defendants were liable in the action, even though the plaintiffs paid their own notes with money borrowed from the company, whose agents they were in the transaction. 4. That the court erred in instructing the jury that if they find from the evidence that the plaintiffs did have notice of the alleged agreement between the company and the defendants, still they may recover in the actions if the jury further find that the defendants neglected and failed to comply with the terms of the agreement. 5. That the court erred in instructing the jury that the agreement to receive as a compromise in discharge of the notes a sum less than the amount of the same could only be made available as a defense, by proving that the sum agreed was paid or tendered by the defendants as therein stipulated. Exceptions not assigned for error will not be separately examined. Two of the errors assigned, to wit, the first and the second, are so nearly alike that they may be examined together.

§ 393. *Parol evidence of an agreement contemporaneous with a promissory note and varying its terms or legal affect is not admissible.*

Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument. *Brown v. Wiley*, 20 How., 442. In that case, the defendant offered to prove to the jury, pursuant to the defense set up in a special plea, a parol agreement between him and the plaintiffs, that the bill should not be presented for acceptance until funds were furnished and placed in the hands of the drawees, to provide for a certain other draft, who had agreed to accept the second bill when funds were received to meet their liability for accepting the first bill; but the court below excluded the evidence, and the defendant excepted; and this court decided that the ruling was correct, and affirmed the judgment, holding that the evidence offered, that the bill should not be presented until a distant, uncertain or undefined period, tended in a very material degree to alter

and vary the operation and effect of the instrument. *Shankland v. Washington*, 5 Pet., 394; 1 Greenl. Evid. (12th ed.), 318; *Stackpole v. Arnold*, 11 Mass., 27; *Hunt v. Adams*, 7 id., 518; *Myrick v. Dame*, 9 Cush. (Mass.), 248; *Thompson v. Ketcham*, 8 Johns., 192.

Certain fixed principles govern the liability of parties to a bill of exchange or promissory note which are essential to the credit and circulation of such paper, of which the most important is that whatever may have occurred between other parties to the instrument, if not fraudulent in its inception, the holder of the same, if he acquired it for value in the usual course of business before maturity, cannot be affected by any such transactions, unless it be first shown that he had knowledge of such transactions at the time the transfer was made. Nothing less than knowledge of such transactions can meet the exigencies of such a defense, the rule being that the *bona fide* holder of a negotiable instrument for value, if acquired before maturity and without notice of any facts which impeach its validity between the antecedent parties, has a good title to the instrument, unaffected by any such prior transaction, and may recover the amount, even though the instrument, as between the antecedent parties, is without any legal validity. *Goodman v. Simonds*, 20 How., 343 (§§ 420-425, *infra*); *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*). Attempt was made in a leading case to prove that the payee agreed with the indorser that, if he would indorse the note, he should incur no responsibility, as the payment was secured by collaterals, and when offered in the circuit court the evidence was admitted; but the court, when the case was brought here on writ of error, reversed the judgment, holding that the evidence should have been excluded. *Bank v. Dunn*, 6 Pet., 51. Decided cases of the most authoritative character have determined that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to or subtract from, the absolute terms of a written contract. *Specht v. Howard*, 16 Wall., 564. In the absence of fraud, accident or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement alleged to have been made at the time of drawing, making or indorsing a bill or note, cannot be permitted to vary, qualify or contradict, or to add to or subtract from, the absolute terms of the written contract. *Forsythe v. Kimball*, 91 U. S., 291. Parol evidence of an agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition. *Chitty, Contr.* (10th ed.), 99; *Abrey v. Cruz*, Law Rep., 5 C. P., 41; *Allan v. Furbish*, 4 Gray, 514; 2 Pars. Bills and Notes, 501. Apply these rules to the case before the court and it is clear that the first and second assignments of error must be overruled, as it is clear that the evidence offered was inadmissible, and that the ruling of the court was correct.

§ 394. *Rights of a bona fide purchaser of a promissory note.*

Due execution of the notes is admitted, nor is it questioned that they were indorsed in blank, as set up by the plaintiffs. Beyond all doubt, the plaintiffs became the holders of the notes before maturity, and for value; but the defendants insist that the plaintiffs did not become the holders of the same in good faith, nor in the regular course of business; and they requested the court to instruct the jury that, if they believed that the plaintiffs came into the posses-

sion of the notes without paying value, or under circumstances which would have put a prudent man upon inquiry concerning the alleged agreement, then the jury must consider the plaintiffs bound by the agreement, and that their verdict should be for the defendants. Three objections arise to that prayer for instruction, any one of which is sufficient to show that it was properly rejected: 1. Because the uncontradicted evidence showed that the plaintiffs did pay value for the notes. 2. Because the settled rule of law is that the plaintiffs, as the holders of the notes for value, and having acquired the same before maturity and in the usual course of business, or without notice of any prior equities, have a good title to the same, irrespective of what may have transpired between the defendants and prior holders of the notes. 3. Because there is no evidence in the case that the plaintiffs had knowledge of any equities between the defendants and such prior parties, the settled commercial rule being that nothing less than prior knowledge of such facts and circumstances as impeach the title can meet the exigencies of such a defense, unless it be shown that the instrument or instruments were fraudulent in their inception. Where the supposed defect or infirmity in the title of the instrument appears on the face at the time of the transfer, the question whether the party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law, as has been held by this court in several cases. *Andrews v. Pond*, 13 Pet., 65; *Fowler v. Brantly*, 14 id., 318 (§ 427, *infra*). But it is a very different thing when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. *Goodman v. Simonds*, 20 How., 343 (§§ 420-425, *infra*); *Collins v. Gilbert*, 94 U. S., 753 (§§ 432-436, *infra*). Tested by these authorities, it follows that the third assignment of error must be overruled.

§ 395. *A party cannot avail himself of a compromise unless he can show performance on his part.*

Both the fourth and the fifth assignments of error have respect to the supposed compromise which it is alleged was proposed and adopted; and, inasmuch as they relate to the same state of facts, they will be examined together. Parties may, doubtless, adjust their controversies; and where they do so in good faith and understandingly, courts of justice will uphold the adjustment, unless it violates the rules of law applicable to the transaction. Suppose that is so, still it is clear the alleged compromise was never carried into effect. What was proposed is that the notes were to be delivered up upon the payment of a prescribed amount at the time and in the manner set forth in the agreement; but nothing was ever paid or tendered, nor was anything ever done in fulfilment of the agreement. Instead of that, the evidence shows that the defendants never made any attempt to make the payments; and the court instructed the jury, that, if they found that the agreement of compromise was never carried out by the defendants, it constitutes no defense to the action; that such a compromise can only be made available to the defendants as a defense by proving that the sums agreed to be paid in discharge were paid or tendered as stipulated. Formal exceptions were taken to those instructions, and they are the basis of the errors alleged in the fourth and fifth assignments.

Sufficient appears to show that the indebtedness of the defendants amounted

to the sum of \$13,603.96, and that the plaintiffs agreed to accept \$10,000 as a compromise, "upon the payments being made at the times stated," from which it is evident that nothing short of the fulfilment of that agreement would discharge the original demand, and that such a compromise to be available must be performed. 2 Pars. Contr. (6th ed.), 685; 2 Story, Contr. (5th ed.), 537; Chitty, Contr. (10th ed.), 693. Agreements unperformed cannot be pleaded as accord and satisfaction. *United States v. Clarke, Hemp.*, 315. Where a creditor agreed to satisfy a judgment for a less sum than the amount recovered, if paid by a day certain, and the debtor failed to make the payment, it was held that the creditor might enforce the judgment for the full amount. *Early v. Rogers*, 16 How., 599. Performance of the agreement by the judgment debtor, it was held in that case, was a condition precedent to the proposed reduction of the judgment; and the court said, we think the district judge interpreted the agreement of the parties and the judgment correctly, as the parties made the reduction dependent on a condition which has not been fulfilled. Where an arrangement was made for the discharge of certain notes, but the arrangement failed because one of the debtors disagreed to the terms of the composition, the court decided that the debt stood revived, and that judgment was properly rendered for the whole amount. *Clark v. Bowen*, 22 id., 270; *Addison*, Contr. (6th ed.), 996. Two other exceptions were taken at the trial, in respect to which it is only necessary to say that they have not been assigned for error, and if they had been, it would not have benefited the defendant, as the questions presented fall within the rules already sufficiently explained.

§ 396. *Certain irregularities in practice reprehended.*

Nothing remains for remark except to advert very briefly to certain irregularities which appear in the proceedings. Judgment was rendered in the first suit before the parties went to trial in the second, and yet the defendants were allowed to file eight bills of exceptions, which purport to be applicable to each of the two cases; and the judgment in each case is removed here by one writ of error, though the transcript does not show that the two cases were ever consolidated. Such proceedings are palpably irregular; but inasmuch as they are not the subject of objection by either party, the court has decided to exercise jurisdiction and dispose of the controversy. Separate judgments having been entered in the court of original jurisdiction, the judgment rendered here must be separately applied in the court below.

Judgment affirmed.

OATES v. NATIONAL BANK.

(10 Otto, 239-251. 1879.)

ERROR to U. S. Circuit Court, Middle District of Alabama.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This is a writ of error to a judgment in favor of the First National Bank of Montgomery, against Oates, the plaintiff in error, upon a promissory note for \$5,200, executed by him at Eufala, Alabama, on the 25th day of July, 1873, and made payable on the 1st of December thereafter, to the order of B. H. Micow, president, at the office of the Tallassee Manufacturing Company, No. 1, in the city of Montgomery. The consideration of the note was fifty shares of the capital stock of that company purchased by Oates, for which, at the time, he received a certificate in the customary form. As part of the contract of purchase, he took from the company a separate written obligation, reserving to him the option, on the 1st of December, 1873, at the matu-

urity of the note, of surrendering the certificate of stock and receiving his note duly canceled. It appears that he was induced to buy the stock upon certain representations of the special agent of the company as to its financial condition. These representations were subsequently ascertained by him to have been false and fraudulent. On or about November 4, 1873, Micow applied to the bank for an extension of time upon certain indebtedness then held by it against the company, amounting to about \$40,000, and all of which matured thereafter and in that month. That indebtedness had been previously extended, on several occasions, at usurious rates of interest, paid invariably in advance. The bank signified its willingness to give an extension for thirty, sixty, ninety and one hundred and twenty days, upon collateral security being furnished, and upon the payment in advance for such extension of interest at the rate of one and one-quarter per cent. per month, upon the different classes of the company's paper by it held. These conditions were complied with, and the extension was accordingly made for the periods stated. The required interest was not carried into the extension bills, but was paid in advance. Among the collaterals placed with the bank, under this arrangement, was the note for \$5,200 already described, indorsed in blank, "B. H. Micow, Prest."

The evidence was somewhat conflicting as to whether the officers of the bank, at the time of receiving the note in question, had actual notice from Oates as to its consideration. It was, however, conceded that its president had reason to believe the note was given for stock of the company. Oates, although residing at Eufala, was a stockholder and director of the bank. No inquiry was made of him by the officers of the bank, before receiving the note as collateral security, as to any defense which he might have against its payment. But it was proven by them that when the extension was given to the company they had no notice of any defect in or defense to the note, or of any equities except such notice as might be implied from the foregoing facts and the relations of the parties. It is not claimed that the bank had at that time any notice of the separate written obligation of the manufacturing company to which we have already referred. On the 24th of November, 1873, the bank gave written notice to Oates that it held his note as collateral security for the indebtedness of the company. A few days thereafter he transmitted to the bank the company's agreement or obligation, under which he had purchased the stock and given his note, informing its officers that he had by the same mail returned his stock certificate to the company and demanded the surrender and cancellation of his note. The bank, replying to this notification, stated that it had purchased the note as negotiable paper, in good faith, for a valuable consideration, and without notice of any private understanding between Oates and the company, its officers or agents. These are the essential facts developed in the record. We are to inquire whether the court below committed any error of law to the prejudice of the plaintiff in error.

§ 397. *Rights of share taker to surrender stock and cancel note.*

The first contention of the plaintiff in error is that by the terms of the contract under which he purchased the stock and gave his note, and in view of the false and fraudulent representations of the company's agent as to its financial condition, he was entitled, as of absolute right, to surrender the certificate of stock and have his note returned or canceled; and, further, that his defense upon that ground was secured to him by the statutes of the state of Alabama, in force when the contract was made.

§ 398. *Bills and notes in Alabama. Rights of bona fide holder.*

It is clear that as between the Tallassee Manufacturing Company and Oates the defense of the latter is perfect. And it would undoubtedly be sustained, even against the defendant in error, were it true, as claimed, that by the statutes of Alabama the transfer of the note was without prejudice to any defense which the maker might assert against the payee. This renders it necessary that we should ascertain to what extent, if at all, the rights of parties are affected or controlled by the statutes of Alabama. By section 1833 of the Revised Code of that state it is declared that "bills of exchange and promissory notes, payable in money at a bank or private banking house, are governed by the commercial law, except so far as the same is changed by this code." Section 1839 declares that "all contracts or writings, except bills of exchange, promissory notes payable in money at a bank or private banking house, and paper issued to circulate as money, are subject to all payments, set-offs and discounts had or possessed against the same previous to notice of the assignment or transfer." Thus stood the law of Alabama until April 8, 1873, when, by statute of that date, entitled "An act to amend section 1833 of the Revised Code of Alabama," it was enacted that section 1833 (copied in full in the act) "be so amended as to read as follows: 'Bills and notes payable at a banker's or a designated place of payment are negotiable instruments; bills of exchange and promissory notes, payable in money at a bank or a certain place of payment therein designated, are governed by the commercial law.'" Acts 1872-3, p. 111. By the same statute, section 1833, as it then stood in the Revised Code, was expressly repealed. It should be observed that the words "except so far as the same is changed by this code," in section 1833 as it originally stood, are omitted from that section as remodeled by the act of 1873.

The argument of the plaintiff in error is that although, by the explicit declaration in the act of 1873, "bills and notes, payable in money at a certain place of payment therein designated," are negotiable instruments, to be governed by the commercial law, such bills and notes are, nevertheless, under section 1839, "subject to all payments, set-offs and discounts had or possessed against the same previous to notice of the assignment or transfer." We concur with the court below in holding that construction to be wholly inadmissible. It seems that upon this precise point there has been no direct adjudication by the supreme court of Alabama, to which primarily belongs the duty of giving authoritative construction of the statutes of that state. The only case in that court to which we are referred, that has any bearing upon this question, is *Cook v. Mutual Insurance Co.*, 53 Ala., 37. Jones, it seems, gave to Cook, in 1871, a promissory note, payable to the order of the latter at the office of W. H. Roberts, Mobile, and indorsed by the payee to the insurance company. In an action instituted by the latter against Cook, the question arose as to whether the note was commercial paper, protected, in the hands of a *bona fide* holder for value, against defenses resting upon payment, set-off or discount. The inferior state court ruled that it was paper of that kind; but the supreme court of Alabama held that the note, when made, was not commercial paper, and that the rights and liabilities of the parties were to be determined by the statute in force at the date of its execution. That court, speaking by its Chief justice, said: "Since the making of the promissory note, on the indorsement of which this suit is founded, the statute of April 8, 1873, has converted promissory notes, payable in money at a designated place, into negotiable instruments governed by the commercial law. It operates on the nature and obligation of

the contract of the parties to such notes, and cannot be construed as affecting notes made and indorsed prior to its passage. The law in force when the note is made and indorsed regulates and defines the liability of the parties." No other reasons are assigned in support of the conclusion that the act of 1873 did not control the case. It is quite manifest, from the language employed by the court, that, had the note there in suit been executed subsequent to the act of 1873, it would have sustained the ruling of the inferior state court, and excluded all defenses inconsistent with the established doctrines of the commercial law. Such, in our opinion, must have been its determination upon any proper construction of the act of 1873. It is true that that statute does not in express words *amend* section 1839, whereby *only* "bills of exchange and promissory notes, payable in money at a bank or private banking house, and paper issued to circulate as money," are, in terms, protected against payments, set-offs and discounts which the maker might assert in the case of all other contracts and writings. But it is perfectly evident that the object of the act of 1873 was to place bills of exchange and promissory notes, payable at a certain designated place of payment, upon exactly the same basis, as to immunity from set-off, discount or equities, as the statute prescribed in reference to bills and notes payable at a bank or private banking house. In declaring that bills and notes of the former class were negotiable instruments, to be governed by the commercial law, the legislature necessarily intended to throw around such paper the same protection that had previously been given by statute to bills and notes payable at banks or private banking houses. If such was not its object, then, confessedly, the act of 1873 was both meaningless and illusory. The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. *Wilkinson v. Leland*, 2 Pet., 627; *Sedgwick, Const. and Stat. Constr.*, 196. And we should discard any construction that would lead to absurd consequences. *United States v. Kirby*, 7 Wall., 482. We ought, rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power when thus expressed. The defense of the plaintiff in error would be good under section 1839, if no regard was had to the act of 1873; but since that statute expressly included notes payable at a certain designated place in the class of negotiable instruments to be governed by the commercial law,—which could not be if section 1839 be enforced according to its literal import,—the judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers." *Suckley v. Furse*, 15 Johns. (N. Y.), 338; *The People v. Utica Insurance Co.*, id., 357, 380.

For these reasons we are of opinion that the statutes of Alabama do not permit, as against a *bona fide* holder, for value, of a "promissory note, payable in money at a certain place of payment therein designated," defenses which are disallowed in cases where the note is payable at a bank or private banking house.

§ 399. *One who takes a note as collateral security is a holder for value and bona fide.*

Giving to the Alabama statute the construction indicated, our next inquiry is, whether the bank, under the circumstances disclosed in this case, became,

according to the recognized principles of commercial law, a *bona fide* holder for value of the note in suit. That it acquired the note in good faith, without fraud, we are not permitted by the evidence to doubt. Its officers were not bound to inquire of Oates, before they took the note, whether he had any defense or set-off. They rightfully supposed, as the face of the note imported, that he had undertaken absolutely to pay the amount specified at the time and place designated. That the president of the bank had reason to believe it was given for stock of the Tallassee Manufacturing Company is a fact of no significance whatever in determining the question of good faith. Having no knowledge or notice of the private agreement between Oates and the company, as set forth in the separate obligation of the latter, which was withheld from the public, the bank officers justly assumed that there was no circumstance attending the sale of the stock which could lessen the obligation of Oates to pay the note according to its tenor and effect.

§ 400. *Federal courts are not controlled by the decisions of state courts on questions of commercial law.*

But it is contended that by the rules of commercial law, as recognized by the supreme court of Alabama, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value, in the course of business, so as to cut off equities which the maker may have against the payee. Such was declared to be the settled doctrine of that court in *Fenouille v. Hamilton*, 35 Ala., 319. But the opinion in that case contains some passages which apply with peculiar force to a suit like this. The court said: "In this case there was no other consideration for the transfer of the note to the defendant than the security of the pre-existing indebtedness of the defendant's indorsee. The fact that the defendant may have been led to grant indulgence, or forbear to enforce his remedies for the collection of the debts, does not prove that such indulgence or forbearance was an element of the contract, or the consideration upon which it was made. If there was any forbearance by the defendant, it was a voluntary act to which he may have been persuaded by the collateral security, and may have resulted from a consciousness of security; but such forbearance was not the result of contract, and is not shown to have been the consideration of it." Had there been, in that case, a present consideration for the transfer of the note beyond giving security for a pre-existing debt, or had the forbearance of the creditor to enforce his remedies been an element in a binding contract, under which the collateral security was furnished, we are persuaded that the Alabama court would have ruled that the creditor, in receiving the collateral, became a holder for value in the course of business. But, if we are mistaken in our interpretation of the decision of the supreme court of Alabama, the result will not follow for which plaintiff in error so earnestly contends. While the federal courts must regard the laws of the several states, and their construction by the state courts (except when the constitution, treaties or statutes of the United States otherwise provide), as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*); *Carpenter v. Prov. Ins. Co.*, id., 495; *Watson v. Tarpley*, 18 How., 517 (§§ 1174-77, *infra*). We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money

at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the federal courts to determine upon their own judgment as to what these rules and doctrines are.

§ 401. *One who takes a negotiable note, accepted before maturity, as security for a pre-existing debt, is, in the sense of commercial law, a bona fide holder for value.*

Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a *bona fide* holder for value of the note in suit. In *Swift v. Tyson* (*supra*), cited by counsel, this court, speaking by Mr. Justice Story, said that it entertained no doubt "that a *bona fide* holder for a pre-existing debt of a negotiable instrument is not affected by any equities between antecedent parties, when he has received the same before it became due, without notice of any such equities." In some of the state courts the authority of that case has been disputed, so far as the language of the court referred to collateral security received for a pre-existing debt, upon the ground that the note there in suit was transferred in payment of, and not as security for, a pre-existing debt, and that, consequently, the opinion expressed in the language just quoted was unnecessary to the decision of the point in issue. In the more recent case of *Goodman v. Simonds*, 20 How., 343 (§§ 420-425, *infra*), it was contended that a party who took negotiable paper *merely* as collateral security for a pre-existing debt did not acquire it in the usual course of business, but took it subject to prior equities. The court being of opinion that no such question was presented by the record, waived its consideration. But after an extended review of the authorities, American and English, the court, speaking through Mr. Justice Clifford, said: "It seems now to be agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument, before its maturity, as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is used as collateral."

That language would seem to be conclusive of the question under consideration. There was here a present consideration at the time of the transfer, independent of the indebtedness of the manufacturing company to the bank. That consideration as to the bank was the unconditional extension of time upon all the company's indebtedness, for different periods reaching beyond the maturity of the note transferred as collateral security. Such extension for fixed periods was a cardinal element of the contract. The creditor forbore pursuit of the remedies which the law supplied for the enforcement of his demands, then soon to mature, in consideration of collateral security being furnished, and in consideration also of the payment by the debtor of usurious interest in advance. Besides, having received the note, indorsed so that it became a party thereto, the bank was bound to observe all the rules of the law merchant as to presentation, protest, and notice of non-payment. It did not receive the note as the agent of the debtor, and merely for collection. It took it under all the responsibility as to presentation, protest, and notice of dishonor, which attached to absolute ownership, and became liable to have the note treated as payment *pro tanto*, if there were a failure to make due presentation, and, in the event of non-payment, to give proper notice to the cred-

itor. The debtor could not withdraw his indorsement after delivering the note, under the contract for extension, nor could the bank, after receiving the note under that contract, disregard its agreement for forbearance. Nor was the bank any the less bound by the contract for extension because of the payment in advance of usurious interest by his debtor. Although the taking of usurious interest subjected the bank to certain forfeitures prescribed by law, and to an action by the debtor, if he so elected, to recover twice the amount so paid by him, it could not, of its own volition or by its own act, avoid the contract for indulgence because of such payment of usury. The payment in advance was itself a sufficient consideration for the extension, in the sense that the bank would not be allowed to repudiate its agreement, upon the ground that it had taken usurious interest in violation of law. 2 Daniel, Neg. Inst., sec. 1317. But independent of that aspect of the case, and throwing out of view altogether the usurious feature of the contract, we are of opinion that a creditor who takes a negotiable note before maturity, so indorsed that he becomes a party to the instrument as collateral security for a pre-existing debt, and in consideration of an extension of time to the debtor, actually granted, is, according to the law merchant, a holder for value, and that his rights as such holder cannot be affected by equities between antecedent parties, of which he had no notice. *Goodman v. Simonds*, *supra*; 1 Parsons, Notes and Bills, 221-228; Story, Promissory Notes, sec. 195, notes (7th ed., by Thorndike); 1 Daniel, Neg. Inst. (2d ed.), secs. 820, 832, and notes; Leading Cases upon Bills of Exchange and Promissory Notes, by Redfield & Bigelow, 186-217, and notes. Whether the taking of such note merely as collateral security for antecedent debts, without any binding contract for indulgence, would constitute a valuable consideration within the established rules of commercial law, protecting the creditor against defenses or equities between antecedent parties, of which he had no notice, it is not necessary now to decide. That precise question is not presented in this case, and we forbear to express any opinion upon it.

§ 402. *The Alabama law concerning the effect of usurious contracts.*

One other question remains to be considered. Counsel for plaintiff in error have pressed with much vigor the suggestion that the bank, consistently with public policy, should not be regarded as a *bona fide* holder for value of the note in suit, since the contract under which it received the note involved in its execution a direct violation of the statutes against usury. We are referred in support of that position to several decisions of the supreme court of Alabama, which, it must be conceded, announce the broad doctrine that one "who has become the indorsee of a bill, by violating the provisions of a statute, cannot with any degree of propriety be said to be a *bona fide* holder in the usual course of trade." 13 Ala., 410; 14 id., 688; 16 id., 406. Without extending this opinion by a critical examination of those cases, we repeat that in the determination of such a question we are not bound by the decisions of the state court. The question is one of general law, and depends in nowise for its solution upon local laws and usages. We are referred, in this connection, to two cases, *Levy v. Gadsby*, 3 Granch, 180, and *Gaither v. Farmers' & Mechanics' Bank*, 1 Pet., 37. The first is so meagrely reported that it is difficult to see the precise ground upon which the conclusion of the court was placed, and the second is clearly distinguishable from this. There, a note was indorsed and delivered as collateral security for a pre-existing debt, evidenced by a note given on a usurious contract. The case was held to be governed by the statute of Maryland,

which declared "all bonds, contracts, and assurances whatever, taken on a usurious contract," to be utterly *void*. Under that statute the contract of indorsement was held to be void. In the eye of the law, it was as though it had never existed, and consequently no cause of action, it was adjudged, passed to the indorsee. The case in hand is altogether different. The statute under which the bank was organized, known as the national banking act, does not declare the contract, under which the usurious interest is paid, to be *void*.

§ 403. *The rule of the national banking law concerning usury.*

It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. "On what principle could this court add another to the penalties declared by the law itself?" *DeWolf v. Johnson*, 10 Wheat., 367; *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S., 29 (BANKS, N., §§ 205-210); *Barnet v. National Bank*, 98 id., 555 (BANKS, N., §§ 213-215).

§ 404. *Where one consideration of a note is good and another is bad, the good consideration will sustain the contract.*

Besides, in this case, the forbearance extended to the debtor was not upon the sole consideration of usurious interest paid in advance; it was upon the additional and substantial consideration that the debtor corporation gave collateral security for the payment of indebtedness about to mature, and which it confessed its inability to meet. We have already seen that the transfer of the note before maturity, as collateral security, and so indorsed that the bank became a party to the instrument under obligation to make due presentment and give due notice of non-payment, was itself a sufficient consideration to constitute the bank a *bona fide* holder for value, within the recognized principles of the law merchant. The presence, then, in the contract under which the note was indorsed and delivered to the bank of an additional consideration,—the payment in advance of usurious interest,—which the law declares to be vicious and illegal, ought not to destroy the entire contract of indorsement, when there is a sufficient consideration, aside from the usury paid, upon which it may rest. We are of opinion that no error of law was committed by the court below.

Judgment affirmed.

BANK OF PITTSBURGH v. NEAL.

(22 Howard, 96-111. 1859.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Indiana. All of the questions presented in this case arise upon the pleadings and the facts therein disclosed. It was an action of *assumpsit*, brought by the plaintiff in error as the holder of two certain bills of exchange, against the defendants as the acceptors. An amendment to the declaration was filed after the suit was commenced. As now exhibited in the transcript, it contains four counts. Two of the counts were drawn up on the respective bills of exchange, and are in the usual form of declaring in suits, by the holder of a bill of exchange against the acceptor. Those contained in the amendment are special in form, setting forth the cir-

cumstances under which the respective bills of exchange were drawn, accepted and negotiated, and averring that these acts were subsequently ratified by the defendants. To the merits of the controversy the defendants pleaded the general issue, and filed seven special pleas in bar of the action. Demurrers were filed by the plaintiff to each of the special pleas, which were duly joined by the defendants, and, after the hearing, the court overruled all of the demurrers. Those filed to the pleas responsive to the first and second counts were overruled upon the ground that the pleas were sufficient, and constituted a good bar to the action; but those filed to the fifth, sixth, seventh and eighth pleas were overruled upon the ground that the third and fourth counts, to which those pleas exclusively applied, were each insufficient in law to maintain the action. Whereupon, the plaintiff abiding his demurrers, the court directed that judgment be entered for the defendants, and the plaintiff sued out a writ of error and removed the cause into this court. It being very properly admitted, by the counsel of the defendants, that the first and second counts of the declaration are in the usual form, it is not necessary to determine the question as to the sufficiency of the third and fourth, and we are the less inclined to do so, from the fact that the counsel on both sides expressed the wish, at the argument, that the decision of the cause might turn upon the question whether the plaintiff, on the facts disclosed in the pleadings, was entitled to recover against the defendants. That question is the main one presented by the pleadings; and inasmuch as it might well have been tried under the general issue, we think it quite unnecessary to consider any of the incidental questions which do not touch the merits of the controversy. Special pleading in suits on bills of exchange and promissory notes ought not to be encouraged, except in cases where by law the defense would otherwise be excluded or rendered unavailing. Full and clear statements of the facts, as disclosed in the pleadings, were presented to the court, at the argument, by the counsel on both sides. They are substantially as follows: In June, 1857, the defendants, residents of Madison, in the state of Indiana, being desirous of procuring a loan of money, made their certain acceptances in writing of two blank bills of exchange, in sets of two parts to each bill, and transmitted the four blanks, thus accepted, to their correspondent, Lot O. Reynolds, then and still residing at Pittsburgh, in the state of Pennsylvania. Both sets of blanks were in the form of printed blanks usually kept by merchants for bills of exchange in double sets, except that each of the four was made payable to the order of the correspondent to whom they were sent, and was duly accepted on its face by the defendants, in the name of their firm. They were in blank as to the names of the drawers and the address of the drawees, and as to date, and amount, and time and place of payment. When the defendants forwarded the acceptances they instructed their correspondent to perfect them as bills of exchange by procuring the signatures of the requisite parties, as accommodation drawers and indorsers, and to fill up each with the appropriate date, and with sums not less than fifteen hundred nor more than three thousand dollars, payable at the longest period practicable, and to sell and negotiate the bills as perfected, for money, and remit the proceeds to the defendants. Afterwards, in the month of July, of the same year, the defendants, at the request of the person to whom those acceptances were sent, made four other similar acceptances, and delivered them to him, to be sold and negotiated as bills of exchange, in double sets, for his own use, and with power to retain and use the proceeds thereof for his own benefit. They were in all respects the same, in point of form, as the four acceptances first named, and,

like those, each of the four parts was made payable to the order of the person at whose request they were given, and was duly accepted by the defendants in the name of their firm. When they delivered the sets last named, they authorized the payee to perfect them as bills of exchange, in two parts, in reasonable amounts, and with reasonable dates. Eight acceptances were thus delivered by the defendants to the same person, corresponding in point of form to four bills of exchange, but with blanks for the names of the drawers and the address of the drawees, and for the respective amounts, dates, and times and places of payment. Four contained, in the printed form of the blanks, the words, "first of exchange, second unpaid;" and the other four contained in the corresponding form the words, "second of exchange, first unpaid;" but in all other respects they were alike. All of the first class were perfected by the correspondent as bills of exchange of the first part, and were sold and negotiated by him at certain other banks in the city of Pittsburgh. He perfected them by procuring L. O. Reynolds & Son to become the drawers, addressed them to the defendants, indorsed them himself in blank, and procured another individual or firm to become the second indorser. They were filled up by him for sums varying from about two thousand to three thousand dollars, with dates corresponding to the times when they were negotiated, and were respectively made payable in four months from date. Contrary to his instructions, he retained the proceeds of the one first negotiated, which he had been directed to remit; and he also retained in his possession, but without inquiry or complaint on the part of the defendants, the other four acceptances, constituting the second class. On the 1st day of August, 1857, he perfected and filled up as a separate bill of exchange one of the last-named acceptances, and sold and negotiated it to the plaintiff for his own use and benefit. He also perfected and filled up, on the 18th day of the same month, another of the same class, in the same manner, and for the same purpose, and on the same day sold and negotiated it to the plaintiff. Both of these last-mentioned bills of exchange vary from those of the first class, not only in dates and amounts, but also as to time and place of payment, and are in all respects single bills of exchange. They were each received and discounted by the plaintiff, without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under which they had been intrusted to his care, unless the words, "second of exchange, first unpaid," can be held to have that import.

§ 405. *A bill of exchange accepted in blank authorizes the holder to fill up the blanks.*

In all other respects the bills must be viewed precisely as they would be if they had been perfected and filled up by the defendants, and for two reasons, deducible from the decisions of this court: First. Because where a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such a party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or in other words it is the act of the principal, and he is bound by it. *Goodman v. Simonds*, 20 How., 361 (§§ 420–425, *infra*); *Violett v. Patton*, 5 Cranch, 142 (§§ 553–555, *infra*).

• § 406. *A bona fide holder of a negotiable instrument is not affected by antecedent equities.*

Secondly. Because a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. *Swift v. Tyson*, 16 Pet., 15 (§§ 382-386, *supra*); *Goodman v. Simonds*, 20 How., 363. Applying these principles, it is obvious that the only question that arises on this branch of the case is as to the effect of the words, "second of exchange, first unpaid," which appear on the face of the bills. That question, under the circumstances of this case, is a question of law, and not of fact for the jury. Three decisions of this court sustain that proposition; and in view of that fact we think it unnecessary to do more than refer to those decisions, without further comment in its support. *Andrews v. Pond*, 13 Pet., 65; *Fowler v. Brantly*, 14 Pet., 318 (§ 427, *infra*); *Goodman v. Simonds*, 20 How., 366.

§ 407. *Where bills of exchange are drawn in sets, an innocent holder of any one of the set may recover.*

Another principle firmly established by this court, and closely allied to the question under consideration, will serve very much to elucidate the present inquiry. In *Downes v. Church*, 13 Pet., 207, this court held that either of the set of bills of exchange may be presented for acceptance, and if not accepted that a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for, say the court, it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder. Now, if either of the set may be presented, and when not accepted a right of action immediately ensues, it is difficult to see any reason why, if upon presentation the bill is accepted, it is not competent for the indorsee to negotiate it in the market; and clearly, if the indorsee may properly negotiate the bill, a *bona fide* holder for value, without notice, may acquire a good title. In this connection Mr. Chitty says that, "unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others; but if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part;" from which he deduces the rule that a drawee of a bill drawn in sets should only accept one of the set. Chitty on Bills, 10th Am. ed. by Barb., 155. Mr. Byles says: "The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also;" which could not be, unless it was competent for the holder of a second part to negotiate it in the market. Byles on Bills, p. 310.

Where the drawee accepted and indorsed one part to a creditor as a security, and afterwards accepted and indorsed another part for value to a third person, but subsequently substituted another security for the part first accepted, it was held, in *Holdsworth v. Hunter*, 10 Barn. & Cress., 449, that under these circumstances the holder of the part secondly accepted was entitled to recover on the

bill; and Lord Tenterden and Baron Parke held that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally. Judge Story says, in his work on bills of exchange, that the *bona fide* holder of any one of the set, if accepted, may recover the amount from the acceptor, who would not be bound to pay any other of the set which was held by another person, although he might be the first holder. Story on Bills, sec. 226. No authority is cited, for the defendant, to impair the force of those already referred to; but it is not necessary to express any decided opinion upon the point at the present time. Suffice it to say, that, in the absence of any authority to the contrary, we are strongly inclined to think that the correct rule is stated by Mr. Chitty, and that such is the general understanding among mercantile men.

But another answer may be given to the argument for the defendant, which is entirely conclusive against it; and that is, that the bills described in the first and second counts were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated, by the correspondents of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a *bona fide* holder for value, without notice that the acts were performed without authority. When the transaction is thus viewed, as it must be in contemplation of law, it is clearly brought within the operation of the same rule as it would be if the defendant himself had improvidently accepted two bills for the same debt. In such cases, it is held that the acceptor is liable to pay both, in the hands of innocent holders for value. *Davison v. Robertson*, 3 Dow. P. C., 218. Lord Eldon said, in that case: "Here were two bills for the same account, and supposed to be for the same sums; they who were to pay them had a right to complain that there were two, and yet they were bound to pay both, in the hands of *bona fide* holders, if accepted by them, or by others for them, having authority to accept." To suppose, in this case, that the words "second of exchange, first unpaid," import knowledge to the plaintiff that the bills were drawn in sets, would be to give them an effect contrary to the averments of the defendants' pleas, as well as contrary to the admitted fact that they were not so drawn; and for those reasons the theory cannot be sustained.

In view of all the facts as disclosed in the pleadings, we think the case clearly falls within the operation of the rule, generally applicable in cases of agency, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. *Fitzherbert v. Mather*, 1 Term, 16, per Buller; *Androscoggin Bank v. Kimball*, 10 Cush., 373; *Montague v. Perkins*, 22 Eng. L. & Eq., 516. Business men who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and intrust them to their correspondents, to raise money at their discretion, ought to understand the operation and effect of this rule, and not to expect that courts of justice will fail in such cases to give it due application.

According to the views of this court, the demurrers to the several pleas filed to the first and second counts of the declaration should have been sustained. Having come to that conclusion, it is unnecessary to examine the other propositions submitted on behalf of the defendants. The judgment of the circuit court is therefore reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff, as upon demurrer, on the first and second counts of the declaration.

COOPER v. LABER.

(Circuit Court for Illinois: 1 Bissell, 539-545. 1866.)

Charge by DRUMMOND, J.

STATEMENT OF FACTS.—It is necessary that you should understand clearly the circumstances under which this note was given. By acts of the legislatures of Wisconsin and of Illinois, certain corporations were authorized to construct a railroad from Racine, partly through Wisconsin and partly through Illinois, to the Mississippi river at Savannah, and to consolidate those roads with each other, so as to make one continuous line of road. Articles of association were entered into to accomplish that purpose. After this was done, the company sought to raise money by obtaining subscriptions to the stock of the road from different parties along the line, and took from them notes similar in character to the one that is in evidence here, and to secure their payment mortgages were given on real estate. Accordingly, to secure the payment of this note, the defendant executed a mortgage on his farm. At the time this note and mortgage were given, the Racine & Mississippi Railroad Company entered into an agreement with the defendant to the effect that, in consideration that the defendant assigned to the company his right to any dividends that he might be entitled to on his stock, the company would save him harmless from the payment of interest and from any loss whatever for his subscription to the stock. On the 29th day of May, 1856, the railroad company executed a bond, with coupons attached, and in June of that year this bond, together with the note and mortgage, were assigned to the plaintiff, he paying the amount of the note. The bond recited that the company was indebted to the bearer in the sum of \$3,700, payable at their office in the city of New York on the 10th of May, 1861, with interest from and after the 10th of May, 1856, at the rate of ten per cent., payable semi-annually, and that as security for the same it assigned and transferred to the holder of the bond the note and mortgage of the defendant. The note, unindorsed, the mortgage and bond were fastened together and delivered to the plaintiff's son and agent, Fletcher Cooper, at the time the money was paid. There is evidence tending to show that certain representations were made at the time by parties who procured the note and mortgage from the defendant, and which, it is said, caused him to execute them, and there has been also a good deal of evidence introduced, the object of which, on the part of the defendant, is to show that these representations were untrue, and therefore, it is claimed, the defendant was not bound to pay the note and mortgage.

§ 408. *The expression of an opinion or a simple recommendation will not be construed to be the inducement or cause of the commission of a certain act by another.*

The only remark the court desires to make in relation to that is this: It is necessary for you to distinguish between statements made by way of expressing an opinion or a simple recommendation and those made by the parties with a view of inducing the defendant to execute the note. A mere expression of opinion or a recommendation in relation to certain things should, of course, be regarded merely as the judgment of the party. A statement of the facts which the defendant would not be presumed to know and had not the means of knowing, with a view of inducing him to execute the note, would be different. The court will leave it to you to determine whether there were representations made as facts to the defendant, with a view to induce him to execute the note and

mortgage, which were false. If you should find that these statements were made, and were untrue, the next question would be whether they would affect the plaintiff.

§ 409. *Notice of fraud or collateral agreement necessary as against a bona fide purchaser.*

It was in June, 1856, that the note and mortgage were transferred to the plaintiff. You have to take the state of facts as they existed at that time in order to ascertain the *bona fide* character of the assignment; whatever might occur afterwards could not affect the plaintiff. It is made a question how far the facts at the time bound the plaintiff. There can be no doubt, from the evidence in the case, that the plaintiff knew for what the note and mortgage were given; that they were given as a subscription for so many shares of the capital stock of the company. The main question is whether the plaintiff knew of the existence of the representations alleged to be made, at the time or prior to the execution of the note, and also knew that they were untrue. Is there evidence in the case that tends to show that the plaintiff or his son, Fletcher Cooper, at the time the bond, note and mortgage were taken, knew or had reason to know that there were any false or fraudulent representations made to the defendant to induce him to execute them? If there is not any such evidence in the case, then, according to the view which the court takes, the plaintiff would be as to that a *bona fide* holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant.

The defendant's counsel has contended that the note and mortgage were invalid for the reason that the articles of consolidation were void; that there was in reality no foundation in law for the note and mortgage to rest upon; and some authorities have been cited on this point. I have not had as much time as I would desire to consider this question. The main ground upon which he puts it, as I understand, is that those articles of association between the different corporations were not under seal, and therefore the union of the roads in the two states was illegal. So far as I am at present advised I am inclined to think, considering the manner in which this question arises, so far as the authority was concerned on the part of the railroad company to receive this note and mortgage, we must treat them as a valid note and mortgage.

I have spoken of the alleged misrepresentations that were made at the time and of the necessity of the plaintiff or his agent knowing that these misrepresentations were made before that part of the defense can be made out. I will now particularly call your attention to the fact that at the time the note and mortgage were given the railroad company entered into a written agreement with the defendant. There is no doubt that the note and mortgage and the agreement were all one transaction. The question is, was the plaintiff, at the time of the transfer to him, aware of that agreement? Did he know the nature and contents of that contract? If he did, then he was bound by it, not otherwise. You will see that the agreement, by its terms, seems to contemplate that the note and mortgage were to be transferred, because in the case of transfer the company guaranties the defendant against loss. The view that I take of it is that, unless the plaintiff or his son, as agent, knew of the existence of this agreement made by the company, he is not bound by it.

§ 410. *An informal indorsement may be cured by the subsequent written indorsement of the note by the assignor thereof, if made before its maturity.*

The only remaining question is whether there was an indorsement or assignment of the note to the plaintiff. The evidence shows that the Racine &

Mississippi Railroad Company appointed agents to negotiate the loan of these notes and mortgages, and by virtue of the authority so given, as I understand, this and similar bonds were executed by the company, which were secured collaterally, as in this case, by notes and mortgages. As I have stated, the note was not indorsed by the company. By the terms of the bond they transferred and assigned the note; but there is a clause in the bond that declares that the note and mortgage were assigned and transferred in connection with the bond — “in connection with the bond, and not otherwise.” So that I think it is quite clear that it was the intention of the company that the bond, the note, and the mortgage, should all go together, forming one security to the holder or bearer. They were all attached together, and transferred at the same time to the plaintiff. There may be a question whether this was not legally a good indorsement of the note by the payees, the Racine & Mississippi Railroad Company. It is true the indorsement was not written on the back of the note, but it was written upon a paper which was attached to it and which it was intended should become a part of it. However that may be, there was a written indorsement afterward, and years before its maturity, made upon the note by the president of the company to the plaintiff. Some question has been made whether this indorsement was authorized. You have heard the testimony of Mr. Durand, the president, on that subject. There is no doubt that it was the intention of the company to transfer whatever right of property it had in the note to the plaintiff, at the time that the money was received and the negotiation consummated. Therefore, the written indorsement upon the note, which was subsequently made, was only carrying out the intention of the parties at the time. He says that it was the subject of conversation in the board of directors; that indorsements were made by him from time to time in the presence and with the knowledge of the board; and he gives the reason why. It was supposed that under the law of Illinois a written indorsement of a note was necessary. It was thought, he says, by the board, that no additional authority was necessary in order to enable him to make the indorsement, and it was made accordingly. If you believe this, then I think there is no doubt that there was a valid technical indorsement made on the note, because, if his statement is true, it was done with the knowledge and consent of the board of directors, and in fact it would have been a breach of faith for the board of directors to withhold the indorsement from the note, if that were necessary, because they had transferred the note for which they had received value in cash, and it was right that they should give to the plaintiff all the power and control over the note which they themselves had.

§ 411. *Of two innocent parties the one who gives occasion for the loss must suffer.*

You will perceive, therefore, that according to the view which the court takes in this case, the plaintiff was a *bona fide* holder of the note, and can recover, if he did not know that there were any false or fraudulent representations made at the time, or previous to its execution, and which caused its execution, and if he did not know of the existence of the contract or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent. It is said to be a hard case for the defendant, as the stock has become worthless, that he should pay his money for nothing. That may be true; but the question is, who should suffer a loss in a case like this? Admitting that he has been imposed upon, and as between the original parties themselves he ought not to pay it, still if he or the plaintiff has to suffer, the

rule is that, by executing the note and enabling the company to put it in circulation and raise money on it, the defendant must suffer the loss, for if he had never executed the note, or caused it to be put in circulation, the plaintiff never would have advanced his money on it. That is the reason of the rule of law on the subject, and it is founded, it seems to me, on the plainest principles of justice and equity. Therefore you will see that the case turns, so far as you are concerned, upon this, viz.: whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made (if there were misrepresentations of the character that I have stated), and whether the plaintiff knew of the existence of the agreement that was made at the time by the railroad. If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make inquiry, then I think that the plaintiff is entitled to recover. If, however he knew of the existence of any fraud,—if he knew of this contract and its terms,—then he is not a *bona fide* purchaser without notice, but he takes the note and mortgage subject to the equities which exist between the parties, and the defendant would not be liable. The other questions raised by the defendant I shall reserve for future consideration, if it becomes necessary. If you shall find for the plaintiff, of course he is entitled to recover the amount of the note with interest from the last payment, which was the 10th day of May, 1857. Verdict for plaintiff.

BANK OF SHERMAN v. APPERSON.

(Circuit Court for Tennessee: 4 Federal Reporter, 25-31. 1890.)

Opinion by HAMMOND, D. J.

STATEMENT OF FACTS.—On motion for a new trial. Upon full consideration of the arguments made upon this motion, I am satisfied with the rulings I made upon the demurrer and at the trial upon the points then raised against the negotiability of the note sued on.

§ 412. *Note to administrator is negotiable although it recites the consideration.*

I think it entirely clear of all doubt that an administrator may negotiate a note made payable to him, and that the recital of the consideration in the face of the note does not at all affect its negotiable character. If the note in question had said that it was subject to the agreement for the purchase of the land, or used other words indicating that it was to be burdened with the conditions of that agreement, the case would be different. *Cushing v. Field* (Sup. Ct. Me.), 13 Chi. Leg. News, 11. The note is hereinafter copied, and I need only refer to its language to show that it is a simple recital of the consideration. *Burchell v. Sloccock*, 2 Ld. Raym., 1545; *Bailey v. Rawley*, 1 Swan, 295; *Baxter v. Stewart*, 4 Sneed, 213. Even in Tennessee, then, where whatever is sufficient to put a person upon inquiry amounts to notice, the mere recital that the consideration was for land does not have this effect. *Ryland v. Brown*, 2 Head, 270; *Merritt v. Duncan*, 7 Heisk., 156. But in the courts of the United States, where the rule is that there must be actual notice or bad faith to charge the holder for value, there can be no question that the recitals of this note are not sufficient to charge the plaintiff with any equities between the defendants and the payee. *Goodman v. Simonds*, 20 How., 343 (§§ 420-425, *infra*); *Merritt v. Duncan*, *supra*; *Murray v. Lardner*, 2 Wall., 110.

§ 413. *Facts held insufficient to show notice of defense.*

This brings us to the question of fact upon the proof as to notice. It is not pretended that there was anything further to charge plaintiff with notice than

that he knew the land lay in Arkansas, and that Gregg was an administrator in Arkansas. It is said by a witness that the officer of the bank "looked at some papers" at the moment of taking the note before he agreed to take it. What the papers were, whether one thing or another, is not proved, nor is there anything from which to infer that there was in that circumstance a probable knowledge of any fact connected with this note. It may have been a report of some commercial agency showing the standing of defendants, for anything that appeared in proof, or it may have been some other paper totally disconnected with this transaction. All knowledge of the alleged facts are denied by the officers. But, more than this, the defense is that the consideration of this note has failed by reason of a failure of title and diminution in quantity of the land, and that, by the contract of purchase, the money was not to be paid until the title was satisfactory. There is not a single circumstance or fact in the proof which even tends to show that the plaintiff had any knowledge that there were such defenses to the note, or of the facts upon which they were predicated. It does not follow because the plaintiff knew the note was given for land that it knew the facts as to the title or quantity. The whole argument of defendants is grounded upon the assumption that because the face of the note itself conveyed a knowledge that there was a contract for land, that the land lay in Arkansas, that the payee was an administrator, and because he was pledging a note of \$1,500 for a loan of \$500 at an enormous interest of four per cent. a month, therefore, in the language of the brief, "the bank had notice or knowledge that there was a probable defense to the note." Now, if the decisions of the supreme court already cited, and many others, mean anything, they forbid, in this court, that any circumstance short of actual knowledge of the facts constituting the defense shall be taken to defeat the holder of his right to recover. The proof showed that in Texas, where this bank resides, the rate of interest was lawful and not unusual, and therefore no imputation of bad faith can be based upon that circumstance. As to the fact that the negotiator of the loan was an administrator, it is wholly immaterial. He may have needed the money for the purposes of the estate. The note may have belonged to him, having been taken in settlement for his commissions, or for a debt, or for a distributive share of the estate, for anything the bank knew to the contrary. He was the payee; the legal title was in him, and the bank need not, under the commercial law of the United States, trouble itself to inquire into the facts.

Any man may pledge a large collateral for a small loan, and they are often out of all proportion to each other. I could see in the proof nothing tending to show that the bank had actual notice of the fact that the title to the land had failed, or the quantity was diminished, or the quality insufficient, and nothing tending to show bad faith on its part, and if the jury had found otherwise I should, without the least hesitation, have set aside the verdict and granted a new trial; therefore, no error was committed in directing a verdict for the plaintiff. *Orleans v. Platt*, 99 U. S., 676. I was the more willing to do this, because, although the result would have been the same, no matter how well founded the defenses may have been, I allowed the proof upon the issues to be taken, and was satisfied that if the original payee himself had been suing there was absolutely no defense to the suit in a court of law, however it may have been in a court of equity, on a bill for specific performance or a bill to rescind the contract. I shall not undertake to show the correctness of that opinion, because, strictly, it is not properly in judgment, the plaintiff being entitled to

recover as a *bona fide* purchaser for value, without notice of any equities in favor of the makers of the note. I should also have mentioned that, even if the contract for the land referred to in the note had been before the bank, it could safely, in my opinion, have taken this note. The facts on which the supposed defects of title and other defenses rest were, at that time, unknown even to the defendants themselves. The land contract contained a stipulation that the purchase money was not to be paid until certain deeds were executed. Those deeds had been executed, and after their receipt the defendants paid all the money due, and executed this note and others for the purchase money not due in satisfaction of, and for the purpose of, closing up the agreement about the land. The supposed defects in the deeds, the mistakes in them, and their alleged worthlessness to convey the title, were afterwards discovered; indeed, they were discovered after the pledge of this note to the bank. This demonstrates that, at the time this note was negotiated, the defendants themselves had no knowledge of the facts constituting their defenses.

I come now to consider a new question, raised since the motion for a new trial was submitted, and never before referred to by counsel or detected by the court. The note sued on reads as follows:

"\$1,500.

MEMPHIS, TENN., June 7, 1875.

"On the 14th February, 1876, we promise to pay to Col. E. P. Gregg, the administrator *de bonis non* of the estate of James L. Goree, deceased, the sum of \$1,500, for value received, being for a part of the third payment on the Goree plantation purchased of said Gregg, as per agreement of the 14th February, 1874.

E. M. APPERSON & Co."

§ 414. *The words "or order" or their equivalent are not necessary to the negotiability of a note.*

It will be observed that the note does not contain the words "or order," "or bearer," "or assigns," or any equivalent words of negotiability. It is now said that this omission destroys the negotiability of this note, and that it cannot be sued upon in the name of the indorsee. This latter objection, as to the form of the suit, should have been taken by demurrer or plea in abatement. But even if so taken it would be untenable under our statutes. Whether negotiable or not, the note is assignable, and may be sued on in the name of the assignee. T. & S. Code, § 1967, and notes; *Wolf v. Tyler*, 1 Heisk., 313. Nor is it a jurisdictional question in this court, for the pleadings show that a suit might have been prosecuted in this court if no assignment had been made, Gregg, the payee, being a citizen of another state. Wherefore, the jurisdiction does not depend upon the commercial character of the paper. Act March 13, 1875 (18 U. S. St., 470). If we consult the authorities immediately preceding and subsequent to the statute of 3 and 4 Anne, c. 9, cited in *Muir v. Jenkins*, 2 Cr. C. C., 18, and elsewhere, by the text writers and annotators, it will be discovered, I think, that there has been much confusion of opinion as to the precise effect of that statute on notes omitting the words "or order," usually inserted to give the note negotiability, with the general result that these or other special words were not essential, if from the words actually used an intention to issue negotiable paper were manifested. If, under that statute, and solely by force of it, a note not containing these or equivalent words could be declared upon in the same manner as a bill of exchange, according to the custom of merchants, was entitled to grace, and would support a contract of indorsement, it does not seem satisfactory to hold that the note is not other-

wise fully negotiable. And it will be seen that the judicial and professional mind never fully recognized the soundness of the position. Yet it is well settled that a bill or note is not negotiable unless it contains these words, or some word of like effect, except where made so by local statute. 1 Am. Lead. Cas. (5th ed.), 399, top page; 3 Kent (12th ed.), 77; 1 Dan'l, Neg. Inst., §§ 104-107. The most direct and satisfactory case I have found is *Gerard v. La Corte*, 1 Dall., 194; S. C., 1 Am. Lead. Cas. (5th ed.), 369.

The unsatisfactory state of the law on this subject induced the state of North Carolina, from which we have derived it, nearly one hundred years ago, to enact that "every bill, bond, or note for money, whether sealed or not, and *whether expressed to be payable to order*, or for value received, *or not*, shall be negotiable in the same manner as promissory notes." Act 1786, c. 4, § 1; T. & S. Code, § 1957. The act of 1762 (chapter 9) had substantially re-enacted the statute of Anne. T. & S. Code, § 1956. The argument now made is that the only effect of the act of 1786 was to make *bills single* negotiable in the same manner as promissory notes were under the act of 1762, and notes like this *assignable*. This is contrary to the words of the act itself, which says that "every note for money, whether expressed to be payable to order or not, shall be negotiable in the same manner as promissory notes." This is more manifest by reference to the original act itself, which this section of the code more briefly expresses. Besides, it was further amended by the acts of 1820 (chapter 25) and 1837 (chapter 5), where it is enacted that upon every such instrument the holder may maintain a joint action against the maker and the indorsers, or a several action against any one or more of the indorsers. T. & S. Code, § 1958. See, also, *id.*, § 1967. The cases cited in the notes to these sections of the code fully sustain this construction, which is too plain to require further notice. This note is, then, fully negotiable by our local statute. It is confidently argued, however, that the federal courts do not recognize or enforce the laws of the states upon the subject of commercial law, and that this question must be decided according to the law merchant and the statute of Anne, and that this act cannot change the rights of the parties under that law. *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*); *Keary v. Farmers' & Merchants' Bank*, *id.*, 89; *Watson v. Tarpley*, 18 How., 517 (§§ 1174-77, *infra*); *Dromgoole v. Farmers' & Merchants' Bank*, 2 How., 241; 1 Am. Law Rev. (N. S.), 211, 226.

§ 415. When state statutes affecting the "law merchant" are binding on federal courts.

It is said in *Gregg v. Weston*, 7 Biss., 360, that congress meant by "the law merchant," as used in the act of March 13, 1875, the law of contract governing the note, and that the statute of the state enters into and becomes a part of the contract. Whether this would be so as to *restrictive* statutes may be doubtful under the above decisions, particularly *Watson v. Tarpley*, *supra*. I must confess that, if the state has power, by legislation, to *enlarge* the commercial law, it does not seem very clear why it should not have power to restrict it in the same way; but there can be no doubt that restrictions are not binding. No case has, however, been cited which holds that a *statute* of a state enlarging the negotiability of bills and notes is not binding on the federal courts. On the contrary, such statutes are frequently enforced. The latest case I find is *Oates v. Nat. Bank*, 100 U. S., 239. There are many others. Nearly all the cases either construe the statute of Anne as adopted by the states or the statutes in lieu of it regulating the subject of negotiable paper.

The result of the authorities seems to be that while the *decisions* of the

state courts construing contracts under the general commercial law are not binding as rules of property or rules of construction on the federal courts, nor are state *statutes* which restrict or impair the rights and remedies secured to the citizens of the several states under the general commercial law, or which divest the federal courts of the cognizance of those rights and remedies, those statutes which enlarge and extend the general commercial law will be enforced. It is so in equity cases. While the federal courts uniformly administer the equitable rights and remedies of the general law, and will not permit any restriction by state legislation or judicial decision, they recognize and enforce any new equitable right given by the legislature of the states. *Broderick's Will*, 21 Wall., 503; *Gaines v. Fuentes*, 92 U. S., 10, at p. 21. The motion for a new trial is overruled.

SWIFT v. SMITH.

(12 Otto, 442-451. 1880.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—The appellants complain of the decree of the circuit court because it adjudged that the complainant Janet Smith, as administratrix of David Smith, deceased, had a lien on the lots described in the bill, by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson on the 1st day of October, 1868, and because it adjudged that lien to be prior to the lien in favor of Joseph Swift and Edwin Swift, and that in favor of Elizabeth Carroll and Ellen Carroll. There are other objections to the decree, but the two mentioned are the most important, for they strike at all the relief sought by the complainant's bill.

Both the defendants below (now appellants) and the complainant claim under Charles C. Waite, who, it is agreed, was the owner of the lots on the 1st day of October, 1868. On that day Charles C. Waite made his deed of the lots to one George N. Williams, which was duly recorded on the 24th day of the same month. To secure the payment of part of the purchase money, Williams gave two promissory notes, both dated October 1, 1868, payable to the order of Charles C. Waite,—one for \$6,000, payable in one year from its date, and the other for \$30,000, payable four years after its date, with interest at the rate of eight per cent., payable semi-annually. On the same day (October 1st) Williams made and delivered his deed of trust of the lots, sold to him by Charles C. Waite, to Obadiah Jackson, to secure payment according to the tenor of the promissory notes he had given. This deed was duly acknowledged and recorded concurrently with Waite's deed to him. In effecting the sale from Waite to Williams, and in taking the notes and security for the payment of the purchase money, Jackson was the attorney and agent for the vendor, and during some years thereafter the interest on the \$30,000 note appears to have been paid through him. The \$6,000 note was paid at its maturity. The other note came into the hands of Waite, the vendor, then living in New York, and he soon afterwards transferred and indorsed it to the order of his brother, Silas M. Waite, who subsequently, and before it fell due, indorsed it generally in blank to Obadiah Jackson. Thus Jackson became clothed with apparent ownership of the note, and with apparent power to transfer it by his indorsement. On the 18th day of April, 1871, Jackson borrowed from David Smith, the complainant's intestate, the sum of \$31,500, giving his promissory note therefor, and to secure the payment of his note he indorsed and delivered to Smith the

Williams note for \$30,000 as a collateral. This was nearly a year and a half before its maturity. At the time when the note was thus indorsed to Smith there were entries upon its back of payments of interest upon it up to May 17, 1871. These entries purported to be acknowledgments of "S. M. Waite by O. Jackson." There was also a regular chain of indorsements by Charles C. Waite, the payee, to Silas M. Waite or order; by Silas M. Waite to Obadiah Jackson or order, followed by an indorsement by Obadiah Jackson in blank. There was also on the margin of the note the following: "This note secured by trust deed of even date herewith, duly stamped."

Thus far the facts appear without any real controversy, and unless there is something in the case to qualify them, they unquestionably establish that on the 18th of April, 1871, Smith became the *bona fide* holder of the \$30,000 note for value paid, and as such entitled to the benefit of the deed of trust given by Williams to Jackson to secure its payment. Though he took it only as a collateral security for a loan made to Jackson at the time, he was entitled to the protection of a purchaser for value, without notice of anything to impeach his right. Conceding, what appears to be more than probable, that Jackson was not, in fact, the owner of the note when he transferred it to Smith, that he simply held it as agent or attorney of S. M. Waite for collection, and that in transferring it to Smith he perpetrated a fraud upon the true owner, it is still certain that he was clothed by Waite with power to transfer the ownership as he did. Waite's indorsement of the note to him gave him that power; and though its exercise was a fraud, if Smith advanced his money in good faith, relying upon Jackson's apparent ownership, he was justified in so doing, and S. M. Waite, who enabled Jackson to negotiate the note, thereby lost his title. He was bound by Jackson's act.

§ 416. *One who purchases negotiable paper, for value, before maturity, acquires a good title that can only be defeated by proof of actual notice, or of bad faith.*

There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the indorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Goodman v. Simonds*, 20 How., 343. He can lose his right only by actual notice or bad faith. It is true that if the bill or note be so marked on its face as to show that it belongs to some other person than the one who offers to negotiate it, the purchaser will be presumed to have knowledge of the true owner, and his purchase will not be held to be *bona fide*. *Fowler v. Brantly*, 14 Pet., 318 (§ 427, *infra*). Nothing of this kind existed in the present case. Everything upon the note tended to show that it belonged absolutely to Jackson when Smith bought it. And we fail to discover anything in the entries of interest payments, or in any other circumstances, that should have aroused even suspicion to the contrary. We are unable, therefore, to comprehend how it can be maintained, as the appellants contend, that the note did not belong to the complainant, but belonged to Silas M. Waite. Whatever may have been the fact before its indorsement to David Smith, and even after

its indorsement to Jackson, Waite was estopped from asserting any claim to it by its transfer to Smith. It is true Waite is not a party to this suit. The decree does not bind him. But there is enough without the decree to estop him. He was examined as a witness for the appellants on the 12th of May, 1877. Then, if not before, he was informed that the note had been transferred to Smith, and that Smith's administratrix was proceeding to collect it. Plainly, then, it became his duty to assert his claim to it, if any he then had. He could not innocently lie by without intervention, or any action to vindicate his claim, while she was proceeding to enforce the trust. His laches, if he had any right, was inexcusable. But he made no movement in this case, and, so far as it appears, none elsewhere. Without further remark upon this part of the case, we think we have said enough to warrant the conclusion at which we have arrived, that the complainant's intestate, on the 18th of April, 1871, became the owner of the note, and thereby entitled to the benefit of the trust declared in the deed of Williams to Jackson.

§ 417. *Deed to a fictitious person, or to one under an alias.*

The appellants, however, contend that no lien was created by that deed, because, as they assert, Williams was a fictitious person, or an *alias* of Jackson, and, therefore, that the pretended deed was void, since no man can convey to himself. This is a strange position for the appellants to take. If there was no such person as Williams, then Waite's deed to Williams was a nullity, for there was no person to take, and, as all the rights which the appellants assert come from Waite through Williams (as will appear hereafter), they have no interest in resisting the demand of the complainant, and are not entitled to be heard in the case. And so, as all the rights they assert are by virtue of a deed subsequently made by Williams (a deed hereafter to be noticed), it is not easy to see how they can have any standing; or, if Williams was but another name for Jackson, and Waite's deed was made to Jackson under the name of Williams, then the note, though signed by the name George N. Williams, was Jackson's note, and the trust deed signed by the same name would be construed as a declaration of trust for the security of the note, equivalent to a covenant to stand seized to uses for the holder. But we are of opinion that Williams was not a myth. Beyond doubt Waite's deed was made to a person calling himself Williams, and made to the same person who signed the note and signed and acknowledged the deed of trust. Whether that was his real name or not is immaterial. He appeared before the notary and acknowledged the deed as his. He was not Jackson, it is clear. The evidence that the witnesses called in 1877 knew no such person as George N. Williams, in a city containing several hundred thousand inhabitants, is hardly worthy of respect as proof that no such person was in Chicago in 1868. The existence of the lien, or of the trust declared by the deed, is not to be disproved by such evidence.

Concluding, then, that David Smith, on the 18th of April, 1871, obtained a lien on the lots described in the bill by virtue of the deed of trust from Williams to Jackson, we come to consider the second leading objection urged against the decree of the circuit court. It is that the court erred in decreeing that lien to be prior to the liens in favor of the appellants Swift and Carroll. To comprehend this assignment of error, it is necessary to observe the facts as they appear in the record. On the 5th day of October, 1868, Williams, who had then become the purchaser of the lots, and who held them subject to his deed of trust to Jackson, sold and conveyed them by warranty deed to Mary

P. Moody for the consideration of \$60,000, subject to the deed of trust to secure the payment of the \$30,000 note which the grantee agreed to assume and pay as part of the consideration of the purchase. This deed was recorded October 24, 1868. On the 17th of May, 1871, Mary P. Moody, by warranty deed, recorded May 25, 1871, conveyed the lots, for the consideration of \$45,000, to Charles V. Dyer, subject to the trust deed aforesaid, describing it as given to secure the note for \$30,000, which amount, with interest from date, the grantee covenanted to pay as part of the consideration. Afterwards, on the 1st day of June, 1872, Charles V. Dyer and wife, by deed of that date, with warranty, conveyed the lots to Obadiah Jackson aforesaid, expressly subject "to a trust deed given by George N. Williams to Jackson, dated October 1, 1868, . . . to secure a certain note on which is due \$30,000, and interest." This deed was filed for record June 18, 1872. Subsequently Jackson, with his wife, made a deed of trust of the same property to Norman Perkins to secure the payment of an indebtedness by two bonds, each for \$25,000, given by Jackson, one to Joseph Swift and the other to Edwin Swift. This deed was dated June 1, 1872, acknowledged June 29, 1872, and filed for record August 3, 1872. On the same day, August 3, 1872, there was filed for record an instrument purporting to be a release by Jackson to Charles V. Dyer, for the consideration of \$1, of the right, title, interest, claim and demand of him, the said Jackson, which he had acquired by virtue of the trust deed given to him by Williams to secure payment of the \$30,000 note. This release was dated October 2, 1871. It was not acknowledged until August 3, 1872, the day when the deed of trust to Perkins was filed for record, nor did it acknowledge the payment of the note. On the 13th day of November, 1876, Jackson and wife made a second deed of trust, conveying the lots with other property to George Chandler, to secure the payment of notes which he had given to Elizabeth Carroll and Ellen Carroll. This deed was filed for record on the next following day. This recital of the conveyances exhibits the fact that the lien of the trust deed to Jackson, given to secure the payment of the note for \$30,000, was long prior in time to the liens of the Messrs. Swift, and Elizabeth and Ellen Carroll, and it was certainly in existence on the 18th of April, 1871, when that note was indorsed to Smith, the complainant's intestate.

§ 418. *A release executed by a trustee of a lien on property of which, by mesne conveyances, he has become the owner, is a fraud upon the beneficiary of the trust.*

But it is earnestly insisted by the appellants that the act of Jackson in making the release to Dyer protects them against the Williams deed of trust. That the release was a gross fraud upon the rights of Smith, the holder of the Williams note, is plain enough, and we think both the Swifts and the Carrolls had constructive, if not actual, notice that it was fraudulent. They were bound to know what was in the line of their title, that title being upon record. They are presumed to have known, and they are affected by the recitals in the deed under which they assert their rights. The trust deed to Jackson informed them of the trust to protect the \$30,000 note, and informed them that when the release was made and put upon record the note had not matured. The deeds to Mrs. Moody, to Dyer, and from Dyer to Jackson, all recited the continued existence of the debt, down to June, 1872, and each grantee, including Jackson, assumed its payment. The record assured them that Jackson was the owner of the lots when the release to Dyer was made, and that Dyer had no interest in the trust deed to be released. They, therefore, were informed that the release was substantially a release by Jackson to himself of a debt

which he had assumed to pay. Even if his power to execute the trust confided in him by the trust deed was not extinguished by his acquisition of the property, it was evident that he could not release the lien while he remained the owner of the lots without a gross abuse of his trust. In regard to Perkins, who was the trustee in Jackson's deed to secure the Swifts' loans, and who was their attorney to examine the title before the loans were made and the trust deed was executed, it appears that he knew there was no release of the trust for the protection of the Williams note, and required one to be filed. The release was brought to him by Jackson, unacknowledged. It was, therefore, in Jackson's possession, and, in fact, Dyer had never seen it. It was dated in 1871, October 2, and Perkins was informed that was not the date when the instrument was made. Jackson told him, indeed, it was the date when the debt was paid; but he was not authorized to rely upon Jackson's assertion, more especially when he had before him in Dyer's deed of the lots to Jackson the acknowledgment that the note was unpaid on the 1st day of June, 1872, nine months after the time when Jackson affirmed it had been paid, and had in view also Jackson's assumption, at that time, to pay it. The evidence leaves no doubt that the release was not made until August, 1872, when it was put upon record. Then Jackson, being the owner of the lots subject to the operation of the Williams deed of trust, was in such a situation that he could not, without an abuse of his trust, destroy the rights of the holder of the note. It is impossible, therefore, to maintain that there was not enough on the face of the recorded title under which the Swifts claim, and in the facts attending the execution of the release, to make it their duty to inquire whether the Williams note had been in fact paid,—enough to apprise them that the holder of that note could not be postponed or injured by the fraudulent release.

The other appellants are in no better condition. When the deed of trust was made to Chandler to secure the debt due to the Carrolls, the prior trust protecting the Williams note was on the record in the line of their title. They were affected by notice of it. And though the subsequent release to Dyer also appeared upon the record, the fact that Dyer had no interest in the property when the release was acknowledged and recorded; that Jackson was then the owner; that he then held the lots under a deed from Dyer, declaring the property to be subject to the payment of the \$30,000 note, which he assumed to pay; that the note was not then mature, and that therefore the release was practically a release by Jackson to himself,—these facts were all before them when they took their lien, that is, the trust deed to Chandler. The Carrolls were dealing with one who they knew had been a trustee for the holder of the Williams note, and who was still such trustee, unless the trust had been extinguished or transferred. The facts by which they were confronted were more than enough to put them upon inquiry whether the Williams note had been in fact paid. They revealed a plain abuse of his trust by Jackson, from which, with the knowledge of it that they must be presumed to have had, they could derive no advantage. In the face of it they could not obtain a priority over the earlier equity held by Smith. We conclude, therefore, that the circuit court correctly decided that the complainant has a lien on the lots described in the bill by virtue of the deed of trust purporting to have been made by George N. Williams to Obadiah Jackson, and that the lien is prior to the liens held by the Messrs. Swift and by the Carrolls. We may add that there is no evidence of such laches as should postpone the complainant's lien to those of the appellants, or either of them. It is agreed, however, that in the decree in the cir-

cuit court there was an error in calculating the amount due to the complainant. The amount is too large by \$554.27. The sum decreed to the complainant should have been \$34,101.73.

§ 419. *The rule in Illinois as to redemption of lands sold at a judicial sale.*

We think, also, the court erred in not according to the defendants the right of redemption after the sale ordered by the master, according to the provisions of the statute of the state. In *Brine v. Insurance Co.*, 96 U. S., 627, we held that the statutory right of redemption after a judicial sale, under a decree of foreclosure of a mortgage, or deed of trust, is a rule of property in Illinois, and that it must be accorded in the federal courts equally as in those of the state. It may be admitted that if the sale ordered in this case had been made by the trustee named in the deed of trust, or by a substitute under the power which the deed gave him, and made in accordance with its directions, no right of redemption would exist. But such was not the sale directed. A strict foreclosure was not decreed. The bill prayed for nothing of the kind. It prayed for a sale, in default of payment, under the order and decree of the court, and the court decreed that its master should make the sale, after giving notice of the time and place thereof, according to the course of practice of the court, not according to the provision of the trust deed. Henry W. Bishop, it is true, was substituted as trustee in place of Jackson, but he was one of the masters of the court, and he was ordered to sell as *master*. He was required to make a report to the court, to pay into court any surplus arising from the sale, there to abide the court's order. The decree also contemplated a report of the sale by the master, and a confirmation of it by the court. The sale, therefore, as ordered, was in all respects a judicial sale, instead of a sale by the trustee under the power conferred by the deed. Hence it comes within the rule declared in *Brine v. Insurance Co.*, and the right to redeem should have been preserved in the decree.

For this error, as well as for the mistake in the amount adjudged to be due the complainant, the decree must be reversed. In all other particulars the decree was correct. The decree will be reversed, and the record remitted with instructions to enter a decree in accordance with this opinion, and it is so ordered.

GOODMAN v. SIMONDS.

(20 Howard, 343-373. 1857.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This was a writ of error to the circuit court of the United States for the district of Missouri.

Timothy S. Goodman, a citizen of the state of Ohio, complained in the court below of John Simonds, a citizen of the state of Missouri, in a plea of trespass on the case upon promises. The declaration was filed on the 1st day of March, 1854. It contained two counts—one upon a bill of exchange, and the other upon an account stated. At the April term following, the defendant appeared and pleaded the general issue, which was joined, and several special pleas in bar of the action. The special pleas were held bad on demurrer, and at the October term, 1855, the parties went to trial on the general issue. Robert M. Nesbit, a witness called for the plaintiff, testified that he was a notary public of the county of St. Louis; and that, as such, on the 15th day of January, 1848, he presented the bill in suit for payment to John Simonds, the acceptor, who

refused to pay it, and that he afterwards gave due notice of the presentment and refusal to both indorsers. And the witness further testified that he was well acquainted with the signatures of all the parties to the bill, except that of the drawer, and that they were genuine. Whereupon the plaintiff read in evidence the bill of exchange described in the first count of the declaration, together with the indorsements thereon, as they appear in the record. W. Nesbit & Co. were merely nominal holders of the bill, never having had any interest in it, and only indorsed it to the plaintiff for the greater convenience in bringing the suit. Evidence was then introduced on the part of the defendant, exhibiting substantially the following state of facts: On the 21st day of June, 1847, the defendant addressed a letter to Wallace Sigerson, who resided at Cincinnati, informing him that he wished to avail himself of banking facilities in that place, to carry on certain business, in which he and John Sigerson had determined to engage, and asking his assistance, as a correspondent, to negotiate discounts, inclosing at the same time his letter of credit for \$10,000, and two bills of exchange, each for the sum of \$5,000, and suggesting in the same letter that they should require some twenty to twenty-five thousand dollars during the next four or five months, in sums of about five thousand dollars, as the same could be used from time to time. In the same letter also he instructed his correspondent to negotiate \$5,000 immediately, authorizing him to use for that purpose either the letter of credit or the bills of exchange. When those bills were transmitted to Cincinnati, they were in all respects perfect bills of exchange, except that the name of the drawer was wanting, and they were without date. They were both made payable to the order of John Sigerson, and by him indorsed in blank, and were accepted by the defendant. Soon after their receipt, Wallace Sigerson, as drawer, procured one of the bills to be discounted according to his instructions, and remitted the proceeds, or a part thereof, to the defendant; and it also appeared that, during that season, he procured other bills of the same kind to be discounted for the same parties, to the amount of \$25,000. The other bill forwarded at the time is the one now in suit. Wallace Sigerson had also large transactions of his own, the same season, amounting to \$400,000. Many of his own transactions were with his brother, John Sigerson, who was the payee and indorser of this bill, and was jointly engaged in the same business with the defendant. He and his brother interchanged accommodation paper, and some of their acceptances were regularly discounted in bank, and it did not appear that any complaint was made, either by the acceptor or indorser, that this bill had not been accounted for or returned. There were dealings, also, the same season, between T. S. Goodman & Co. and Wallace Sigerson. They made a settlement on the 12th day of October, 1847, when it was ascertained that the amount due to T. S. Goodman & Co. was about five thousand six hundred dollars, arising principally from notes discounted, secured by bills of exchange as collaterals, on which nothing had been realized. At the settlement, the debt was divided into two notes, one having sixty and the other seventy-five days to run; and Wallace Sigerson testified that he gave his two notes in payment of the debt, and left this bill as collateral security to the notes, fixing the dates so that the notes would mature twelve or fifteen days before the bill. Two drafts on Ravissess, Bullock & Co., previously held as collaterals, were embraced in the settlement, and formed a part of the indebtedness for which the notes were given; and McDonald, who was the book-keeper of the plaintiff's firm, and a witness for the defendant, testified he knew of no other collateral security than this bill, which the firm

held for those notes. It would seem, therefore, that all the prior collaterals were surrendered to the defendant at the settlement.

There is some confusion, and perhaps uncertainty, in the evidence reported, respecting the history of the bill from the time it went into the possession of Wallace Sigerson till it was thus placed in the hands of T. S. Goodman & Co., as collateral security to the above-mentioned notes. It may, however, be gathered from the testimony of Wallace Sigerson, that he first offered it for discount to the Ohio Life and Trust Company, and shortly afterward to the plaintiff, for the same purpose, and that the plaintiff declined to discount it, but soon after took it as collateral security for temporary loans. How long the bill remained in the possession of the plaintiff as collateral security for temporary loans does not appear, nor for whose benefit the money was obtained. When the settlement took place, Wallace Sigerson told the plaintiff that he had a right to use the bill, and the plaintiff agreed that it should not be sent to St. Louis for collection till after the maturity of the notes to which it was collateral. Nothing of the kind was agreed when it was left as collateral security for temporary loans. Wallace Sigerson became the drawer of this bill, as he had previously done with respect to the other, which was sent him at the same time, and filled up the date, but whether at the time of the settlement, or previously, was not entirely certain. He failed in business in November, 1847, and on the 20th day of the same month, T. S. Goodman & Co. addressed a letter to C. W. Clark & Brothers, inclosing this bill, and requesting them to pass it at the least rate, not exceeding twelve per cent. interest, saying, "We do not indorse it, as we are selling it for another;" and when L. C. Clark, one of that firm, a few days afterward offered the bill for sale to the defendant, "he said it was a forgery of his name; that Wallace Sigerson had no authority to use it." At the trial, the court, on the prayer of the plaintiff, instructed the jury to the effect that, if the plaintiff acquired the bill of Wallace Sigerson as collateral security without notice of his want of authority to transfer it, that the plaintiff was unaffected by such abuse of trust, and that the defendant was precluded from setting it up as a defense in this suit, to which no exceptions were taken. We pass over the first instruction given to the jury on the prayer of the defendant, for the same reason that it was not excepted to, and proceed to examine the second, as amended by the court, which presents the principal subject of controversy at the present time. It was to the effect that, "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

§ 420. *An instruction given without evidence on which to base it is erroneous.*

I. The general question which the bill of exceptions presents, arising upon that instruction, is certainly one of very considerable importance, especially to the mercantile community, as it affects the transfer and free circulation of bills of exchange and promissory notes, which, by virtue of their negotiable quality, constitute the principal medium for the transaction of their business affairs.

There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that ac-

count. When a prayer for instruction is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after, as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction, and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was offered for discount, more than what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction, so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining, and none were asked for by the holder, who offered the bill. Mere speculative inferences are never allowable, and cannot be regarded as evidence. The refusal to discount the bill might have been for the reason supposed in the instruction; and so also it might have been for a very different reason, such as a prior obligation to other customers, want of available funds, or from a desire for farther information as to the pecuniary standing of the parties to this bill; and whether it was for any one of the reasons suggested, or some other, in the absence of any explanation, was a mere naked conjecture. Another answer may also be given to this suggestion, which is equally decisive, and that is, the subsequent conduct of the plaintiff in taking the bill as a pledge for temporary loans, which seems to negative the supposition altogether that the previous refusal to discount it was on account of any suspicion he entertained, either as to the genuineness of the paper or of the authority of the holder to pass it. Some time elapsed, after the bill was offered for discount, before it was finally transferred to the plaintiff, and that fact undoubtedly was well known to the plaintiff at the time of the transfer; and so also was the more important one in this investigation, that during all that time the bill remained in the custody or under the control of Wallace Sigerson, as the ostensible owner, and that he claimed and exercised over it all the rights of a holder for value. If these circumstances are taken in connection with each other, as they unquestionably should be, there can be no doubt they were far better suited to inspire confidence in the title of the holder than to excite suspicion in regard to his authority to pass the bill; and if they had that effect, it was plainly the fault of the defendant in executing and forwarding the bill to his correspondent, and in intrusting it to his control and suffering it to remain in his custody without inquiry or complaint.

§ 421. *Delivery of note or bill to agent without date authorizes him to fill the blank.*

The want of date to the bill at the time it was offered for discount, under circumstances disclosed in the evidence, was entirely an immaterial consideration. When the defendant sent the bill to Wallace Sigerson, indorsed in blank and without date, and intrusted it to his care and discretion, to be used for his own benefit, he thereby empowered him to fill the blank, as a necessary incident to the trust conferred, just as effectually as if the authority had been expressly

delegated by the terms of the letter in which it was sent. Nor was it of any consequence that it was antedated, as compared with the time when it was passed to the plaintiff, inasmuch as it was filled up by his own correspondent before he parted with its possession and control, and was actually made to bear date subsequent to the time when it was received from the defendant. In filling it up, he but carried into effect one of the purposes for which it had been forwarded, as is plainly indicated from the general scope and design of the letter. He was authorized to use the bill to raise money for the benefit of the defendant; and in order to use the bill for that purpose, it must have been expected that he would become the drawer, and fill up the date at his discretion. Independently, however, of the terms of the letter, it may be asserted as a general principle, that where a party to a negotiable bill of exchange or promissory note intrusts it to the custody of another, when it is without date, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such bill or note carries on its face an implied authority to fill up the blank; and, as between such party to the bill or note and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such bill or note to his custody, and as acting under his authority, and with his approbation. *Mitchell v. Culver*, 7 Cow., 336. The general doctrine on this subject, and the reasons on which it is founded, are stated by Shaw, C. J., in *Androscooggin Bank v. Kimball*, 10 Cush., 373, as follows: "The rule is very clear that if one party, intending to accommodate another, signs his name to a blank paper, he authorizes the other to whom he delivers it and for whose accommodation it was made, to fill up the blank; and the filling up being done by his authority, is his act, and he is bound by it; and we concur in the principle, and think it applies with even more force when it was done for his own benefit, as in this case." *Violett v. Patton*, 5 Cranch, 142 (§§ 553-555, *infra*); *Russell v. Langstaffe*, 2 Doug., 514; *Collis v. Emett*, 1 H. Black., 313; *Montague v. Perkins*, 22 Eng. L. & Eq., 516.

§ 422. *The title of indorses of negotiable paper taken in good faith before due not defeated by suspicious circumstances attending negotiation.*

The circumstances thus far considered, we think, afforded no ground of inference whatever to support the theory of fact assumed in the instruction. But it is more difficult to dispose of those that follow in the same way, on account of the extremely indefinite nature of the inquiry arising under the instruction. One man is more readily influenced to suspect fraud in matters of business than another, and the same individual may be differently impressed by similar transactions occurring at different times under *precisely* similar circumstances; so that in some cases, where the evidences to excite suspicion were slight, it might be impossible to determine whether they were or were not of a character to be regarded as tending to support an issue like the one presented under the first branch of the instruction, without first ascertaining the general characteristics of the mind of the individual who was the subject of the inquiry, and his usual habit in conducting his business affairs. A striking illustration of the difficulty attending the investigation is to be found in the instruction itself, assuming for the present that it must be understood according to the usual import of the language employed. Under its first branch it was necessary, in order to relieve the defendant, that the jury should find that such facts and circumstances were known to the plaintiff as caused *him* to suspect the title or authority of the holder to transfer the bill. But the jury

might come to the conclusion that the plaintiff was thoughtless, confiding, or inattentive on the occasion, and that he in fact took the bill without any such suspicion; and to guard against the effect of such a finding, the second branch of the instruction was framed, and under that it was of no consequence whether the plaintiff himself suspected the title of the holder or not, as the defendant was nevertheless to be fully exonerated if the jury found that such facts and circumstances were known to him as would have caused one of ordinary prudence to suspect, and by ordinary diligence he could have ascertained, the true state of the title. Here was an attempt to prescribe a standard in the investigation, by which the degree of suspicion intended to be required to defeat the claim of the plaintiff could be ascertained and measured by the jury; but under the first branch of the instruction no such attempt was made, and no other criterion was furnished to guide the jury in their deliberations than mere naked suspicion; and consequently, if the jury believed, from the evidence in the case, that the plaintiff at the time of the transfer suspected the title or authority of the holder to pass the bill, no matter how slight his suspicions were, they were directed to return their verdict for the defendant. With this explanation as to the nature of the present inquiry, we will proceed to notice the remaining circumstances relied on as evidence in the case to support the instruction. They consist of the knowledge that the plaintiff is supposed to have acquired at the settlement, that Wallace Sigerson was embarrassed in his business affairs, and of the subsequent conduct of his firm, in forwarding the bill to St. Louis before the maturity of the notes, and the remark in their letter that they did not indorse the bill, as they were selling it for another. These circumstances are consistent with the proposition of fact assumed in the instruction; and though they are susceptible of an entirely different explanation, yet perhaps it would be going too far to say, as matter of law, that they afforded no ground of inference in the direction supposed by the defendant. We think, therefore, that the judgment ought not to be reversed on the ground that there was no evidence in the case to authorize the instruction. We say so, however, in reference to the peculiar issue arising under that instruction, and the form of the questions submitted to the jury, and not in respect to any different issue which may properly arise hereafter in cases of this description. There is a wide difference between suspicion and knowledge in respect to the subject matter under consideration, and even as between the evidences of suspicion, and such as would show gross negligence on the part of a banker or business man when discounting or purchasing negotiable paper transferable by delivery. A person may often suspect in matters of business what in fact he does not believe, and experience teaches that he will sometimes suspect what he has no reason to believe, and that too when the evidences to excite suspicion are so slight that he himself would scorn to acknowledge them as the basis of his action in the premises. Evidence merely tending to show, as in this case, that a party, in acquiring a negotiable bill of exchange or promissory note, suspected the title of the holder at the time of the delivery, would clearly be insufficient to authorize the conclusion that he was guilty of gross negligence when the transfer was made, and it would hardly constitute an approach towards proof that he had knowledge that such holder, who was known to be dealing in such paper, and claimed the right to use it, was guilty of any breach of trust in passing it.

II. The more important question, whether the instruction was correct, remains to be considered; and in approaching that question it becomes necessary

in the first place to ascertain what the instruction was, and to deduce from it the principle of commercial law which was applied to the case. It was somewhat peculiar in its language, and, in fact, contained two distinct propositions, differing essentially in certain aspects, and not entirely reconcilable with each other; and yet we cannot doubt that the circuit court, in giving the instruction to the jury, intended to apply the doctrine to the case that the title of the holder of a negotiable bill of exchange acquired before maturity is not protected against prior equities of the antecedent parties to the bill, where it was taken without inquiry, and under circumstances which ought to have excited the suspicions of a prudent and careful man. Such was certainly the general scope of the instruction, especially its second proposition; and such, it may be presumed, was the general principle intended to be embodied in the questions submitted to the jury. They have been so treated here in the oral argument for the plaintiff, and were treated in the same way in the printed argument filed for the defendant. Whether either or both of the questions, in the form in which they were submitted, were objectionable as involving a departure from the doctrine intended to be applied, it will not become necessary to inquire. One thing is certain — if the general principle cannot be sustained, there is nothing in the features of the departure from it, or the particular phraseology of the questions submitted, to benefit the defendant. Undoubtedly the same general idea pervaded the instruction, though the questions were submitted to the jury in different forms, in order to meet the different aspects of the evidence in the case. It was to the effect that, if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defense had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction is, whether the rule of commercial law applied to the case was correct

§ 423. *Bills of exchange are favored instruments.*

Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.

§ 424. *The holder of negotiable paper acquired before due is not affected by suspicious circumstances, but only by actual knowledge of infirmity in the title.*

A well-defined and correct exposition of the rights of a *bona fide* holder of a negotiable instrument was given by this court in *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*), as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration.

This court then said, and we now repeat, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect. Such being the settled law in this court, it would seem to follow as a necessary consequence from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits. The word notice, as used by this court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in *Andrews v. Pond*, 13 Pet., 65, where it is said that "a person who takes a bill which, upon the face of it, was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in *Fowler v. Brantly*, 14 Pet., 318 (§ 427, *infra*), where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face, must be *presumed* to have *knowledge* of what it imported." See *Brown v. Davies*, 3 Term, 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency, that we forbear to pursue the subject. *Ayer v. Hutchins*, 4 Mass., 370; *Wiggins v. Bush*, 12 John., 305; *Cone v. Baldwin*,

12 Pick., 545; *Brown v. Tabor*, 5 Wend., 566. But it is a very different matter when it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defense; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not, is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination, under the instructions of the court; and the proper inquiry is, did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not wilfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke in *May v. Chapman*, 16 Mees. & W., 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is, by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of *Goodman v. Harvey*, 4 Ad. & Ell., 870. That was a case in bank, on a rule *nisi*, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence *only* would not be a sufficient answer, where a party has given consideration for the bill; gross negligence may be evidence of *mala fides*, but it is not the same thing. Where the bill has passed to the plaintiff without any proof of *bad faith* in him, there is no objection to his title." That case was followed by *Uther v. Rich*, 10 Ad. & Ell., 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that *he had notice of it*, leaving the circumstances by which that notice was to be proved, directly or indirectly, to be established in evidence; and he further held, that an averment that the plaintiff was not a *bona fide* holder was not equivalent. According to the rule laid down in *Goodman v. Harvey*, which indubitably is the settled law in all the English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to recover; and if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any.

facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld. Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith,—it cannot require any farther reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in *Goodman v. Harvey* is now adopted and sanctioned by the most approved elementary treatises upon commercial law. *Raphael v. Bank of England*, 33 Eng. L. & Eq., 276; *Stephens v. Foster*, 1 Crompt., Mees. & W., 849; *Palmer v. Richards*, 1 Eng. L. & Eq., 529; *Arbouin v. Anderson*, 1 Ad. & Ell., N. S., 498; *May v. Chapman*, 16 Mees. & W., 355; *Chitty on Bills*, 12th ed., 257; *Story on Bills*, 3d ed., sec. 416; *Byles on Bills*, 4th Am. ed., 121–126; *Smith's Mer. Law*, ed. 1857, 255; *Edwards on Bills*, 309; 1 Saun. Plea. & Ev., 591; *Wheeler v. Guild*, 20 Pick., 545; *Brush v. Scribner*, 11 Conn., 388; *Backhouse v. Harrison*, 5 Barn. & Add., 1098; *Gwynn v. Lee*, 9 Gill, 137.

These cases, beyond controversy, confirm the rule laid down by this court in *Swift v. Tyson*, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in *Goodman v. Harvey*, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about twelve years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in *Gill v. Cubitt*, 3 Barn. & Cress., 466, and it was followed by the other cases referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was *acquiesced in* for a time as a correct exposition of the commercial law upon the subject under consideration. At the same time it is proper to remark, that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain that, nearly two years before it was finally overruled, Parke, baron, in delivering judgment in *Foster v. Pearson*, regarded it as mere "*dicta*," rather than the decision of the judges of the king's bench." See *Raphael v. Bank of England*, per Cresswell. The reasons assigned for that departure from the long-established rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say, that it has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority in that court for more than twenty years. The doctrine, says Mr. Chitty in his *Treatise on Bills*, is now completely exploded, and the old rule of law that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess, to a person taking them *bona fide* for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow, but the error, so to speak, was literally broken up and destroyed by instalments. The foundation of the superstructure was severely shaken in *Crook v. Jadis*, 5 Barn. & Ad., 909, when the full bench first came to the conclusion that want of due care and caution were insufficient to constitute a defense, and

that gross negligence, *at least*, must be shown, to defeat a recovery. But it was left to the case of *Goodman v. Harvey* to announce a complete correction of the error, when Lord Denham declared we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in *Gill v. Cubitt* was a departure from the well-known and long-established rule upon the subject under consideration. One of the earliest cases usually referred to is that of *Hinton's case*, reported in 2 Show., 235. It was an action of the case against the drawer upon a bill of exchange payable to bearer. The court ruled that the holder must entitle himself to it on a consideration; "for if he come to be bearer by *casualty* or *knavery*, he shall not have the benefit of it;" and so in *Anonymous*, 1 Salk., 126, where a bank note payable to A., or bearer, was lost, and found by a stranger, and by him transferred to C., for value. Holt, Ch. J., held that "A. might have trover against the stranger, for he had no title to it, but not against C., by reason of the course of trade, which creates a property in the bearer." And again in *Miller v. Race*, 1 Burr., 452, where an innkeeper received a bank note from his lodger in the course of business, and paid the balance, Lord Mansfield held he might retain it, as he came by it *fairly* and *bona fide*, and for value, and *without knowledge* that it had been stolen. And on a second occasion, in *Grant v. Vaughan*, 3 Burr., 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same court left it to the jury to find whether he came to the possession *fairly* and *bona fide*. But a still stronger case is that of *Peacock v. Rhodes*, 2 Doug., 633, where a bill of exchange, indorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant that a holder should not *in prudence* take a bill unless he knew the person. Lord Mansfield answered, "that the law is well settled that a holder coming *fairly* by a bill has nothing to do with the transaction between the original parties. . . . The question of *mala fides* was for the consideration of the jury." And lastly, and to the same effect, is *Lawson v. Weston*, 4 Esp., 56, where a bill of exchange for £500 was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant that "a banker or any other person should not discount a bill for one unknown, without *using diligence* to inquire into the circumstances." Lord Kenyon replied, that "to adopt the principles of the defense would be to paralyze the circulation of all the paper in the country, and with it all its commerce; that the circumstance of the bill having been lost might have been material, *if they could bring knowledge of that fact home to the plaintiff*." The cases cited, commenced in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when *Gill v. Cubitt* was decided, especially as the judges of the king's bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified.

§ 425. *Surrender of other collaterals and extension of time on principal note is sufficient consideration for note indorsed as collateral.*

III. But, assuming that the instruction was erroneous, it is still insisted by the course of the argument for the defendant that it was immaterial; and the argument proceeds upon the ground that the case as made in the bill of exceptions shows that the plaintiff was not the holder of the bill for a valuable consideration in the usual course of business. On the contrary, it is insisted that he held it merely as a collateral security for a pre-existing debt, without any present consideration at the time of the transfer, and that a party who takes

negotiable paper under such circumstances does not acquire it in the usual course of business, and consequently takes it subject to prior equities. Whatever may be our impressions in a case like the one supposed, we think the question does not arise in the present record, assuming the facts to be as they are exhibited in the bill of exceptions; and the answer to the argument will be based entirely upon that assumption without prejudice to what may hereafter appear. When the settlement was made, the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitively fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already overdue, and a forbearance to enforce remedies for its recovery; and the implication is very strong that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration. *Elting v. Vanderlyn*, 4 John., 237; *Morton v. Burn*, 7 Ad. & Ell., 19; *Baker v. Walker*, 14 Mees. & W., 465; *Jennison v. Stafford*, 1 Cush., 168; *Walton v. Mascall*, 13 Mees. & W., 453; Com. Dig., Action, Assumpsit, B. 1; *Wheeler v. Slocumb*, 16 Pick., 52; Story on Prom. Notes, sec. 186, and cases cited. The surrender of other instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute. *Dupeau v. Waddington*, 6 Whart., 220; *Hornblower v. Proud*, 2 Barn. & Ald., 327; *Ridout v. Bristow*, 1 Crompt. & Jer., 231; *Bank of Salina v. Babcock*, 21 Wend., 499; *Youngs v. Lee*, 2 Ker., 551. It seems now to be agreed that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, that a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt for which it is held as collateral. *White v. Springfield Bank*, 3 Sand., S. C., 222; *New York M. Iron Works v. Smith*, 4 Duer, 362. And the better opinion seems to be, in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and consequently whatever would have given validity to the bill as between the original parties is sufficient to uphold a transfer like the one in this case. We are not aware that the principle, as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of the delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case. *Poirier v. Morris*, 20 Eng. L. & Eq., 103; Byles on Bills, pp. 96 and 127. A contrary rule prevails in New York, as appears by several decisions. *Coddington v. Bay*, 20 Johns., 637; *Stalker v. McDonald*, 6 Hill, 93; and also in Tennessee, *Napier v. Elam*, 6 Yerg., 108. It is settled that it is a sufficient consideration in Massachusetts, Vermont and New Jersey, and such was the opinion of the late Justice Story,

as appears from his remarks in *Swift v. Tyson*, and in his valuable treatise on Bills of Exchange. *Stoddard v. Kimball*, 6 Cush., 469; *Story on Bills*, sec. 192; *Chicopee Bank v. Chapin*, 8 Metc., 40; *Blanchard v. Stevens*, 3 Cush., 162; *Atkinson v. Brooks*, 26 Vt., 569; *Allaire v. Hartshorne*, 1 Zab., 665. We think, however, that the point does not arise in this case for the reasons before stated, and consequently forbear to express any opinion upon the subject. The judgment of the circuit court is reversed, and the cause remanded for further proceedings, with directions to issue a new *venire*.

DRESSER v. MISSOURI & IOWA RAILWAY CONSTRUCTION COMPANY.

(3 Otto, 92-96. 1876.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This action is brought upon three several promissory notes made by the Missouri & Iowa Railway Construction Company, dated November 1, 1872, payable at two, three and four months to the order of William Irwin, for the aggregate amount of \$10,000. The defense is made that they were obtained by his fraudulent representations. But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery. Under the ruling of the court he recovered \$500. His contestation is that he is entitled to recover the face of the notes, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin, for a valuable consideration, on the 1st of November, 1872, and paid \$500, part of the consideration, on 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury: "That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that, if the defendants failed to satisfy the jury of that fact, the whole defense fails. That, if the fact of fraud be established, and the jury find, from the evidence, that the plaintiff paid \$500 upon the notes, without notice of the fraud, and that, after receiving notice of the fraud, the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice."

§ 426. *Purchaser of fraudulent note protected only to the extent of part of purchase price paid without notice.*

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might, by its transfer, subject him to liability. His agreement seems to have been an oral one merely—to pay the amount agreed upon, as should be required; and he had paid \$500, and no more, when notice of the fraud was brought home to him. The argument of the plaintiff in error is, that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for \$500, before maturity and without notice of any defense, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed

to him, and he could have recovered the full amount due upon them. *Fowler v. Strickland*, 107 Mass., 552; *Park Bank v. Watson*, 42 N. Y., 490; *Bank of Michigan v. Green*, 33 Ia., 140. The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. *Barnard v. Campbell*, 53 N. Y., 73; *Lewis v. Bradford*, 10 Watts, 82; *Juvenal v. Jackson*, 2 Harris, 529; *id.*, 430; *Youst v. Martin*, 3 S. & R., 423, 430. In *Weaver v. Barden*, 49 N. Y., 291, the court use this language: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of an equitable incumbrance, before payment of the money, though after giving the bond, is sufficient. *Tourville v. Naish*, 3 P. Wms., 306; *Story v. Lord Windsor*, 2 Atk., 630. Mere security to pay the purchase price is not a purchase for a valuable consideration. *Hardingham v. Nicholls*, 3 Atk., 304; *Maundrell v. Maundrell*, 10 Ves., 246, 271; *Jackson v. Cadwell*, 1 Cowen, 622; *Jewell v. Palmer*, 7 J. C., 65. The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid, the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes; of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther. Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. Authorities *supra*. *Crandell v. Vickery*, 45 Barb., 156, is in point. Holdridge had obtained the indorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandell without notice or knowledge of the fraud, he giving to Holdridge several checks for the amount, upon the understanding that they were not to be presented for payment, but, when the money was wanted, he was to give new checks as needed. Before giving the new checks, plaintiff was informed of the fraud, and requested not to make payment, or to give his checks. He did, however, give his new checks, according to the original agreement, and brought suit upon the notes against Vickery, the indorser. It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterwards, and under circumstances that afforded no protec-

tion. That case is stronger for the holder than the one before us, in the fact that checks were there given on the original transaction, which might have been presented or passed off to the prejudice of the maker; while here the transaction was oral throughout. To the same purport in principle, although upon facts somewhat different, are the cases of *Garland v. Salem Bank*, 9 Mass., 408; *Fulton Bank v. Phoenix Bank*, 1 Hall, 562, and *White v. Springfield Bank*, 3 Sandf., S. C., 227.

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration as collateral security, he holds for the amount advanced upon it, and for that amount only. *Williams v. Smith*, 2 Hill, 301. In *Allaire v. Hartshorn*, 1 Zab., 663, the case was this: Hartshorn sued Allaire on a note of \$1,500 at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been intrusted; that he had pledged it to the plaintiff as security for \$750 borrowed of him on Hegeman's check, and also as security for a \$400 acceptance of another party then given up to Pettis. On the trial, the court charged the jury that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the court of errors and appeals of the state of New Jersey, upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorn could recover only the amount of his advances. The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser. No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing. It has our concurrence, and is affirmed.

FOWLER v. BRANTLY.

(14 Peters, 318-321. 1840.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—This is an action of *assumpsit* by the assignee of a note against the makers. The questions of law arising in this cause depend on the construction of a note of hand in the following words:

"SELMA, DALLAS COUNTY, ALABAMA, March 1, 1836.

"Eleven months after date, we, Harris Brantly, Peyton S. Graves and Hugh Ferguson, jointly and severally, promise to pay Andrew Armstrong, cashier, or bearer, \$2,000, value received, negotiable and payable at the Branch Bank of the State of Alabama, at Mobile.

(Signed)

"HARRIS BRANTLY,
"PEYTON S. GRAVES,
"HUGH FERGUSON.

"Credit: Diego M'Voy.

"HARRIS BRANTLY,
"PEYTON S. GRAVES,
"HUGH FERGUSON."

The note had on it the two indorsements of Diego M'Voy and William D. Primrose, and that of Taulmin, Hazard & Company was stricken out. On the face of the note there was, in pencil, the figures 169. The defendants, the three makers, introduced evidence to prove that the note, in its present form (except the indorsements), was sent by one of the makers to M'Voy, who was his factor in Mobile, to be offered for discount in the Branch Bank of the State in that city as an accommodation note, the proceeds of which were to be forwarded to said maker; that the note was offered for discount, and rejected. The factor then proposed to raise money on the note for his own use, without the knowledge of the makers, and intended to conceal the appropriation of the note from them. The first person to whom he offered to sell the note deemed the attempt a fraud and refused to purchase. M'Voy then indorsed and transferred the note to Primrose for \$1,200, communicating to him it had been offered for discount at the bank and rejected. Taulmin, Hazard & Company held a note for \$3,250, on Black, indorsed by Vail and Dade and by Primrose, and which was past due, to discharge which in part Primrose transferred the note in controversy to Taulmin, Hazard & Company, and Taulmin, Hazard & Company indorsed the same, before its maturity, to the plaintiff, Fowler, and received credit on their account, they being largely indebted to him at the time.

The leading feature in the cause, involving the principle on which it turns, is this: the note was in the form prescribed by the bank to those who desired accommodations at it, which form was not in use before its adoption there. The memorandum on the left-hand side of the note, and signed by the drawers, was designed to show the officers of the bank to whose credit the money was to be placed should the note be discounted, and, by the usages of the bank, no other person than the one thus named could receive the money. Primrose testified he knew from the pencil mark on the face of the note it had been offered for discount and refused when he purchased it. The cashier proved the pencil mark was made, according to the usage of the bank, on all notes offered for discount and refused. To a part of the first instruction that held, if the plaintiff took the note in payment of a pre-existing debt due to him from Taulmin, Hazard & Company, then the jury ought to find for the defendants, exception is taken; and the court refused to instruct the jury that if the plaintiff took the note fairly in payment of a debt due to him before its maturity, without notice of the purpose for which M'Voy had held it, then he was entitled to recover; and also refused to instruct, if the jury believed plaintiff took the note *bona fide* in payment of a previous debt, that he had no notice of any fraud, and there were no circumstances to put him upon an inquiry into any fraud committed on the part of M'Voy, he was entitled to recover. There were other instructions asked and refused, but, as they are, in effect, the same as those recited, an answer to which will cover the whole case, they need not be further noticed.

§ 427. *Restrictive indorsement, together with mark showing refusal of bank to discount note, held to be notice.*

The known customs of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof and entered into the contract, and the parties to it must be understood as having governed themselves by such customs and modes of doing business; and this whether they had actual knowledge of them or not; and it was especially the duty of all those dealing for the paper in question to ascertain them if unknown. Such is the established doctrine of this court as laid down in

Renner v. Bank of Columbia, 9 Wheat., 581 (§§ 754-759, *infra*); Mills v. Bank of United States, 11 Wheat., 431 (§§ 958-963, *infra*), and the Bank of Washington v. Triplett, 1 Pet., 32, 33 (§§ 760-768, *infra*).

The note sued on is peculiar in its form; it was made for the purposes of discount, and only intended for negotiation at the bank, and not for circulation out of it. The pencil mark on its face when sold was common to all rejected paper, and was put there by the officers of the bank as evidence of the fact that it had been offered and rejected, and those dealing for it with the mark on its face must be presumed to have had knowledge what it imported, as the slightest inquiry would have ascertained its meaning. These were the legal presumptions attached to the contract when the plaintiff purchased it, and the explanatory evidence to prove the customs of the bank was introduced to enlighten the court and jury in regard to the rules governing the transaction, and furnishing the law of the case, and which the plaintiff, when he purchased the paper, is presumed to have known and understood as the court knew and understood it after it was proved on the trial. This was the case made up of law and fact on which the court was asked to charge the jury, and not the abstract proposition whether, on a proper construction of the statutes of Alabama, negotiable paper, payable in bank, purchased *bona fide* and without notice of an existing infirmity, but taken in discharge of a pre-existing debt, carried the infirmity with it into the hands of the purchaser, for the reason that the mode of payment was not in the usual course of trade. A note overdue or bill dishonored is a circumstance of suspicion to put those dealing for it afterwards on their guard, and in whose hands it is open to the same defenses it was in the hands of the holder when it fell due. 13 Pet., 79. After maturity such paper cannot be negotiable "in the due course of trade," although still assignable. So the paper before us carried on its face circumstances of suspicion so palpable as to put those dealing for it, before maturity, on their guard, and as to require at their hands strict inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide by the misfortune their negligence imposed, and stand in the condition of M'Voy. As between him and the defendants, there was no contract or liability on their part; nor as bearer of the note could he lawfully pass it off in the due course of trade, so as to communicate a better title to another, the face of the paper betraying its character and purposes and M'Voy's want of authority.

All the rulings of the court below must be referred to this paper and to the special case made by the proofs. Any instruction asked, which cannot be given to the whole extent asked, may be simply refused, or it may be modified, at the discretion of the court. No instruction was asked that could have been lawfully given; to every one the court could well say, and did in substance say, that under no circumstances could a purchase of this note be made by the plaintiff from Taulmin, Hazard & Co., so as to exempt it in the hands of the assignee from the infirmity it was subject to in the hands of M'Voy. And in regard to the last part of the first instruction, where the jury is in substance told that if they believed the note was taken in payment of a pre-existing debt due to plaintiff from Taulmin, Hazard & Co., still they should find for the defendants, the court might have gone further and instructed the jury that neither could the plaintiff recover had the note been purchased *bona fide*, and without notice of the fraudulent conduct of M'Voy. The judgment is, therefore, ordered to be affirmed.

LEMOINE v. BANK OF NORTH AMERICA.

(Circuit Court for Missouri: 3 Dillon, 44-52. 1874.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—On the facts found by the district court, upon which, by stipulation, the cause is submitted to this court, it is to be taken as true that the notes in question were indorsed with the firm name of Earickson & Boyd solely for the accommodation of White Brothers, the makers, without any consideration to the indorsers therefor. It is also to be taken as true that this indorsement of the firm name was made by Earickson, without the knowledge or consent of Boyd, and against the express stipulation on this subject in their articles of copartnership, and that the notes, when thus indorsed, were returned to the possession of the makers, from whom the bank received them, and at whose instance it discounted them, and who, through the checks of Earickson, drawn in the firm name, received the proceeds of the transaction. There is no finding or agreement that the indorsement of the firm name was made in accordance with any habit of dealing of the firm known to Boyd, or that there was with Boyd's knowledge such a course of dealing as respects accommodation indorsements in the firm name as to justify an inference of Earickson's authority to bind the firm in this manner.

§ 428. *Indorsement in firm name presumed for the benefit of the firm.*

I concede that in favor of third persons acting in good faith it is a presumption of law that notes indorsed in the name of the firm were indorsed on the partnership account, and hence the indorsement on the notes in question will bind the firm, unless it appears that the bank had notice that the indorsement was made outside of the partnership affairs. Story on Notes, sec. 72; Byles on Bills, 47; Austin v. Vandermark, 4 Hill (N. Y.), 259, 262, per Nelson, C. J. But inasmuch as the settled rule of law is that it is not within the general scope of one partner to bind the firm by contracts of suretyship or to issue accommodation paper in the name of the firm for third persons, if the bank had notice that this was an accommodation indorsement, the burden of proof is upon it to show the assent of the other partners (either expressly or from the firm's course of dealing in this respect) or their subsequent ratification. Byles on Bills, 47, and cases cited in the notes. If, therefore, the bank discounted these notes without notice of the fact that the name of the firm had been indorsed upon them by one of the partners without the consent of the other and for the accommodation of the makers, it is entitled to hold the firm upon the indorsement, although in point of fact it was placed there by one of the partners in fraud of the rights of his copartner, or without authority from him. And the question on which the case turns is *whether the bank had such notice*, for it is not attempted to show that Earickson had authority from Boyd, express or implied, to make the indorsement. The bank is sought to be affected with such notice by virtue of the fact that after the notes bore the indorsement of the firm they were in the hands of the makers, who met one of the directors of the bank when on his way to a meeting of the board of directors, and giving him the notes asked him to have them discounted for the makers. It does not appear that the director informed the board of whom he had received the notes, but this is not material, for the learned counsel for the bank conceded on the argument that he supposed the law to be that the board or the bank would be chargeable with the knowledge of the director thus obtained.

§ 429. *Possession by maker, before maturity, of an indorsed note is notice that the indorsement is for his accommodation.*

Thus viewed, the real question in the case is reduced to this: Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker and discounts it for him, with the notice that it was indorsed for the maker's accommodation? At the bar counsel stated that they had been unable to find any adjudged cases upon the exact point, and they argued it on general principles. In view of the nature of the notice required to defeat the rights of the holder for value of commercial paper, as settled by the supreme court of the United States in *Goodman v. Simonds*, 20 How., 343 (§§ 420-425, *supra*), I was at first impressed in favor of the bank; but subsequent reflection has brought me to an opposite conclusion. To make accommodation paper is so entirely *extra* the business of a partnership and the legitimate authority of a partner, that the presumption is against, and properly against, the power of one partner thus to bind his co-partners; for suretyship, it has been well remarked, is "a contract which carries with it a lesion by its very nature." *Louisiana, etc., Bank v. Nav. Co.*, 3 La. Ann., 294. Therefore, when a bank has knowledge that an indorsement of the name of a firm is an accommodation indorsement, it is bound at its peril to ascertain whether the members of the firm on whom it intends to rely assented to this use of its name. This it can easily do. While on the other hand, if the bank were entitled to presume that the other members of the firm assented, the presumption would in many instances, as in the case before us, be contrary to the fact, and highly disastrous to innocent partners, who would be without the means of guarding against the fraudulent use of the copartnership name in unauthorized transactions.

If the facts of the case as found by the district court be considered there can be little doubt that the bank knew the discount was for the benefit of White Brothers, and, consequently, that the indorsement of Earickson & Boyd was presumptively, as it was in fact, for the accommodation of the makers. On examination I find several cases distinctly asserting this to be law, and have not met with any holding a different view. When a note not due is taken by the makers to a bank for discount for their account, with an indorsement thereon, the presumption, unless there is something in the transaction to rebut it, is that the indorsers are sureties for the maker, and that they did not indorse it in the ordinary course of business. Upon this subject, Mr. Chancellor Walworth, in *Stall v. Catskill Bank*, 18 Wend., 466, holds this language: "If, therefore, it appears from the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril, make the necessary inquiries and ascertain that there is some special authority for one partner to sign the partnership name as such surety, express or implied. So if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person, with the name of the firm indorsed thereon, *the transaction, on its face*, shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who thus receives it from the drawer, being thus chargeable with the notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to such

holder of the note." This language was quoted and approved by Mr. Chief Justice Sawyer, in giving the judgment of the supreme court of California in *Hendrie v. Berkowitz*, 37 Cal., 113, 1869, and in which the court distinctly held, in a case precisely like the one now before the court, that the presumption was that the indorsement was an accommodation indorsement, and that the burden of proving the consent of the member who did not write the indorsement is upon the holder. So, in *Overton v. Hardin*, 6 Coldw., 375, 1869, the supreme court of Tennessee said: "There can be no doubt that the possession of an indorsed note by the maker is presumptive evidence that it was indorsed for his accommodation. *Edwards on Bills*, 103, 105; *Brown v. Taber*, 5 Wend., 566; *Erwin v. Shaffer*, 9 Ohio St., 43."

§ 430. *Where a note with an indorsement is in the hands of the makers before maturity, presumption.*

In this last case *Brinkerhoff, J.*, says: "That although an indorsed note in the hands of the maker after due is presumed to have performed its office, and to have been paid off and taken up by the maker, yet no such presumption arises in the case of such a note before due; but that on the contrary, in such case, it is a matter of legal presumption that the note is unsatisfied, and is indorsed and placed in the hands of the maker for his accommodation. *Wallace v. The Branch Bank*, 1 Ala., 565; *Mauldin v. The Branch Bank*, 2 Ala., 502; *Stall v. Catskill Bank*, 18 Wend., 478." See, also, language of Mr. Justice Nelson in *Bank of Rochester v. Bowen*, 7 Wend., 159; *Byles on Bills*, 47, and note.

§ 431. *The indorsement hereinbefore mentioned not binding on the firm, but on Earickson alone.*

The amount of the notes less the discount was, in accordance with a usage of the bank, placed to the credit of the last indorsers, in this case *Earickson & Boyd*, and was drawn out on the two checks of *Earickson & Boyd*, signed by *Earickson*, without the knowledge of *Boyd*, in favor of *White Brothers*. One of these checks showed on its face that it was for the proceeds of the note discounted, and the amount of each showed that it was for the note transactions. It is insisted that this makes the indorsement binding on both. This view rests upon the ground of ratification by *Boyd*; but the essential element of knowledge on his part, both of the fact of the indorsement and of the check being drawn, is wanting. The checks do not, therefore, change the rights of *Boyd*, or make binding upon him his partner's act in indorsing the firm's name to the notes in question. The district court erred in holding that the two notes were a claim upon the firm assets. The indorsement is alone binding upon *Earickson*.

Judgment accordingly.

COLLINS v. GILBERT.

(4 Otto, 753-762. 1876.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

STATEMENT OF FACTS.—This was an action on an acceptance of a draft, drawn by *Collins & Co.* to their own order, and indorsed by them in blank. *Collins & Co.* were sub-contractors, under *Barnes*, for the grading of a railroad, and the draft was given to *Barnes* as security for advances. The draft was accepted by *Thomas Collins*, and the action is against him by *Gilbert & Gay*. Further facts appear in the opinion.

§ 432. *Presumption that transferees are bona fide holders for value, without notice.*

Opinion by MR. JUSTICE CLIFFORD.

Transferees of a negotiable instrument, such as a bill of exchange or promissory note payable subsequent to its date, hold the instrument clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument.

§ 433. *How negotiable paper is transferable.*

Instruments of the kind are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferable by mere delivery. *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Goodman v. Simonds*, 20 How., 365 (§§ 420-425, *supra*); *Wheeler v. Guild*, 20 Pick. (Mass.), 545; *Noxon v. De Wolf*, 10 Gray (Mass.), 346; *Magee v. Badger*, 34 N. Y., 249.

§ 434. *Presumption from possession of negotiable paper.*

Possession of such an instrument payable to bearer, or indorsed in blank, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, if unattended with *mala fides*, is sufficient to overcome the effect of that evidence, or to invalidate the title of the holder supported by that presumption. Story on Bills (4th ed.), sec. 416; Byles on Bills (10th ed.), 119; Chitty on Bills (12th ed.), 257; *Mills v. Barber*, 1 Mees. & W., 425; *Murray v. Lardner*, 2 Wall., 110; *Bank of Pittsburgh v. Neal*, 22 How., 96 (§§ 405-407, *supra*). Apply that rule in a suit in the name of the transferee against the maker, and it is clear that he has nothing to do in the opening of his case except to prove the signatures to the instrument, and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value at its date, in the usual course of business, without notice of anything to impeach his title. *Bank v. Leighton*, Law Rep., 2 Exch., 61; *Pettee v. Prout*, 3 Gray (Mass.), 503; *Way v. Richardson*, 3 id., 413. Clothed as the instrument is with those presumptions, the plaintiff is not bound to introduce any evidence to show that he gave value for the same until the other party has clearly proved that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Uther v. Rich*, 10 Ad. & Ell., 784; *Bailey v. Bidwell*, 13 Mees. & W., 73; *Arbouin v. Anderson*, 1 Ad. & Ell., N. S., 504; *Bank v. Fagan*, 7 Moore, P. C., 76; *Fitch v. Jones*, 5 Ed. & Bl., 238; *Smith v. Braine*, 16 Ad. & Ell., N. S., 251; *Hall v. Featherstone*, 3 Hurlst. & N., 286.

STATEMENT OF FACTS.—Sufficient appears to show that the drawers of the draft described in the declaration were sub-contractors to grade seven miles of a railroad referred to in the affidavit of defense, and that they were to be paid monthly for work done, subject to a certain deduction to be retained as a security for the completion of their contract. Moneys received from the monthly payments being insufficient for the purpose, they were unable to complete their undertaking without an advance from the principal contractor. What they wanted was an advance of \$8,000; and it appears that the contractor was willing to make it if they would give him the acceptance of the defendant in the same amount, as a security that they would perform their contract.

Pursuant to that arrangement, they drew their draft upon the defendant in that amount, payable to the order of their senior partner; and the record shows that the draft was accepted by the defendant, and was duly indorsed by the payee. Beyond doubt, the draft was duly executed and delivered to the contractor as security for the performance of the contract of the drawers of the instrument. By its terms it was payable in ninety days from date; and it must be assumed, in the absence of proof to the contrary, that the plaintiffs became the holders of the same before maturity. Payment being refused, the plaintiffs instituted the present suit to recover the amount. Process was served, and the defendant appeared and pleaded that he never accepted the draft, and that he never promised in manner and form, as alleged in the declaration. Subsequently the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Six offers of proof were made by the defendant in the course of the trial, all of which were excluded by the court, subject to the exception of the defendant. Four of the rulings of the court in that regard are now assigned for error, and they present the only matters of controversy exhibited in the record. Rulings of the kind, not assigned for error, may be dismissed without remark; nor would the other two exceptions have required much examination, even if they had been assigned for error, as they involve substantially the same questions as those presented by the other rulings of the court.

1. Testimony having been introduced by the defendant that one of the plaintiffs was informed, before the draft came into their hands, that the contractor had agreed to advance money to enable the sub-contractors to pay their employees, they, the sub-contractors, giving the defendant an acceptance as security in lieu of retained percentage, the defendant proposed to ask the witness what was the arrangement between the sub-contractors and the contractor, by virtue of which the defendant's acceptance was obtained; to which the plaintiffs objected, and the court excluded the question. 2. Evidence having been given by the same witness that there was an arrangement between the sub-contractors and the contractor to the effect that the latter would advance money to the former to pay their men upon their giving to the contractor the defendant's acceptance, to be retained by him in lieu of the stipulated percentage, the defendant proposed to show by the same witness that the work was finished by the defendant, and that by the terms of the contract all of the percentage retained became due and payable when the contract was completed; which offer of proof was objected to by the plaintiffs, and was ruled out by the court. 3. Complete execution of the draft is not denied; but the theory of the defendant is that the contractor took the same of the sub-contractors in lieu of retained percentage; and he proposed to show that the sub-contractors subsequently abandoned their contract, and that the defendant, at the suggestion of the contractor, finished the same, he agreeing that if the defendant would complete the work, he, the contractor, would return the acceptance; and that the defendant never got either the percentage or the acceptance; to which the plaintiffs objected, and the court excluded the testimony. 4. Finally the defendant proposed to show that the contractor, when the acceptance was delivered to him, was indebted to the sub-contractors for retained percentage in excess of the amount of the acceptance; which was also objected to by the plaintiffs, and was excluded by the court.

Properly analyzed and construed, it is quite obvious that these several offers

of proof present but a single question, and that they serve to illustrate very fully the different theories of law maintained by the respective parties in respect to such commercial instruments. Throughout the trial the plaintiffs contended that they were the *bona fide* holders for value of the acceptance, having received the same before maturity in the usual course of business, and that they held a good title to the instrument, unless the defendant could show that they had notice of such facts as were sufficient to impeach the title between the antecedent parties, or that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to their possession. *Swift v. Tyson*, 16 Pet., 15 (§§ 332-336, *supra*). Due delivery of the executed draft to the contractor indorsed in blank is admitted; but the theory of the defendant is that the contractor received it merely as security that the sub-contractors would perform their contract, and that the contractor caused it to be discounted without authority. Neither illegality of consideration nor fraud in the inception of the instrument is charged or pretended; nor is it alleged that the acceptance had been lost or stolen before the plaintiffs received it for discount. Instead of that, the theory of the defendant assumes that the contractor became the lawful holder of the acceptance indorsed in blank for the specified purpose, which is an implied admission that the acceptance was one of a class of commercial instruments which may be transferred by delivery. Suppose that is so, still it is insisted by the defendant that evidence is admissible in such a case to show that the first holder under such circumstances appropriated the acceptance to a use other than that for which it was delivered to him, and that proof of such a misappropriation is sufficient to impeach the title of a subsequent holder for value, even though it came into his possession before maturity in the usual course of business.

§ 435. *Rights of bona fide holder discussed.*

Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question, whether the party who took it had notice or not, is, in general, a question of construction, and must be determined by the court as matter of law. *Andrews v. Pond*, 13 Pet., 65; *Fowler v. Brantly*, 14 id., 318 (§ 427, *supra*); *Brown v. Davies*, 3 Term R., 86. But it is a very different matter when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of that character can meet the exigencies of such a defense, if it be true that a party who acquires commercial paper for value in the usual course of business may, if it was acquired before maturity and without notice of any defect in the title, hold it free of all equities between the antecedent parties to the instrument. Indorsees of negotiable bills of exchange and promissory notes enjoyed the benefit of that rule for ages before any attempt was made to annex any qualification to it, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. *Hinton's Case*, 2 Show., 235; *Anonymous*, 1 Salk., 126; *Miller v. Race*, 1 Burr., 462; *Grant v. Vaughan*, 3 id., 1516; *Peacock v. Rhodes*, 2 Doug., 633; *Lawson v. Weston*, 4 Esp., 56. Attempt was subsequently made to qualify that right of a *bona fide* holder, and to establish the rule that, if the indorser of the instrument had no valid title

to the same, and that such facts and circumstances were known to the indorsee at the time of the transfer as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. *Gill v. Cubitt*, 3 Barn. & Cress., 466. Though the modified rule was never satisfactory, yet it must be admitted that it was followed for a time in many jurisdictions. But it is unnecessary to discuss that topic, as the case referred to has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority there for more than forty years. *Goodman v. Harvey*, 4 Ad. & Ell., 870. Abundant authority for that proposition is found in the cases already cited, and Mr. Chitty says that the old rule of law, that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess to a person taking the same *bona fide* for value, is again re-established in its fullest extent. Chitty on Bills (12th ed.), 257. Speaking upon that subject, the supreme court of Massachusetts said that it was once held that the holder of a bill of exchange or promissory note fraudulently put in circulation must show that he had used due and reasonable caution in taking it; but the court proceeds to say that it has since been definitively adjudged that if he took the instrument in good faith he is entitled to recover on it, and that even gross negligence is not tantamount to fraud, though it may be given in evidence as tending to prove that charge; that the burden of proving good faith is all the burden which the law imposes on such a holder. *Worcester Bank v. Dorchester Bank*, 10 Cush. (Mass.), 491. Conclusive support to that conclusion is found in the authorities which the court cite for that purpose, among which are the following: *Goodman v. Harvey*, 4 Ad. & Ell., 870; *Arbouin v. Anderson*, 1 Ad. & Ell., N. S., 504. We must hold, said Lord Denman, in the case last cited, that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession; that, to meet the inference so raised, fraud, felony, or some such matter, must be proved. *Smith v. Sac County*, 11 Wall., 146.

Instruments of the kind are intended for circulation, and Shaw, Ch. J., says that the law is so framed to give confidence and security to those who receive them, for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery; and he adds that, in general, a party taking such an instrument under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated for a valuable consideration, in the usual course of business, to one who has no knowledge of those facts, his title is good, and he shall be entitled to receive the amount. *Wheeler v. Guild*, 20 Pick. (Mass.), 545. Title and possession in such a case are, in general, considered one and inseparable, and it will be presumed that a party thus in possession of such an instrument holds it for value until the contrary appears, and the burden of proof is on the party impeaching his title. *Collins v. Martin*, 1 Bos. & Pull., 648; *Bank v. Hoge*, 35 N. Y., 68; *Phelan v. Moss*, 67 Penn. St., 63; *Raphael v. Bank*, 17 C. B., 171. In order to defeat the rights of a *bona fide* holder for value of a promissory note, which it is claimed was procured by fraud, it must be shown, either directly or by circumstances, that he had notice of such infirmity. Proof of such facts and circumstances as would have put a reasonable man upon

inquiry in relation thereto are not sufficient to constitute a defense to a suit by the holder. *Lake v. Reed*, 29 Ia., 359; *Gage v. Sharp*, 24 id., 15. Adjudged cases to support those propositions are very numerous, and it is equally well settled that where a negotiable bill or note is given in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the instrument, or at least antecedently to its becoming due; and the rule is, that if the defendant would avail himself of any defense not open to him, unless the bill or note was negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the instrument was overdue. *Ranger v. Cary*, 1 Metc. (Mass.), 373; *Noxon v. De Wolf*, 10 Gray (Mass.), 347.

§ 436. *Possession is presumptive evidence of title. Effect of fraud, etc.*

Actual possession of a negotiable instrument, payable to bearer or indorsed in blank, is plenary evidence of title in the holder "until other evidence is produced to control it;" but if to an action on the same "the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, the illegality being proved, the *onus* is cast upon the plaintiff to prove that he gave value." *Smith v. Braine*, 16 Ad. & Ell., N. S., 250; *Bailey v. Bidwell*, 13 Mees. & W., 73. Proof of gross negligence is not sufficient to overcome the *prima facie* presumption of title arising from possession; but if it be alleged and proved that the instrument had its inception in illegality or fraud, a presumption arises from that proof that the plaintiff took it without value, or, in other words, it so far shifts the burden of proof, that, unless the plaintiff gives satisfactory evidence that he gave value for the same, the defense will prevail. *Fitch v. Jones*, 5 Ell. & Bl., 246; *Harvey v. Towers*, 6 Hurlst. & G., 656. Where there are circumstances in the nature of fraud or illegality which can properly be left to the jury, proof of those circumstances by the defendant will cast on the plaintiff the *onus* of showing that he gave value for the bill or note. *Hall v. Featherstone*, 3 id., 287; *Mills v. Barber*, 1 Mees. & W., 432. Negotiable instruments are expressed to be for value, and, if payable to bearer or indorsed in blank, they pass by delivery from hand to hand, clothed with that presumption; nor is that presumption overcome, where the suit is in the name of a subsequent holder, by proof that the indorsement was for the accommodation of the maker. If it appears that the bill or note was obtained by fraud, or that it had been stolen before it came to the possession of the holder, then the presumption may arise that the holder did not pay full consideration for it, because in such a case it is probable that the person obtaining the instrument would pass it away for less than its full value. But where there is only the simple fact that it was an accommodation bill or note, then the inference is that the holder did give value for it, because that was the very object for which the instrument was given. *Percival v. Frampton*, 2 Crompt., M. & R., 183; *Seybel v. Bank*, 54 N. Y., 291. Decided cases almost without number support that proposition; but if the note or bill is founded in fraud, or was fraudulently obtained and put in circulation, the indorsee must prove that he paid value for it before he can recover the amount. *Tucker v. Morrill*, 1 Allen (Mass.), 528; *Maither v. Maidstone*, 1 C. B., N. S., 287; *Sisternans v. Field*, 9 Gray (Mass.), 337; *Brush v. Scribner*, 11 Conn., 390.

Tested by these several considerations, it is clear that there is no error in the record.

Judgment affirmed.

TRUST COMPANY v. NATIONAL BANK.

(11 Otto, 68-71. 1879.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—This case as made by the bill, answers, replications and proofs is as follows: On the 24th day of September, 1874, the First National Bank of Wyandotte, Kansas, made its promissory note at Chicago, Illinois, in these words:

“\$5,000.

CHICAGO, ILLINOIS, Sept. 24, 1874.

“Four months after date we promise to pay to Cook County National Bank of Chicago, or order, five thousand dollars, with interest at the rate of — per cent. per annum after due, value received, all payable at Cook County National Bank.

“B. JUDD,

“Cashier 1st Nat'l Bank, Wyandotte, Ka's.

“\$6,000 Wyandotte Co. and city bonds as collateral.”

The note was made and delivered to the Cook County Bank in pursuance of an arrangement between that bank and Judd, the cashier of the Wyandotte Bank, by which it was agreed the latter should execute a four months' note for \$5,000, with security, and have the same discounted by the Cook County Bank, and the proceeds placed to the credit of the Wyandotte Bank, but not to be drawn against, so as to reduce the credit for such proceeds below \$4,000,—such note to remain with the Cook County Bank, and to be surrendered to the maker on the renewal or close of the account. It was distinctly understood between the officers of the two banks when the note was given that it should be held by the Cook County Bank as a memorandum, and not be negotiated or separated from the Wyandotte city and county bonds for \$6,000 accompanying it, which were delivered contemporaneously with it as collaterals. Accordingly, the sum of \$4,000, part of the proceeds of the discount, was suffered to remain on deposit to the credit of the Wyandotte Bank, until the Cook County Bank failed, became insolvent, and passed into the hands of a receiver. At the time of such failure and the appointment of a receiver there was also an additional credit of \$868 due from the Cook County Bank to the Wyandotte Bank. When, therefore, the note matured there was due from the payee to the maker of the note the sum of \$4,868. But before its maturity, to wit, on the 7th day of October, 1874, the Cook County Bank, in violation of its agreement above mentioned, passed the note to the New York State Loan and Trust Company, by which it was discounted, without any knowledge of any defense which the Wyandotte Bank had against it, or any knowledge of the origin of the note and of the agreement between the two banks, other than what the face of the note revealed. The note was protested when it fell due, and it is now held by the Central Trust Company of New York, the receiver of the New York State Loan and Trust Company, and the collaterals, the municipal bonds, are held still by the Cook County Bank.

This bill has been filed to compel its surrender and the surrender of the Wyandotte city and county bonds on the payment of \$132, the difference between \$5,000 and \$4,868, the sum standing to the credit of the Wyandotte Bank against the payee, the claimant offering to pay that sum. In view of these facts, fairly deducible from the evidence, it is manifest that, as between the

complainant and the Cook County Bank, there is a perfect defense against the note to the extent of \$4,868, the sum standing to the credit of the Wyandotte Bank due from the payee. On the payment of \$132 the maker of the note has a clear equity to have it surrendered, together with the municipal bonds hold as collaterals. But it is claimed that the Trust Company having received the note before its maturity, and having discounted it in the usual course of business without any knowledge of any equities or defense against it, is entitled to hold it free from any defense which the maker could set up against the payee; that is, against the Cook County Bank.

§ 437. *A guaranty is not such an indorsement as will cut off the equities of the maker.*

A large portion of the argument before us has been expended upon the questions whether, inasmuch as the note was given by the cashier of the Wyandotte Bank at Chicago, and was made payable at a future day, it was not void under the general banking law. We pass those questions as unnecessary to be considered. If it be conceded that the note was valid at its inception, it is certainly true the maker had a good defense against it while it was in the hands of the payee, and we do not perceive that the manner in which the Trust Company or its receiver obtained it puts them or either of them in any better position than the payee occupied. The note was not indorsed to the Trust Company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the Trust Company would hold it unaffected by any equities between the maker and the payee. But instead of an indorsement, the president of the Cook County Bank merely guarantied its payment, and handed it over with this guaranty to the Trust Company. The note was not even assigned. There was written upon it only the following: "For value received, we hereby guaranty the payment of the within note at maturity or at any time thereafter, with interest at ten per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same. B. F. ALLEN, Pres't."

In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason, perhaps, it was not indorsed. That a guaranty is not a negotiation of a bill or note, as understood by the law merchant, is certain. *Snevily v. Ekel*, 1 Watts & S. (Pa.), 203; *Lamourieux v. Hewitt*, 5 Wend. (N. Y.), 307; *Miller v. Gaston*, 2 Hill (N. Y.), 188. In this case, the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the Trust Company. Being express, it can raise no implication of any other contract. *Expressum facit cessare tacitum*. The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. 2 Parsons, Notes and Bills, 46 *et seq.*, notes. At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of \$132.

Decree affirmed.

BRABSTON v. GIBSON.

(9 Howard, 263-279. 1849.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This writ of error is brought to review a judgment of the circuit court for Louisiana. The action was founded on two promissory notes given by Tobias Gibson, and dated the 24th of December, 1839, in which he promised to pay to William Harris, for value received, at the "Agricultural Bank of the State of Mississippi," in one note, \$6,000, the 1st of February, 1845, and in the other, \$7,000, the 1st of February, 1846. These notes were given in part consideration for a plantation and slaves in Louisiana, sold by William Harris to Gibson, to secure the payment of which and other notes a mortgage was executed on the property. The words "*Ne varietur*" were indorsed on the notes to identify them with the sale of the estate. On the 21st of January, 1840, these notes were assigned, in the state of Mississippi, to the plaintiff, as collateral security for the payment of a note to her of the same date, given by Harris, who was a citizen of Mississippi, for \$6,000, payable twelve months after date. In the sale of the above property, there was reserved to the vendor a right to repurchase it within ten years; and it appears there was a redemption of the property at the price for which it was sold, and a reconveyance to Harris was executed on the 18th of September, 1841. Two notes on Gibson were given up as a part of the consideration for the repurchase, but the above two notes for \$13,000, having been assigned by Gibson to the plaintiff, were not surrendered, but Harris agreed that they should be given up and canceled, and a mortgage was executed on the property to indemnify Gibson against him. The first mortgage for the consideration money was canceled. Harris became bankrupt, and took the benefit of the bankrupt act (5 Stats. at Large, 440) in 1843. The cause was submitted to the court on the facts agreed, and a judgment was rendered for the defendant. On several grounds, the plaintiff asks the reversal of this judgment. The notes were given in Louisiana, but they were made payable and indorsed in Mississippi; consequently they are governed by the law of Mississippi. The law of the place where a contract is to be performed, and not the place where it was executed, applies. The indorsement of a note subjects the indorser to the obligations imposed by the law where the indorsement is made.

§ 438. *Redemption from mortgage given to secure notes no defense to an action on the notes by an innocent indorsee.*

It is contended that, under the law of Mississippi, the defendant is not bound. The law referred to is in Howard and Hutchinson's Digest, 373, which declares that "all bonds, obligations, single bills, promissory notes, and all other writings for the payment of money or any other thing, shall and may be assigned by indorsement," etc., and the assignee may bring an action, etc., "and in all actions commenced or sued upon any such original bond, obligation, bill single, or promissory note, or other writing as aforesaid, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had, or possessed against the same previous to notice of the assignment." The only question in the case which can arise under this statute is, whether the admitted facts constitute a defense to the action. The facts not being within the statute, cannot be set up as a defense under it. They do not show "an illegal consideration, a failure of consideration, payment, discount, or set-off." There was no pretense of payment of these

notes in the redemption of the property. They were declared to remain in force, and to be subject to extinguishment when obtained. The case cited, of *Parham v. Randolph*, 4 How. (Miss.), 435, was where the note was given for land, the title to which failed; the failure of the consideration was held a good defense against the note in the hands of an assignee. That case was clearly within the statute. These notes being negotiable, were assigned to the plaintiff, for a valuable consideration, without notice, prior to the act of redemption. That act being a voluntary one by Harris, the assignor of the notes, it could in no respect prejudice the rights of his assignee. Under the laws of Louisiana, the right of redemption may be enforced against a purchaser of the thing liable to be redeemed, though that fact was not named in the second sale. And when a vendor recovers the possession of land, by virtue of the power of redemption, he takes it free of all incumbrances created by the purchaser. But these principles can have no application to negotiable paper, though given for a thing purchased which the vendor may redeem. The purchaser who holds land or other property liable to be redeemed reconveys the property only on the payment of the consideration money. And whether this payment be made by returns of the notes given, in money, or in some other manner acceptable to the parties, cannot be material. In the present case, it seems, Gibson was content to take a mortgage on the property reconveyed, to indemnify him against the outstanding notes.

§ 439. *Effect of words "ne varietur" indorsed on notes.*

From the fact that the notes were not given up, and an indemnity against him having been taken, a jury might well presume that Gibson had notice of the assignment. But this was not important to the right of the assignee. She stands unaffected by the reconveyance. The indorsement of the words, "*Ne varietur*" could have no effect on the notes which were payable in Mississippi, and which were indorsed to the plaintiff in that state. Nor could they have affected the negotiable character of the notes, had they been assigned in the usual course of business in Louisiana. *Abat v. Gormley*, 3 La., 241.

§ 440. *No demand is necessary as between the indorsee and maker of a promissory note to fix the liability of the latter.*

These notes were assigned to the plaintiff, as collateral security, by Harris, for the payment of his note for \$6,000, executed at the same time, which constituted a legal transfer of the notes, for the purpose stated. On the credit of these notes, it may be presumed, the plaintiff received the note of \$6,000 from Harris. If Gibson be considered as a guarantor, as contended, yet a notice was not necessary, as he received an ample indemnity against the \$6,000 by the mortgage. But he was not a guarantor in any sense of that term. Harris assigned the notes as security, and, under the circumstances, he cannot complain of want of notice of his own default. No demand of the notes, when due, at the Agricultural Bank of Mississippi, where they were made payable, was necessary. The action is against the maker of the notes, and if the money was in the bank, or if the party was there with the money to pay the notes on presentation, it is matter of defense, and consequently the demand at the bank need not be averred in the declaration nor proved on the trial. This question was fully considered and decided in *Wallace v. McConnell*, 13 Pet., 136 (§§ 1539-43, *infra*).

We think the judgment of the circuit court must be reversed, and the cause remanded to that court for further proceedings, conformably to this opinion.

§ 441. In general.—Transferee of negotiable paper before maturity presumed to have no notice of defenses to it. *Carpenter v. Longan*, 16 Wall., 271 (§§ 225, 226).

§ 442. Transferee after maturity takes subject to antecedent equities. *National Bank of Washington v. Texas*, * 20 Wall., 72.

§ 443. Promissory notes are presumed to have been taken before due, in good faith and without notice of antecedent equities or infirmities. *New Orleans C. & B. Co. v. Montgomery*, 5 Otto, 16.

§ 444. Against a *bona fide* holder suing on a bill, it cannot be shown that another person had an interest in the consideration which was given for the bill. *Evans v. Gee*, 11 Pet., 80 (§§ 1178-82).

§ 445. Defenses against donee.—Any defense good against the payee is good against his assignee to whom the paper has been transferred as a gift. *Hicks v. Jennings*, 4 Fed. R., 859.

§ 446. Defenses against assignee.—Any equity, such as fraud or failure of consideration, follows a note made in Pennsylvania into the hands of an indorsee. *Commercial & Farmers' Bank v. Patterson*, * 2 Cr. C. C., 346.

§ 447. The maker of a note may set up the same defenses against it in the hands of an assignee that he might make if held by the payee. *Bradley v. Trammel*, * Hemp., 164.

§ 448. Purchaser after due; equities.—When a note is assigned after maturity, it is subject in the hands of the assignee to all the equities to which it was liable in the hands of the payee. *Gwathney v. McLane*, * 3 McL., 371.

§ 449. United States notes.—One who takes United States treasury notes after maturity, takes them subject to the same conditions which attach to bills and notes taken after maturity. *Vermilye v. Adams Ex. Co.*, 21 Wall., 138.

§ 450. Carrier who pays for stolen notes is an equitable assignee.—Where treasury notes had been stolen while in the possession of a common carrier, and the bailee had paid the bailor the value of the notes, *held*, that in equity there was an assignment to the bailee of all the bailor's title to the notes. *United States v. Vermilye*, 10 Blatch., 290.

§ 451. Fraud or illegality.—The indorsee of negotiable paper, which has a fraudulent or illegal inception, must, in order to recover thereon, prove himself to be a *bona fide* holder for value. This will not be presumed from his possession, nor will it be proved by evidence of a judgment in his favor as to other similar paper. This will not estop the defendant from showing the fraud. *Stewart v. Lansing*, 14 Otto, 505.

§ 452. Where county court house bonds were executed by the county judge outside of his county, who at the time received one of the bonds from the contractor as a gratuity, and the court house for which the bonds were given was never built, *held*, in an action upon interest coupons, that the plaintiff must prove that he was a holder of the same for value before maturity. *Smith v. Sac County*, 11 Wall., 139.

§ 453. Possession; presumption of ownership.—Possession of bills by the original indorser, with the subsequent special indorsements uncanceled, raises a *prima facie* presumption that he is the owner, and authorizes him to sue in his own name. *Picquet v. Curtis*, * 1 Sumn., 479.

§ 454. The rule which allows a payee of negotiable paper to strike out subsequent special indorsements, and which presumes ownership from possession, does not extend to an action brought by him as trustee in the right of another. *Fremont v. United States*, * 4 Ct. Cl., 252.

§ 455. The fact that certain bills did not appear ever to have been presented to the drawees for acceptance rebuts the presumption that the holder whose duty it was to present them was a *bona fide* holder for value, and, further, warrants the presumption that they were in his hands merely as agent. *Mandeville v. Welch*, 5 Wheat., 277.

§ 456. Representations bind assignee.—If a firm represents that certain notes on which its name appears are business and not accommodation notes, and a third person takes them, relying upon such representations, the assignee in bankruptcy of the firm cannot deny their truth against such party. *In re Many*, * 17 N. B. R., 514.

§ 457. Warranty of signatures.—A person who sells a note affirms the genuineness of the maker's and indorser's signatures. *Semmes v. Wilson*, * 5 Cr. C. C., 285.

§ 458. Deduction not notice of forgery.—A deduction of ten per cent. and interest upon a dishonored note, not indorsed by the party who offers it for sale, only justifies the inference that the party who purchased it agreed to take the risk of the responsibility of the parties whose names appear upon the note. It does not imply that the purchaser takes also the risk of the paper being genuine. *Ibid*.

§ 459. Presumption from holding for some time; forgery.—The longer a dishonored note remains in the hands of the holder the more reason for a purchaser to suppose it to be genuine, for he might reasonably presume the forgery would have been discovered at maturity or soon after. *Ibid*.

§ 460. Agreement between maker and payee.—Where notes payable to the order of A. were indorsed by him, it was held that a *bona fide* purchaser for value before maturity is not affected by an agreement between the maker and the payee at the time the note was given. *Brown v. Spofford*,* 17 Alb. L. J., 31.

§ 461. Possession of note not essential.—A *bona fide* indorsee for a pre-existing debt acquires a good title to a note although he never had possession of it. *Lanning v. Lockett*, 10 Fed. R., 453.

§ 462. Antecedent debt.—If a negotiable note is accepted in satisfaction of a previous debt, the person so receiving the note is a holder for value, and is protected against equities. *Cummings v. Mead*,* 6 Am. L. Reg. (O. S.), 51.

§ 463. Notes carry their whole evidence of title on their face; and the law assures the right to him who obtains them for valuable consideration, by regular indorsement or delivery, and without actual notice of an adverse claim, or of such suspicious circumstances as should lead to inquiry. *Ibid*.

§ 464. Unless a note is taken in good faith, for a valuable consideration and without notice, the holder is considered as being in privity with the indorser. This privity is created when the note is taken under suspicious circumstances, such as would alarm a man of ordinary prudence; and where the parties are brothers-in-law, this fact puts the holder to stricter proof of the *bona fides* of the transaction. *Ibid*.

§ 465. Taker for antecedent debt a *bona fide* holder.—A's draft was accepted by B. on security of a warehouse receipt and storage certificate of certain property deposited by the drawer, but which was already covered by a chattel mortgage. C. took the draft for an antecedent debt without notice of any fraud by A. Held, that he was a *bona fide* holder for value. Even if C. had taken the draft only as security, he would have been a *bona fide* holder within the rule protecting such holders. *Pugh v. Durfee*,* 1 Blatch., 412.

§ 466. The holder of a negotiable note, who has taken it for a pre-existing debt, is a holder for value, and, as such, protected against any equities subsisting between the original parties to it. *Wood v. Seitzinger*,* 2 Fed. R., 843; *Cummings v. Mead*,* 6 Am. L. Reg. (O. S.), 51.

§ 467. A pre-existing debt is a valuable consideration upon which the holder of a negotiable instrument is entitled to be protected against antecedent equities. *Jewett v. Hone*, 1 Woods, 530 (§§ 169, 170).

§ 468. Collateral security.—A *bona fide* purchaser, without notice and for value, is not chargeable with notice that the draft was given to a contractor as security for the performance of a contract. *Collins v. Gilbert*,* 15 Alb. L. J., 813. See §§ 7, 40, 278.

§ 469. A party who accepts a note as collateral security is a holder for a valuable consideration, and is not affected by equities between the antecedent parties. (Decided on the authority of *Swift v. Tyson*, 16 Pet., 1, and other cases and authorities dissented from.) *National Bank of the Republic v. Brooklyn, etc., R. Co.*,* 14 Blatch., 242; *Goodman v. Simonds*, 20 How., 343 (§§ 420-425).

§ 470. Suspicion not knowledge.—A person who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can only be produced by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title. *Hotchkiss v. National Banks*, 21 Wall., 359; *Murray v. Lardner*, 2 Wall., 110; *Goodman v. Simonds*, 20 How., 343 (§§ 420-425).

§ 471. Duty of bankers as to record of lost or stolen paper.—It is the duty of bankers, brokers and other financial men to keep records of notices of lost or stolen paper, by which to enable them, with very little trouble, to ascertain, when overdue paper is presented, whether they have been served with notice of a claim adverse to the party presenting it. *Vermilye v. Adams Ex. Co.*, 21 Wall., 188.

§ 472. Acceptance of federal officer.—A person taking a bill of exchange drawn or accepted by an officer of the United States must look to the statutes to ascertain whether such officer is authorized to draw or accept it. He takes it at his peril. *The Floyd Acceptances*, 7 Wall., 466 (§§ 15-23).

§ 473. Banks.—That paper has not been authorized by the discount committee of a bank does not affect a *bona fide* holder. *Blair v. First National Bank*, 2 Flip., 111 (§§ 617-619).

§ 474. The knowledge of a bank officer of an infirmity in a note discounted when he is not present is not imputable to his bank. *Third National Bank v. Harrison*, 3 McC., 316 (§§ 1314-18).

§ 475. If a note was payable to some person not connected with a bank, but assigned to it and indorsed by its cashier, and presented by an outsider to another bank for discount, these facts would be enough to put such other bank on inquiry as to the nature of the transaction,

and as to the authority of the cashier to make such indorsement. *Blair v. First National Bank*, 2 Flip., 111 (§§ 617-619).

§ 476. *State certificate of debt.*—A person claiming title to a state certificate of debt, which is not strictly negotiable paper, through assignment by an agent, should show all the circumstances surrounding his acquisition of title, in order to prove himself a *bona fide* holder. *Combs v. Hodge*, 21 How., 397 (§§ 8-10).

§ 477. *Signature in blank; figures at top; not notice.*—The fact that a note was signed in blank, with the sum in figures marked at the top of the paper, is not enough to put a person on inquiry as to whether the note was fraudulently issued or not. *Riley v. Anderson*,* 2 McL., 589.

§ 478. *Absence of pinned certificate.*—The negotiability of a bond, payable to a certain person or bearer, is not affected by a pinned certificate to the effect that the bearer is entitled to a certain amount of the stock of the company upon the return of the certificate, bond and all unmatured coupons thereon; and the absence of the certificate at the time the bond is purchased by a third party is not of itself a sufficient circumstance to put the purchaser upon inquiry as to the title of the holder. *Hotchkiss v. National Banks*, 21 Wall., 359.

§ 479. *Drafts by master of vessel.*—Repairs became necessary to a vessel. She put into port, and while there the owners of the ship advised the master by mail as to obtaining the money needed. The bills for repairs were, by the fraud and collusion of the master, made extravagantly high. The master then drew upon the owners drafts which were upon their face "recoverable against the vessel, freight, and cargo." Relying upon the owners' letter, and without knowledge of any fraud, A. discounted the drafts. *Held*, that he was a *bona fide* purchaser, but that the drafts did not create any lien upon the vessel or cargo. *The Woodland*, 14 Blatch., 499.

§ 480. *Title obtained from bona fide purchaser; notice.*—A title obtained from a *bona fide* holder of a note is good, even in the hands of a taker with notice of antecedent equities between the original parties. *Commissioners v. Clark*, 4 Otto, 278.

§ 481. *That maker is "slow" is not notice.*—The fact that an indorsee of a promissory note considers the maker in doubtful credit, or "slow," does not show that he is not a *bona fide* holder; especially if he paid for the note in other paper equally "slow." *In re Great Western Telegraph Co.*, 5 Biss., 363.

§ 482. *Taking certificate of deposit after bankruptcy.*—A party taking a certificate of deposit, which has been proved and filed as a claim in bankruptcy, from the apparent owner, and merely as collateral security for a precedent debt, is not a purchaser for value, and has no equity superior or equal to that of the true owner. *In re Sime*,* 12 N. B. R., 315.

§ 483. *Dishonored check.*—A party who takes a dishonored check, payable to bearer, takes it subject to equities; also, if he knew that the party had no right to transfer it. *Rounsavel v. Scholfield*,* 2 Cr. C. C., 139. See §§ 47, 48, 200, 335, 358.

§ 484. *Son's knowledge of unsoundness in horse.*—A father and son owned a horse together and the latter acted as agent for the former in selling it. A note was given the father for the purchase price and he indorsed it to the son, who sued upon it. The defense was a total failure of consideration and fraud, in that the horse was diseased and known to be so, although represented as sound, at the time of sale. *Held*, that the son could not be considered as a *bona fide* indorsee, but was a party to the sale, and could not claim the rights and immunities of an innocent holder. *Pease v. McClelland*,* 2 Bond, 42.

§ 485. *Stolen bonds and coupons.*—Bonds of a corporation, negotiable by delivery, were stolen, and sold before maturity to a *bona fide* purchaser. *Held*, that the purchaser took a good title to the bonds, and to the coupons which were not due, but not to the past-due coupons. *Gilbough v. Norfolk & Petersburg R. Co.*,* 1 Hughes, 410. See § 495.

§ 486. *Inadequacy of consideration.*—The selling of notes amounting to over \$5,000 for \$1,000, coupled with knowledge by the indorsee that there was trouble between the maker and the payee, is sufficient to put the indorsee upon inquiry, and to charge him with notice of matters of defense against the notes. *In re Hook*,* 11 N. B. R., 232.

§ 487. *One-half bank note.*—The purchaser of the half of a bank note that is lost or stolen does not become a *bona fide* holder; he takes it subject to every defense which could have been legally made against the finder or robber. The fact of mutilation is sufficient to charge him with notice. *Bullett v. Bank of Pennsylvania*, 2 Wash., 172.

§ 488. *Cessation of interest; option to exchange for bonds.*—U. S. 7-30 treasury notes were stolen from the Adams Express Company. They were sold, after they ceased to bear interest, and after the time for exercising an option to exchange them for bonds had passed, as appeared from the face of the notes. *Held*, that this was notice to the purchaser. *United States v. Vermilye*, 10 Blatch., 280.

§ 489. *Overdue treasury notes.*—A person who takes overdue United States treasury notes is chargeable with all antecedent equities, and bankers, brokers and others cannot establish a

usage in dealing with such paper which contravenes this rule. *Vermilye v. Adams Ex. Co.*, 21 Wall., 138.

§ 490. Notice by special indorsement.—A note was indorsed thus: "This note is transferred and the collection of the same guaranteed to the holder hereof." *Held*, not an indorsement of the paper within the law merchant, and that the indorsee, although without notice and a taker before maturity, received the note subject to any defense existing between the maker and payee—*e. g.*, want of consideration. Such an indorsement amounts only to a guaranty of payment, provided payment cannot be enforced against the maker. *Omaha National Bank v. Walker*,* 2 McC., 565.

§ 491. Knowledge of fraud.—One who takes notes as collateral security for a debt, and with knowledge that the notes were tainted with fraud by reason of false representations as to their consideration, is chargeable with all defenses which can be made against antecedent parties. *Smith v. Babcock*, 2 Woodb. & M., 246. See § 451.

§ 492 Printed hand-bill.—A printed hand-bill advising of the stealing of certain United States treasury notes and particularly describing them, if served after the notes become due, and before they come into the hands of a purchaser, is sufficient notice. *United States v. Vermilye*, 10 Blatch., 280.

§ 493. Dishonor by non-acceptance is non-payment; notice.—One who takes a bill which shows its dishonor upon its face is not a *bona fide* holder; and there is no distinction between such a bill transferred after it is dishonored by non-acceptance and one transferred after dishonor by non-payment. *Andrews v. Pond*, 13 Pet., 65.

§ 494. Recovery from one not a *bona fide* purchaser.—An express company which acquires the title of the rightful owner of stolen treasury notes may recover them from a purchaser of them after maturity. *Vermilye v. Adams Ex. Co.* 21 Wall., 147.

§ 495. But in *United States v. Read*, 2 Cr. C. C., 159, the court refused to order stolen bank notes passed to persons who received them innocently in the usual course of business to be given up to the original owners. See § 485.

§ 496. Transfer by agent *bona fide*.—A. was indebted to B., his attorney and agent. B. being obliged to have money, and A. not being able to pay him, and to pay certain notes of his (A.'s) about to mature, B. charged himself with the amount of the notes, took them up before maturity and indorsed them on the first or second day of grace to C. in payment of claims which B. owed individually to C., which claims C., in consideration of the transfer of the notes, released. *Held*, that C. was a purchaser for value without notice of antecedent equities. *Turnbull v. Thomas*. 1 Hughes, 172.

§ 497. Overdue note.—One who buys an overdue note from a bank that has no title or authority to sell it cannot intervene and claim a right under the note to be paid, in preference to the true owner of the note, out of the proceeds of property sold under a mortgage given to secure it by the maker. *Foley v. Smith*,* 6 Wall., 492.

§ 498. Accommodation paper.—The fact that the check was drawn to accommodate the payee is no defense to a suit by an innocent holder against the drawer. *Deener v. Brown*,* 1 MacArth., 350. See §§ 5, 278, 364.

§ 499. The fact that an accommodation indorser did not indorse the notes until long after they were made, and had no interest in them, is no defense against a *bona fide* holder. *Bank of British North America v. Ellis*, 6 Saw., 96 (§§ 1439-43).

§ 500. An accommodation acceptor of a bill which has come into his possession after having been put in circulation is presumed to own it, and may recover upon it without first showing that he has paid it. *Hunter v. Kibbe*, 5 McL., 279.

§ 501. Although by the laws of Massachusetts the treasurer or manager of a trading company cannot bind it by an accommodation indorsement, yet if the paper is held by an innocent purchaser, it is good. *Ex parte Estabrook*, 2 Low., 547.

§ 502. A *bona fide* holder of an accommodation bill may recover upon it, even when he purchases it with notice of its character. *Perry v. Crammond*,* 1 Wash., 104.

§ 503. A maker of a promissory note, payable to another party, is not estopped from showing that it was accommodation paper, even in favor of one who took it in good faith upon the representation of the payee that it was business paper. *In re Dolge*,* 17 N. B. R., 504.

§ 504. Agent's excess of authority; money; certificate of deposit.—An agent being authorized to raise money on a promissory note of his principal, took a certificate of deposit, payable to order at sight, indorsed it in blank, and it was soon paid to a *bona fide* holder. *Held*, that the principal could not avoid responsibility on his note on the ground that the certificate was not money. *Parrman v. Woodward*, 21 How., 236.

§ 505. Conditional note.—A. gave B. certain acceptances of C. B. in return gave A. his note or due bill. It was agreed that B. was to collect the acceptances; and if they were paid, he was to pay his note or due bill; if they were not paid, then the note or due bill was not to be of any value. The note or due bill was negotiated to an innocent assignee. *Held*, that,

notwithstanding a statute allowed the same defenses to be set up against an assignee that might be urged against the assignor, the defense of non-payment of the acceptances could not be set up against the assignee, as this would make the agreement of the original parties amount to a fraud upon the innocent holder. *Thomas v. Page*,* 3 McL., 369. It is also held that such a condition might be attached to a note or due bill by separate agreement of the parties, and would be obligatory upon a purchaser of the note or due bill with notice of it. *Thomas v. Page*,* 3 McL., 167.

V. INDORSERS, SURETIES AND GUARANTORS.

SUMMARY—*Whether a party is maker, indorser or guarantor*, § 506.—*Joint makers as sureties*, § 507.—*Usurious interest; extension of note*, § 508.—*Indorsing blank paper before note is written*, § 509.—*Indorser liable as guarantor*, § 510.—*Consideration for a guaranty*, §§ 511, 512, 516.—*Extent of guaranty*, § 513; *release by lapse of time*, § 514.—*Notice of acceptance of promise to guaranty*, § 515.—*Notice to guarantor of default*, § 517.—*Suing principal; release of surety or indorsers*, §§ 518-527.—*Accommodation paper; extension; release of surety*, § 528.—*Right of surety after judgment against him*, § 529.—*Agreement of sureties to share loss pro rata*, §§ 530, 532; *right to sue in federal court*, § 531.—*Contribution*, §§ 533, 534.—*Subrogation*, §§ 529, 535, 536.—*Proof as to the capacity in which paper is held*, §§ 537, 538.—*Indorsement by cashier*, § 539.—*Negligence of one holding paper as collateral*, § 540.

§ 506. When a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time it took place: (1) If he put his name in blank on the back of a note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. (2) If his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor: which can only be done where there is legal proof of the consideration for the promise, unless it be shown that he was connected with the inception of the note. (3) If the note was intended for discount, and he put his name on the back of the note, with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser. *Good v. Martin*, §§ 541-549.

§ 507. Joint and several makers of a note may agree, as among themselves, that one of them shall pay the note. Such one then becomes principal debtor, and the others are his sureties; and this may be shown by parol. But this agreement does not affect the creditor, as to whom they are all principal debtors. But if the holder, after notice of such agreement, extend the time of payment, it will release the sureties. *Vary v. Norton*, §§ 550-552.

§ 508. Usurious interest paid is a valuable consideration for an extension of a note. *Ibid.*

§ 509. A. wrote his name on a blank piece of paper, intending that B. should write out and sign upon the other side a promissory note. B. did so. *Held*, that A. was liable as an indorser to one who lent money upon it. The lending of money to B. formed a valid consideration for such an indorsement by A., and the facts that his indorsement was made before the note was written, and that there was no memorandum of A.'s agreement in writing, do not release him. *Violett v. Patton*, §§ 553-555.

§ 510. An indorsement of a note, by which the indorsers name a place of payment (one not being named in the note), and guaranty the payment of the amount when due, creates a different liability from what the law implies from a mere indorsement. It binds the indorsers as guarantors, and can only be enforced by the parties with whom it is made. If made after the creation of the note, it does not pass by assignment. *How v. Kemball*, §§ 556-558.

§ 511. The consideration of a guaranty need not be stated. *Ibid.*

§ 512. The consideration of a guaranty may be the acceptance of the paper guaranteed. *Ibid.*

§ 513. A guaranty of the notes of S. will not cover the notes of a firm of which he is a member. *Russell v. Perkins*, §§ 559, 560.

§ 514. The lapse of a long time, e. g., twelve years, during which a guaranty of notes is not used, will exhaust the guaranty. *Ibid.*

§ 515. Notice of the acceptance of a promise to guaranty need not be shown to charge a guarantor where the guaranty itself is written. The written guaranty is alone sufficient evidence of the acceptance of the oral promise to guaranty. *Lewis v. Brewster*, §§ 561-565.

§ 516. A sale of goods in reliance upon a promised guaranty is a sufficient consideration for it. *Ibid*.

§ 517. A guarantor is entitled to reasonable notice of the default of his principal; such notice, or an excuse for not giving it, must be specially averred in the declaration; and a delay of seven months after default, or until the commencement of suit, is fatal to a recovery against him. *Ibid*.

§ 518. At common law a creditor cannot be required to sue the principal in a note or bill on request by the surety that he do so; and the creditor's failure to sue the principal after such request will not release the surety. *Dennis v. Rider*, §§ 566-539.

§ 519. Indorsers are not within the meaning of a statute expressly applicable to a "surety." *Ross v. Jones*, §§ 570-578.

§ 520. It is not the duty of the indorsee to sue the maker unless he choose, even though the indorser requests him to sue the maker. *Ibid*.

§ 521. Demand of the maker, and protest and notice to the indorser, were duly given by the holder. Subsequently, the indorser gave the holder notice in writing to sue the maker and the indorser at a time when the maker was solvent. The holder (plaintiff) omitted to do so for more than thirty days, during which time the maker became insolvent. *Held*, that the indorser, after notice of non-payment duly given, did not stand precisely in the position of a surety, and that the omission of plaintiff to sue within the thirty days did not release the indorser from liability. *Ibid*.

§ 522. In Illinois the assignor of a note, unless he expressly agree to guaranty it, is liable to pay it only in case the assignee by the exercise of due diligence prosecutes the maker to insolvency; but if the institution of suit against the maker will not avail the assignee, or if the maker, when the note falls due, is out of the jurisdiction of the court and therefore beyond the reach of legal process, the assignor is equally as liable as if due diligence by suit had been used. Want of consideration or the maker's being adjudged a bankrupt is also enough to show that suit against him would have been unavailing. *Wills v. Claffin*, §§ 579-581.

§ 523. In Indiana, the indorser of renewal notes forwarded to the holder of the paper renewed, who resides in another state, is not liable in consequence of their non-payment and notice thereof to pay them. Due diligence to collect them from the maker by suit against him must generally be used in order to fix the liability of an indorser. But in New York such notes are governed by the law merchant, and the indorser is liable as upon an inland bill. *Mott v. Wright*, §§ 582-584.

§ 524. The maker of a note need not be sued before proceeding against an indorser, if he be insolvent. *Violett v. Patton*, §§ 553-555.

§ 525. The record of suit by the holder against the maker and prior indorsers of a note is competent evidence of due diligence by the holder; and if the defendants to such suit were shown to have been insolvent, or to have left the state, these facts would excuse the plaintiff for not suing out executions against the judgment debtors. *Camden v. Doremus*, §§ 585-588.

§ 526. The "due diligence" required of an indorsee who sues the maker is not lessened by an error of the court in which he brings suit, whereby less than the amount sued for is recovered. *Ibid*.

§ 527. Where a suit has been instituted on a bill against a drawer, an agreement for a valuable consideration, by the plaintiff, to continue it until the next term of court, releases the indorsers. *Bank of United States v. Hatch*, §§ 589-591.

§ 528. A. made a note of \$6,000 for the accommodation of B., who indorsed it to the C. bank, which discounted it, knowing that A. was an accommodation maker merely. Subsequently, B. made a new note for \$5,000, at ninety days, which the C. bank discounted, passing the proceeds to the private account of B., who banked with it, and he gave his check for \$5,000, which was charged against his account. As the indorser's note was not secured, the bank retained the original note for \$6,000 as security. *Held*, that a holder who knows the maker of a note is only nominally such, but actually an accommodation indorser, must deal with the paper and parties in reference to their true relationship to the obligation; that the second note amounted to an extension of time to the principal (the indorser) and released the surety (the maker). *In re Goodwin*, §§ 592-595.

§ 529. After judgment against the principal and surety the relation of principal and surety ceases to exist. The character of the surety is merged in the judgment, and he can claim no right but the right of subrogation on paying the judgment. Nor is the liability of the surety affected by the conduct of the creditor after judgment against himself and his principal. *Findlay v. United States Bank*, §§ 596-602.

§ 530. An agreement, collateral to a note, by which two co-sureties agree to share the loss.

pro rata, is founded on a good consideration and may be by parol. It is the promise of the one co-surety to lose one-half if the other co-surety will become a surety with him and lose the other half, followed by the actual payment by the one co-surety of the whole of the note. *Phillips v. Preston*, §§ 603-607.

§ 531. One surety who sues his co-surety under a contract, collateral to the note, to divide the loss between them, may sue in a federal court, although the assignor could not sue in such court. *Ibid.*

§ 532. If two persons agree to indorse a note and to divide between them any loss, one of them who settles the note upon the failure of the maker to pay it may recover from the other the share which he should have paid. The claim upon his co-surety of the person who pays the note rests entirely upon the collateral agreement to divide the loss, and not upon any promise contained in the note, or the co-sureties' indorsements on it. *Ibid.*

§ 533. A's note was indorsed by B. as an accommodation indorser. To insure its being discounted, A. subsequently secured the accommodation indorsement of C. The note being paid by B., the first indorser, *held*, that he could not recover a moiety of the amount paid from C., who was neither liable to B. as co-surety, nor as a general indorser. *McDonald v. Magruder*, §§ 608-611.

§ 534. Under the statute of Virginia, giving to debts due on protested bills of exchange the rank of judgment debts, a joint indorser who has paid more than his moiety of the debt can subject the estate of his co-indorser to contribution with the priority of a judgment creditor. *Liddersdale v. Robinson*, §§ 612, 613.

§ 535. The indorser who pays a bill or note is subrogated to the rights of the holder. *Ibid.*

§ 536. Where a surety of a surety pays the debt of the principal he may recover from the principal. *Hall v. Smith*, § 614.

§ 537. A member of a firm who are indorsers, thus: "Pay Sweeney, R. F. & Co., for collection. Sam Harris & Sons," is competent to testify that his firm held the paper only as agents to collect it, and that they were not owners of it. Such testimony does not contradict the indorsement but merely explains it. *Sweeney v. Easter*, §§ 615, 616.

§ 538. On the question whether a firm of bankers from whom certain notes were received were owners of them or merely agents to collect them, evidence of one of the firm as to its private practice of distinguishing between paper of which they were owners, and paper they were merely agents to collect, is inadmissible to charge with notice of agency a person to whom such paper was sent by said firm of bankers, unless such person is also shown to have knowledge of such private practice of the firm. *Ibid.*

§ 539. A note made payable to A., cashier, is presumed to belong to the bank, and an indorsement by the cashier before maturity will bind the bank. *Blair v. First National Bank*, §§ 617-619.

§ 540. One who holds an unpaid draft as collateral security, refusing to deliver it to the pledgee so that he may collect it, but at the same time making no effort to secure its payment by dividends declared in the estate of the drawee in bankruptcy, is liable for whatever sum is lost by this negligence, though not for the full amount of the bill, if that could not have been recovered from the bankrupt drawee. *Childs v. Corp.*, §§ 620, 621.

[NOTES.—See §§ 622-714.]

GOOD v. MARTIN.

(5 Otto, 90-98. 1877.)

ERROR to the Supreme Court of Colorado Territory.

STATEMENT OF FACTS.—Good wrote his name on the back of a note of which he was neither payee nor indorsee. There was judgment against him, as well as against the makers. Further facts appear in the opinion of the court.

§ 541. *Indorser in blank before delivery held a second indorser by some courts.*

Opinion by MR. JUSTICE CLIFFORD.

Decisions of a conflicting character exist as to the nature and legal effect of the obligation which a third person assumes who indorses his name in blank on a negotiable promissory note before the payee and before the instrument is delivered to take effect. Courts of justice, in some jurisdictions, hold that such a party is a second indorser, even though it be true that the payee may never indorse the instrument. *Phelps v. Vischer*, 50 N. Y., 69; *Shafer v. Farmers' and Mechanics' Bank*, 59 Penn. St., 144.

§ 542. — *not a first indorser.*

Even elementary rules show that he cannot be first indorser, for the reason that he is not payee; and it is well settled law that no one but the payee can sustain that relation to the maker, or put the note in circulation as a negotiable instrument. *Essex Company v. Edmunds*, 12 Gray (Mass.), 272; *Moies v. Bird*, 11 Mass., 436.

Three of the counts of the declaration are framed upon a promissory note, dated June 29, 1866, payable to Alexander Davidson or order sixty days after date, signed by the first two defendants; and the record shows that it was indorsed by Good, the other defendant, before it was indorsed by the payee and before it was delivered to take effect as a negotiable instrument. His indorsement was in blank, and, of course, was without any written explanation as to its nature and intended effect. Besides the three counts framed upon the promissory note, the declaration also contained the common counts, in which it was alleged that the defendants were indebted to the plaintiff in the sum of \$2,000 for work and labor done and performed, and in the same sum for goods, wares and merchandise sold and delivered, and in the same sum for money had and received, and other counts *in indebitatus assumpsit*. Service was made; but the two defendants first named failed to appear and were defaulted. Instead of that Good appeared, pleaded the general issue and went to trial. Evidence was introduced on both sides; and the verdict and judgment were for the plaintiff in the sum of \$3,625.33. Exceptions were filed by Good, and he sued out a writ of error and removed the cause into this court. Only two of the exceptions are embodied in the assignment of errors, and those only will be re-examined: 1. That the court erred in instructing the jury that if they found from the evidence that the defendant wrote his name upon the back of the note before the delivery of the same to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of the makers, and for their accommodation, to give them credit with the payee, and is liable for the payment of the note in this action, and that if that presumption is not rebutted by the evidence in the case, they must find for the plaintiff in the issue joined between her and Good. 2. That the court erred in excluding the testimony of the two defendants called as witnesses by Good.

§ 543. *Indorser before maturity and before the payee is liable as guarantor or original promisor.*

Decided cases almost innumerable affirm the rule, that, if one not the promisee indorses his name in blank on a negotiable promissory note before it is indorsed by the payee, and before it is delivered to take effect as a promissory note, the law presumes that he intended to give it credit by becoming liable to pay it either as guarantor or as an original promisor. *Bryant v. Eastman*, 7 Cush. (Mass.), 111; *Benthal v. Judkins*, 13 Metc. (Mass.), 265; *Colbun v. Averill*, 30 Me., 310. Different courts, as remarked in that case, hold different views in respect to the question here involved; but all concur that such an act constitutes a contract which is to receive a reasonable and an available construction. Great conflict exists in the decided cases; but the better opinion is, that there are certain general rules and principles to be followed in the interpretation of such a contract, which, in the absence of other evidence, will lead to satisfactory results, even amid the conflicting decisions. Beyond all doubt, the contract should be construed as it was at the time it was made. If made at the inception of the note, it is presumed to have been for the same considera-

tion and a part of the original contract expressed by the note. If made subsequently to the date of the note and without a prior indorsement by the payee, it will be presumed that it was not made for the same consideration, and the party, if liable at all, will be regarded as a guarantor. Such a contract to guaranty the debt of a third person must be in writing, and there must be sufficient proof of the consideration. *Brewster v. Silence*, 8 N. Y., 207; *Leonard v. Vredenburg*, 8 Johns. (N. Y.), 29; *Hall v. Farmer*, 5 Den. (N. Y.), 484.

§ 544. *Indorser of a note after a prior indorsement by the payee regarded as a subsequent indorser and liable as such.*

These remarks apply where the third person indorses the note before the payee; but where such a person indorses the note after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be regarded as a subsequent indorser, the rule being, that, if the indorsement is without date, it will be presumed to have been made at the inception of the note. *Ranger v. Cary*, 1 Metc. (Mass.), 369; *Noxon v. De Wolf*, 10 Gray (Mass.), 343; *Collins v. Gilbert*, 94 U. S., 753 (§§ 432-436, *supra*). Irregularities of the kind in the execution of promissory notes are noticed by Judge Story in his work on Promissory Notes, and he says that the maker and such a party are both to be deemed original promisors, and the note a joint and several promissory note to the payee, although as between the maker and the other party they stand in the relation of principal and surety. Standard authorities, too numerous for citation here, are referred to by the author in support of the proposition. Story, Pr., sec. 58; *Sylvester v. Downer*, 20 Vt., 355; *Lewis v. Harvey*, 18 Mo., 74; 1 Parsons, Contr. (6th ed.), 243. None will deny, it is presumed, that the cases cited sustain the proposition where the third person indorses his name in blank on the note at the time when it was made and before it was indorsed by the payee; and the same learned author admits that the rule would be otherwise if the party actually wrote his name at a subsequent period, unless it was done in compliance with an agreement made before the note was executed. *Hawkes v. Phillips*, 7 Gray (Mass.), 284; *Leonard v. Wilder*, 36 Me., 265; *Champion v. Griffith*, 13 Ohio, 228. Prior decisions of this court are to the same effect, as appears by the following citation. *Rey v. Simpson*, 22 How., 341.

§ 545. *Nature of contract where indorsement is made before delivery.*

When a promissory note made payable to a particular person or order is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. 1. If he put his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. *Schneider v. Schiffman*, 20 Mo., 571; *Irish v. Cutler*, 31 Me., 536. 2. Reasonable doubt of the correctness of that rule cannot be entertained; but if his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note. 3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would

be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser.

§ 546. *Construction of contract where indorsement is in blank.*

Considerable diversity of decision, it must be admitted, is founded in the reported cases where the record presents the case of a blank indorsement by a third party made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction is admissible to aid in the interpretation of the language employed. *Denton v. Peters*, Law Rep., 5 Q. B., 475.

§ 547. *Facts concomitant with blank indorsement competent evidence.*

Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for construing the contract which were possessed by the actors. *Cavazos v. Trevino*, 6 Wall., 773. Courts of justice may acquaint themselves with the facts and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Shore v. Wilson*, 9 Clark & F., 352; *Clayton v. Gregson*, 4 Nev. & M., 602; *Addison*, Contr. (6th ed.), 918; 2 Taylor, Ev. (6th ed.), 1035. Evidence to show that the indorsement of the defendant in this case was made before the instrument was indorsed by the payee or delivered to take effect was admitted without objection; but it is not necessary to rest the decision upon that suggestion, as it is clear that the evidence would have been admissible even if seasonable objection had been made to its competency. *Hopkins v. Leek*, 12 Wend. (N. Y.), 105. Like a deed or other written contract, a promissory note takes effect from delivery; and as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is, therefore, admissible to show when that took place, as it cannot appear in the terms of the note. 2 Taylor, Ev. (6th ed.), 1001; *Hall v. Cazenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mees. & W., 694. Opposed to that the suggestion is, that if a holder produces a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument. *Childs v. Wyman*, 44 Me., 433. Grant that, and still it is a mere presumption of fact which may be rebutted and controlled by parol proof that it was not there when the note was delivered, or that it was made at a subsequent date. *Essex Company v. Edmunds*, 12 Gray (Mass.), 273. Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers for the reason that they are not payees; and no party but the payee of the note can be the first indorser and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but if he desire to do so he must employ proper terms to signify that intention,

the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor.

§ 548. *Filling blank indorsement makes a written contract. Evidence.*

Blank indorsements may be filled up to express the legal contract; and the true commercial rule is that, when the blank is filled, the instrument shall have the character of a written instrument, and not depend on parol proof to give it effect, nor be subject to be altered or contradicted by parol proof. Indorsements of the kind are or may be valid, as the law presumes that such an indorser intended to be liable in some form. It does not charge him as indorser, **unless** the terms employed are proper to express such an intent; but if any one, **not the payee** of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note and below that of the maker; that is to say, he is held as a joint maker, or as a joint and several maker, according to the form of the note. Cases also arise where the signature of a third person is subsequent to the making and delivery of the note, and in that case the third person, as to the payee, is not a maker, but a guarantor, and his promise is void if without consideration; but the consideration may be the original consideration if the note was received at his request and upon his promise to guaranty the same, or if the note was made at his request and for his benefit. 1 Parsons, Contr. (6th ed.), 244. Judge Story says that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party intended at the time to be bound only as guarantor of the maker, he shall not be an original promisor; and, if he intended to be liable only as a second indorser, he shall never be held to the payee as first indorser. Story, Pr., sec. 479. Where the evidence on these points is doubtful, obscure or totally wanting, courts of law adopt rules of interpretation as furnishing presumptions as to the actual intention of the parties. Difficulty in that regard can never arise where the indorsement is special, if it contains words proper to show that the party intended to be liable only as second indorser. Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor, and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law. Whether regarded as a second indorser or an original promisor, it is not necessary to allege or prove any other than the original consideration; but, if it be attempted to charge the party as a guarantor, a distinct consideration must appear. *Essex Company v. Edmunds*, 12 Gray (Mass.), 272; *Brewster v. Silence*, 7 N. Y., 207. Viewed in the light of these suggestions, it is clear that the first assignment of error must be overruled.

§ 549. *Territorial courts are not governed, as United States courts are, by the act of congress admitting parties as witnesses.*

Territorial courts are not courts of the United States, within the meaning of the constitution, as appears by all the authorities. *Clinton v. Englebrecht*, 13

Wall., 434; *Hornbuckle v. Toombs*, 18 Wall., 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a territory where a different rule prevails. 13 Stat., 351; *Bowman v. Noyes*, 12 N. H., 302; *Bridges v. Armour*, 5 How., 91; *Bailey v. Knapp*, 19 Penn. St., 192; *Halz v. Snyder*, 26 id., 511. Suppose that is so, then the two defendants called as witnesses were rightly rejected as witnesses. 13 Stat., 351. Special reference is made to the territorial act of the 11th of February, 1870, as inconsistent with the ruling of the court; but that act contains the following proviso: that the act "shall not apply to cases pending at the passage thereof in the district courts, on appeals from justices of the peace, nor to cases at issue at the passage of the same in the district and probate courts." Sufficient appears to show that the case before the court was at issue in the court below one whole year before the passage of that act. Tested by these considerations, it is clear that the second assignment of error must also be overruled, and that there is no error in the record.

Judgment affirmed.

VARY v. NORTON.

(Circuit Court for Michigan: 6 Federal Reporter, 808-814. 1881.)

Opinion by WITHEY, D. J.

STATEMENT OF FACTS.—The suit is upon a promissory note. Defendants Norton, Lee and King defend. Judgment by default against all the other defendants. King pleads separately that the consideration of the note is in part usurious; that payments of interest have been usurious, and that he is the surety of Norton, and has been discharged from liability by the time of payment having been extended by plaintiff without his knowledge or consent. Norton and Lee join in their defense, which is the same in substance as set up by King. The note was made by all the defendants, at Lowell, in this state, March 27, 1871, by which they jointly and severally promised to pay to William Vary or order, five years after date, \$2,000, with interest at the rate of ten per cent. per annum, payable semi-annually. All the interest that matured prior to September 14, 1873, was paid to the payee; at or soon after which date the note passed to plaintiff, and he, as holder thereof, has since received the interest to March 27, 1876. All payments of interest have been at the rate of ten per cent. on the face of the note. Defendant Norton has, since this suit was commenced, made two payments—one of \$200, June 19th, and the same amount October 8, 1877. The consideration of the note was only \$1,790, money loaned to all the defendants, while \$210 included in the note was usury, to which extent the consideration fails. Plaintiff is chargeable with notice of all the facts. A computation based upon the actual consideration of the note, with interest at ten per cent. thereon, less payments made by way of interest, shows that the amount remaining unpaid at the date of this opinion is \$1,994.54. On the 17th of November, 1873, after the note came into the hands of plaintiff, defendant Norton agreed, for a valuable consideration, with defendants Lee and King, to pay the note. Of this arrangement the plaintiff had seasonable notice. On the 4th of April, 1876, plaintiff and defendant Norton made an agreement by which Norton paid to plaintiff \$460, which met all interest due on the face of the note to that time, the taxable costs of a suit pending against all the defendants on the note, and an excess of about \$15. This latter sum was paid and received as consideration for the

agreement of plaintiff then made with Norton to extend the time for the payment of the principal sum to March 27, 1877, without the knowledge of defendants Lee and King. Defendant Lee had, on the 16th of March, 1876, written to plaintiff a letter in which he says: "Mr. Norton's prospects are very good, and just as soon as he can get the money out of his logs he will pay you. I hope you will not make any expense, as it is about impossible to get money here now." The presumption that Norton was pecuniarily responsible and good for this debt in the spring of 1876 has not been rebutted by proof, but that he became insolvent in 1877 appears.

§ 550. *Principals may agree that one shall be principal and the others sureties. Parol evidence admissible to show such agreement.*

The case presents, first, the question whether one or more joint and several makers of a note, all of whom are at the making of the debt principal debtors, can change their relation without consent of the creditor, so as to deprive him of the right he had to treat all of them as principal debtors in any transaction touching the debt. This does not involve the question whether parol evidence is admissible to show that one who signed as a joint and several maker was only a surety for his co-maker. On that question the authorities are far from uniform. They are cited in Parsons on Bills and Notes (2d ed.), 233-4. See, also, 64 N. Y., 457; 5 Dillon, 140. The relation of principal debtor and surety arose in this case subsequent to the execution and delivery of the note, and after the plaintiff became the holder of it. The evidence which has been introduced does not, therefore, tend to contradict the written contract, but to show the changed relation between the makers Lee and King, and Norton. The question as to the effect produced upon the rights of the parties under such circumstances has arisen most frequently in reference to partnership indebtedness, when one partner retires and the other retains the business and agrees to pay the firm debts. In this state it is held that if a creditor, after being informed of the new arrangement between the partners, enters into a valid agreement by which the time of payment is extended without consent of the retiring member, the latter is discharged, on the ground that he had become a surety, and was entitled to the benefit of a surety's rights. *Smith v. Sheldon*, 35 Mich., 42. The same view was held in *Millerd v. Thorn*, 56 N. Y., 402. See cases cited in the opinions. But in *Swire v. Redman*, Law R., 1 Q. B., 536, it was held quite the other way. By it the previous case of *Oakley v. Pasheller*, 4 Clark & Fin., 207, decided in the house of lords, and cited by Judge Cooley in *Smith v. Sheldon*, and by defendants' counsel in this case, to support the rule that an agreement to forbear discharges such retired partner on the ground that he is a surety, is quite explained away, and denied to be an authority for such view. I have not at hand the case of *Oakley v. Pasheller*.

§ 551. *If creditor has notice of the relation of principal and surety by agreement, and gives time to principal, surety is discharged.*

It seems to me that when Norton agreed with Lee and King to pay the note there was created between them the relation of principal debtor and surety, by virtue of which Lee and King became entitled to indemnity from Norton, if payment should be made by them on account of his default, and that they had the right to pay at any time after the debt matured, and bring suit at once against Norton for indemnity. The relation of principal and surety is fixed by the debtors without any action of the creditor. They have a right to arrange such relation between themselves at any time. No change is thereby produced on

the contract rights of the creditor; all the makers continue jointly and severally liable as when the note was signed. But when the creditor has notice that, by an arrangement between the makers, one or more of them has become entitled to the rights of a surety, he is as much bound, upon principles of justice, to regard those rights, and to do no act to abridge them, as if such makers had originally signed as sureties. In either case the discharge of the surety is always brought about by the act of the creditor, and not by a change of his contract rights under the note. In reference to accommodation makers, indorsers, etc., the law is too well settled to allow of discussion, that a valid agreement by the creditor to extend the day of payment without their consent discharges them. The reason upon which such rule rests, and its application to sureties to whom no injury has resulted, might not, at this day, bear the test of justice and common sense; but it is a doctrine too long sanctioned to be questioned in the courts. I cannot regard *Swire v. Redman* as resting upon reasons that ought to control this case.

§ 552. *Usury a good consideration for extension.*

The other question is as to the validity of the agreement to forbear, viz.: whether the payment of usurious interest constitutes a valuable consideration to uphold the agreement of plaintiff to give time. It is claimed that the \$15 paid for the extension of time was interest for the use of the money represented by the note, and was so much in excess of the highest rate allowed by law. Treating it as a sum paid for forbearance, it is interest. In Michigan, whenever parties so agree, ten per cent. is collectible; there is no positive prohibition against taking a higher rate, and a higher rate paid cannot be recovered back from the creditor. The statute provides that no contract whereby a greater rate of interest is directly or indirectly reserved or received than is allowed by law, shall thereby be rendered void; but in an action to recover upon such usurious contract, the plaintiff, subject to certain exceptions, shall have judgment for the principal and legal interest only, exclusive of the usury. The courts are nearly uniform in their judgments that a *promise* to pay usurious interest will not uphold an agreement to forbear, because the promise cannot be enforced, though it was held otherwise in *Wheat v. Kendall*, 6 N. H., 504. But when the usurious sum has been paid, learned judges differ whether there is a consideration to uphold the agreement or not. In New York and Vermont the statute declares contracts tainted with usury to be void; and if usury has been paid, it can be recovered back, with a penalty against the taker. In the former state it was held by two judges, without dissent from the other two, that payment of usury does not afford a consideration. *Vilas v. Jones*, 1 N. Y., 274. In Vermont, on the other hand, a united court has repeatedly held the other way. *Turrill v. Boynton*, 23 Vt., 142; *Burgess v. Dawey*, 33 Vt., 618. In South Carolina and Missouri such contracts are not void by statute, and in both it has been held that usury paid will not uphold an agreement to forbear. *Cornwall v. Holly*, 5 Richardson (S. C.), 47; *Bank v. Harrison*, 57 Mo., 503. Plaintiff's brief also cites 1 J. B. Lee (Tenn.), 360; 48 Me., 35; 12 Kan., 500. In Wisconsin it was decided, in *Meswinkle v. Jung*, 30 Wis., 361, that usurious interest paid was not a sufficient consideration; but in a recent case the earlier decision has been overruled. *Hamilton v. Prouty*, 7 N. W. Rep., 659, 3 Wis., 291. In Kentucky, Indiana, Illinois and Ohio, the statute, like that of Michigan, does not make the contract void, and the decisions are uniform that usurious interest paid is a valuable consideration and upholds the agreement to forbear. *Kunningham v. Bradford*, 1 B. Monroe, 325; 8 B. Monroe, 382;

Cross v. Wood, 30 Ind., 378; 3 Ind., 346; 15 Ind., 115; 17 Ind., 202; *Whittemore v. Ellison*, 72 Ill., 301; 73 Ill., 170; 78 Ill., 257; *McComb v. Kitteridge*, 14 Ohio, —. See 1 Pars. on Notes and Bills (2d ed.), 240.

It is not believed that courts of justice, where the statute declares that usury shall not render a contract void, ought to allow the usurer to plead successfully want of consideration to defeat his agreement, when he has received and appropriated the money of his debtor. It is manifest that the money paid by Norton cannot, under the law of this state, be recovered back by him, and none of the other defendants have any claim upon it. Usury is a personal defense to be interposed by the debtor, or by those who, by reason of interest acquired in the subject matter, are entitled to employ his defenses. 1 Mich., 84; 11 Mich., 59. I agree with opinions in some of the cases that he who accepts usury as consideration for his agreement is estopped from claiming want of consideration. It is no offense, and is not wrong *per se*, to take usury, and there is no justice in saying that money, because received as usury, has no legal value. Usury laws are designed as a protection to the debtor class, and not as a shield for the usurer. After Lee and King have pleaded the validity of the agreement to forbear, their right to have the \$15 applied as a payment on the note is waived, if such right ever existed. But the right exists only when the payment is usury, and I do not see why the \$15 may not be regarded as so much paid by way of interest in advance, rather than have the agreement fail for want of consideration, though I have treated the payment as usury, as was claimed and argued on both sides. Lee's letter to plaintiff, expressing a hope that he would "not make any expense," does not appear to have been acted on by plaintiff; but I infer from facts in the case, he did make expense by suit subsequent to the date of Lee's letter, which suit was discontinued after the agreement to extend the payment. However that may be, the letter is not consent to an agreement to extend the day of payment for a year, and does not prevent Lee from insisting on the defense that he is discharged. Judgment of no cause of action will be entered in favor of defendants Lee and King, and in favor of plaintiff, and against all other defendants, for \$1,994.54 damages, and for costs of suit, to be taxed.

VIOLETT v. PATTON.

(5 Cranch, 142-154. 1809.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This case comes on upon two exceptions; one to the opinion of the circuit court given to the jury, and the other to the refusal of that court to give an opinion which was prayed by the counsel for the defendant below. The declaration contains two counts; one upon the indorsement of a promissory note, and the other for money had and received to the plaintiff's use. The question arising on the first bill of exceptions is whether the court erred in directing the jury respecting the liability of the defendant below on the indorsement which was the foundation of the action. The indorsement was made before the note was written, and it appeared that the body of the note was filled up by Patton. The opinion of the court was that if the jury should be satisfied from the testimony that Violett indorsed this paper for the purpose of giving Brooke a credit with Patton, and that, upon the faith of the

note so drawn and indorsed, Patton did credit Brooke to the amount thereof, the circumstances that the note was made subsequent to the indorsement, without any consideration from Brooke to Violet, and was filled up by the plaintiff, did not bar the action; and, further, that the said Brooke was to be considered as authorized by the said Violet to make the note to Patton. This opinion is said to be erroneous; because, 1. The indorsement was made without consideration. 2. It was made on a blank paper. 3. There was no memorandum of the agreement in writing.

§ 553. *Loan is a sufficient consideration for an indorsement on a blank sheet of paper.*

In support of the first point the counsel for the plaintiff in error have cited several cases, intending to prove that an indorsement made without consideration, though it transfers the paper to the indorsee, creates no liability in the indorser; and that a promise in writing, made without consideration, is void. So far as respects the immediate parties having knowledge of the fact, and so far as relates to an indorsement under the statute of Virginia, this is correct; but the real question in the cause is, does the testimony prove a sufficient consideration for the promise created by the indorsement? This is not intended to comprehend any writing on which an action of debt is given. To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction. In the common case of a letter of credit given by A. to B., the person who, on the faith of that letter, trusts B., is admitted to have his remedy against A., although no benefit accrued to A. as the consideration of his promise. So in the present case, Patton trusted Brooke on the credit of Violet's name, and Violet wrote his name for the purpose of giving Brooke that credit with Patton. It was, in effect, and in intention, a letter of credit. The case shows that this was both the intention and the effect of Violet's giving his name to Brooke. In conscience, and in substance, then, it is a letter of credit, upon which the money it was intended to secure was advanced; and although in point of form the transaction takes the shape, and was intended to take the shape, of an indorsement, yet, so far as respects consideration, the indorsement has the full operation of an undertaking in the form of a letter of credit. It is common in Virginia for two persons to join in a promissory note, the one being the principal and the other the security. Although the whole benefit is received by the principal, this contract has never been considered as a *nudum pactum* with regard to the security. So far as respects consideration, no difference is perceived in the cases. Violet has signed his name upon this paper for the purpose of giving Brooke a credit with Patton, and his signature has obtained that credit. The consideration is precisely the same, whether his name be on the back or the face of the paper.

§ 554. *Indorsement may precede making of note.*

2. The second objection is, that the indorsement preceded the making of the note. This objection certainly comes with a very bad grace from the mouth of Violet. He indorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the indorser of that note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it. It would be to protect himself from the effect of his promise, by alleging a fraudulent combination between himself and another to obtain money

for that other from a third person. The case of *Russell v. Langstaffe*, reported in 2 Doug., 514, is conclusive on this point.

§ 555. *Agreement as to indorsement on blank piece of paper need not be written.*

3. The third objection is, that there was no memorandum of the agreement in writing. The argument on this point is founded on the idea that the statute of frauds in Virginia is copied literally from the statute of Charles II. This is not the fact. The first section of the act of Virginia differs from the fourth section of the statute of Charles II. in one essential respect. The statute of England enacts that no action shall be brought, in the cases specified, "unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The Virginia act enacts that no action shall be brought in the specified cases, "unless the promise or agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The reasoning of the judges, in the cases in which they have decided that the consideration ought to be in writing, turns upon the word *agreement*, of which the consideration forms an integral part. This reason does not apply to the act of Virginia, in which the word "promise" is introduced. It was thought proper to notice this difference between the act of parliament and the act of Virginia, although the opinion of the court is not determined by it. In this case the assignment does express a consideration. It is made for value received. It is unnecessary to decide, in this case, whether the declaration ought to have alleged that the indorsement was made on consideration. With that question the jury had no concern, and the direction of the court was not affected by it. There being no demurrer, it could only occur in arrest of judgment. But on a motion in arrest of judgment, the defendant below could not have availed himself of this error, if it be one, because there are two counts in the declaration, one of which is unquestionably good, and the court cannot perceive on which the verdict was rendered. By the act of *jeofails* in Virginia there is no error if any one count will support the judgment.

The second exception is to the refusal of the circuit court to give the opinion prayed for by the counsel for the defendant below. When the error alleged is not that the court has misdirected the jury, but that the court has refused to give a particular opinion, the opinion demanded must be so perfectly stated that it becomes the duty of the court to give it as stated. In this case, the opinion required by the counsel consists of two parts. The first is to instruct the jury "that if they shall be satisfied, from the evidence, that Richard Brooke, the maker of the note in this case, had, at the time the note became due, or at any time previous to the commencement of this suit against the defendant, property sufficient to pay the debt claimed," etc., and the plaintiff brought no suit, then this action is not maintainable. This court conceives that the circuit court ought not to have given this opinion. Had Richard Brooke possessed property before the making of the note, and not afterwards, the opinion, in the terms in which it was required, would have been a direction to find their verdict for the defendant. So, if Richard Brooke had been in possession of property for a single day, and had the next day become insolvent, the court was asked to say that, in such a case, the indorser could only be made liable by suit against the maker. Such a direction, in the opinion of this court, would have been improper.

The second branch of the opinion the circuit court was required to give is in these words: "Or if the jury shall be satisfied that the said plaintiff and the

said Brooke have, since the said note became due, both lived in the county of Fairfax, in Virginia, and have continued to reside in the county of Fairfax until the beginning of the present suit, and the plaintiff hath not brought suit against the said Brooke in Virginia, then the defendant is not liable in this action." If the plaintiff had sued Brooke elsewhere than in Virginia, or if Brooke had become insolvent previous to the making of the note, and had continued to be so, the opinion of the court, if given as prayed, would have been that, still, a suit against the maker of the note was necessary to give a right of action against the indorser. This is not understood to be the law of Virginia. It is understood to be the law that the maker of the note must be sued, if he is solvent, but his insolvency dispenses with the necessity of suing him. It is not known that any decision of the state courts requires that this insolvency should be proved by taking the oath of an insolvent debtor, nor is it believed that this is the only admissible testimony of the fact of insolvency. Other testimony may be admitted. It would therefore have been proper to leave it to the jury to determine whether it was, at any time, in the power of the plaintiff to have made the money due on this note, or on any part of it, from the maker by suit; and their verdict ought to have been regulated by the testimony in this respect. This opinion was not required.

This court is of opinion that there is no error, and that the judgment is to be affirmed with costs.

HOW v. KEMBALL.

(Circuit Court for Illinois: 2 McLean, 103-111. 1840.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought by the plaintiffs as assignees of the following note:

"On the 20th of August, 1838, we jointly and severally promise to pay James Kinza, or order, the sum of three thousand nine hundred dollars, with seven per cent. interest per annum from the date hereof, for value received of him.

"MARK BEAUBIEN, Jr.,

"MARK BEAUBIEN, Sen.

"*Chicago, August 20, 1837.*"

Indorsed: "I assign the within note to Benjamin Harris, without any recourse on me. October 10, 1837. James Kinza."

"I hereby guaranty the payment of the within note, unconditionally. Benjamin Harris."

"We guaranty the payment of the within note at the Chicago branch of the State Bank of Illinois. Kemball & Porter, A. Garrett, George W. Dale."

In the first count in the declaration the plaintiffs, who are the last assignees, set out the note and the assignments, and aver that, when the note became payable, the said Mark Beaubien, Jr., did not reside in Illinois, but in Michigan; and that, the 24th August, 1838, at the city of Chicago, the said plaintiffs instituted a suit on the note against Mark Beaubien, Sen., against whom judgment was entered. That execution on the judgment was issued, which was returned no property. The second count contains the assignments and the note, etc., as the first count. The third count contains the note, the assignments, and avers that the defendants assigned, and then and there guarantied the payment of the said note, on the day it should fall due, and payable at the Chicago branch of the State Bank of Illinois, etc. And that when the note be-

came due suit was brought, etc. The fifth count sets out the note, the assignments, and avers that the defendants promised to guaranty, and did guaranty, the same, as above, etc. The sixth and seventh counts are substantially the same as above. The defendants pleaded the general issue. And, on the trial, an objection was made to the introduction of the note, and the indorsements thereon, on the ground that, in the first and second counts, the assignments of the note, merely, are set out, whilst the indorsement, under which the plaintiffs claim, is a guaranty to pay the note at the Chicago branch of the State Bank of Illinois. And this guaranty, it is contended, is not evidence under the other counts, because the action is not brought on it, and no consideration for the guaranty appears either on its face, or from the averments in the declaration.

§ 556. *Nature of the contract of guaranty.*

The indorsement of the note by the defendants to the plaintiffs is not a mere assignment of the note, but the indorsers guaranty the payment of the amount, when due, at a specific place. This created a liability somewhat different from that which the law implies from an ordinary indorsement. On the face of the note no place of payment is designated. The indorsement, then, changes the place of payment, and binds the indorsers as guarantors for the amount. This, to some extent, at least, must be considered a new contract; a contract which can only be enforced by the plaintiffs with whom it was made. Had they assigned the note, this guaranty, by the defendants, would not have passed to the assignee, as would a guaranty given at the creation of the note. It was a new contract, so far as a different liability from a simple indorsement was incurred, not incorporated in the note, nor transferable by its indorsement. In the case of the *Oxford Bank v. Haynes*, 8 Pick., 423, it was held that where upon a promissory note, made by S. and A. to the plaintiffs, were written the words, "I guaranty the payment of the within note," which were signed by the defendant, that he was a guarantor, and not a surety. If the indorsement of the defendants be considered a guaranty, the action must be upon it as a special agreement, or upon the consideration which induced the defendants to enter into it. 2 Cox., 172; 2 Bro., 66, 614; 2 Schoales & L., 112; Chitt. on Bills (ed. 1839), 373. The third count in the declaration, and in the counts that followed it, set out the guaranty, and the breach, etc.

§ 557. *The consideration of a guaranty need not be stated.*

And here a question is raised, and elaborately argued, whether this guaranty is binding, as it states no consideration. That this is an undertaking by the defendants to pay the debt of another, which by the statute of frauds must be in writing; and that, as a consideration is essential to the validity of every such agreement, it must be stated in the agreement. The statute of frauds of this state, in regard to this question, is, substantially, copied from the 29 Car. 2, ch. 3, sec. 4. "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or of some other person thereunto by him lawfully authorized." Whether the consideration constitutes an essential part of the agreement, which, by the act, must be in writing, is a question that has been much discussed in England and in this country, and upon which courts have differed in their decisions. Until the decision of the case of *Wain v. Warlters*, 5 East R., 10, was decided, Lord Ellenborough said, "we had always taken the law to be clear, that if a man agreed, in writing, to pay the debt of another,

it was not necessary that the consideration should appear on the face of the writing; and so understanding the law we have no authority or disposition to change it." The action of Wain and another was brought against Warlters, as the assignees and holders of a bill of exchange, drawn by one Gore, and accepted by one Hall, which was due, and for the payment of which the defendant gave the following promise in writing: "Messrs. Wain & Co., I will engage to pay you by half-past four this day, fifty-six pounds and expenses on bill, that amount on Hall." On this promise the plaintiffs alleged that they stayed proceedings, etc.; but the court held that it was not binding, as the consideration, which was a part of the agreement, was not stated in it. That without a consideration the agreement was inoperative, and that they might as well hear parol proof of the promise as the consideration. This decision has been much examined in England, and in several late cases has been confirmed. And particularly in the cases of *Saunders v. Wakefield*, 4 Barn. & Ald., 595; *Jenkins v. Reynolds*, 3 Brod. & B., 14; *James v. Williams*, 5 Barn. & Ad., 1109; *Clancy v. Piggott*, 2 Ad. & Ell., 473.

The same doctrine has been sanctioned in the cases of *Leonard v. Vredenburg*, 8 Johns., 29; *Lanson v. Wyman*, 16 Wend., 246. It has been denied in the cases of *Hunt v. Adams*, 5 Mass., 358; *Packard v. Richardson*, 17 Mass., 122; *Levy v. Merrill*, 4 Greenl., 180; *id.*, 387; *Sage v. Wilcox*, 6 Conn., 81; *Miller v. Irvine*, 1 Dev. & B., 103; 5 Cranch, 151-2. In *Ex parte Minet*, 14 Ves. Jr., 189, Lord Eldon said there was a variety of authorities directly contradicting *Wain v. Warlters*; and in *Ex parte Gardom*, 15 Ves. Jr., 286, he says, "until that case was decided I had always supposed the law to be clear, that if a man agreed, in writing, to pay the debt of another, it was not necessary that the consideration should appear in the writing." On reading the late English decisions on this subject, I cannot perceive the conclusiveness of the reasoning of the judges. Nor can I perceive the danger of subverting the object of the statute, by adhering to what Lords Eldon and Ellenborough considered, before the decision of *Wain v. Warlters*, its settled construction. And it will be found that in some of the latest decisions in the queen's bench, if the above case has not been departed from, its principles have not been very strictly adhered to. An individual agrees, in writing, to pay the debt of another. It is admitted that without a consideration such an agreement is not binding. But why may not the consideration be proved by parol? This, the court say, would open the door to fraud, which the statute of frauds intended to close. That as no agreement is valid without consideration, therefore the consideration is an essential part of the agreement, and must be in writing. So a consideration is essential to the validity of a deed; and yet, where the deed upon its face expresses no consideration, one may be proved by parol. *Peacock v. Monk*, 1 Ves., 128; *White v. Weeks*, 1 Penn., 486; *Davenport v. Mason*, 15 Mass., 85; *Hartley v. M'Anulty*, 4 Yeates, 95. "No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough that the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffers inconvenience, as an inducement to the surety to become guaranty for the debtor." *Com. on Contracts*, 242.

In the case of *Newbury v. Armstrong*, 6 Bing., 201, the court held that the consideration sufficiently appeared on the following guaranty: "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ to the amount of £50." Mr. Justice Bur-

rough observed, "whatever is necessarily implied may be taken to be in the instrument." And Chief Justice Tindall remarked, "we ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." In the case of *Davies v. Wilkinson*, decided in the queen's bench, May, 1839, and reported 1 Jurist (Am. ed.), 372, the court held the following instrument valid: "I agree to pay to Mr. C. Davies, or his order, £695 at four instalments, viz., £200 on June 10, 1833; £150 on the settling-day, after the St. Leger, at Doncaster; £150 on the settling-day, at Epsom, in 1834; £100 on the settling-day, after the St. Leger, in 1834; the remaining £95 to go as a set-off for an order of Reynolds to Mr. Thompson, and the remainder of his debt owing from Mr. C. Davies to him." Lord Denman observes, "this instrument is a note, up to a certain point, but the addition makes it an agreement. As to the second objection, that, if it be an agreement, there is no consideration on the face of it, I think the promise in this case conveyed by the words, 'I agree to pay,' imports consideration." How these words import a consideration more than the words, I promise to pay, is not perceived. The court seem to feel the practical inconvenience of their former decisions on this subject, and, without overruling them expressly, are desirous of escaping from their consequences.

§ 558. *The consideration may be the taking of the paper guarantied.*

But in deciding the question now before the court, it appears to me there need be no conflict with the English decisions. The guaranty here is by the defendants as indorsers of the note to the plaintiffs. The defendants are the assignees of the note, and they assign it to the plaintiffs. Now an ordinary indorsement, as between the indorser and the indorsee, is evidence under the general count for money had and received. And this effect is given to the indorsement although in fact money may not have been the consideration passing between the parties. Now, is not the transfer of this note by the defendants to the plaintiffs, at the time of the guaranty, sufficient evidence of consideration? In the act of making the guaranty the property in the note is assigned. And does not this import a consideration? The guarantors are not only parties to the note, but the responsibility they assume is the ground on which the plaintiffs purchase the note. There is, says Com. on Contracts, an important distinction between a collateral guaranty on a separate paper, or without indorsement, that a bill shall be duly paid by the parties thereto, and the act of indorsing the instrument. The collateral guaranty is void unless it be in writing and signed, and be given upon a sufficient consideration. Where the guaranty or promise to pay the debt of another is made at the same time with the contract to which it is collateral, is incorporated into it, and becomes part of it, the whole is one contract, and the want of consideration, as between the plaintiff and the guarantor, cannot be alleged. *Leonard v. Vredenburg*, 8 Johns., 29. And much less can a want of consideration be alleged by an assignor who in assigning a note guaranties the payment of it. This case is much stronger than the one cited from Johnson. The guarantor in that case, at the time the note is executed, guaranties its payment. He had no beneficial interest in the note, but was the mere surety of the maker. And as this was done at the time the note was given, the act of guaranty became incorporated in the note and constituted a part of it. The note may have been received on his credit, and he shall not set up a want of consideration. The same reason applies with greater force against the defendants. Their guaranty was not only an inducement to

the plaintiffs to receive the note, but they were the holders and owners of the note, and as such were interested in selling and transferring it to the plaintiffs. They, it is true, undertake to pay the debt of the drawers of the note, but they do so that they may pass the note to the plaintiffs more readily, and at its full nominal value. If this be not the clear import of the transaction, both from the language of the guaranty, connected with the note, and the assignment of it, and the averments in the declaration, I have failed to comprehend the subject. Where the party himself is benefited by the transfer, says Chitty on Bills (ed. 1839), 272, it should seem that even his verbal promise would be valid. I cannot doubt that the defendants, under the circumstances of this case, cannot allege a want of consideration, and I think the guaranty is sufficiently set out in the third and other following counts. The district judge, however, entertaining some doubts as to the sufficiency of the averments of the declaration to admit the evidence, a proposition was made to certify the point to the supreme court, under the act of congress. But the plaintiff's attorneys, to avoid delay, asked leave to amend the declaration, which was granted.

RUSSELL v. PERKINS.

(Circuit Court for Massachusetts: 1 Mason, 363-371. 1818.)

STATEMENT OF FACTS.—*Assumpsit* on an agreement made in 1802 to guaranty the notes of Sturgis, who gave notes exceeding \$10,000 in 1803, and in 1804 formed a partnership with Lovell, which continued until 1816, during which time S.'s individual notes were taken up and firm notes were given in renewal of them. These notes were renewed from time to time until the dissolution, upon which they were taken up and replaced by S.'s individual notes. These were paid by the plaintiff, who sues defendant on his guaranty.

Opinion by STORY, J.

§ 559. *A guaranty of the notes of A. cannot be applied to the notes of A. and B.*

I am of the opinion that the plaintiff is not entitled to recover. Independently of every other objection, it is decisive against the plaintiff that the case is not brought within the terms of the guaranty. The guaranty cannot in reason be construed beyond the plain and obvious import of its language. The letter imports that the defendants will guaranty any notes indorsed by the plaintiff for Mr. Sturgis, to the amount of \$10,000. It does not cover any notes indorsed for the firm of Sturgis & Lovell. Nothing can be clearer than that a guaranty of the notes of A. cannot be applied to the notes of A. and B. It is wholly unimportant to the defendants whether the notes would have been more or less safe under such circumstances. They have a right to stand upon the terms of their contract, and declare *non in hac fœdera venimus*.

§ 560. *Notes are extinguished if taken up when due and replaced by new ones.*

The original notes of Sturgis, indorsed by the plaintiff under the guaranty in 1803, were taken up and extinguished by the new partnership notes, indorsed by the plaintiff. When once extinguished, the title under the guaranty was gone, and a continuing liability could not be afterwards created without the express or implied consent of the defendants. The notes on which the present action is brought were indeed made by Sturgis, and indorsed and paid by the plaintiff. But there is no pretense that they were made upon the faith of the guaranty.

Supposing they were now for the first time made, after so great a lapse of time, upon a new consideration, the defendants would not be liable on their guaranty; for the guaranty could not be applied to indorsements made for the first time at such a distance of time. Much less could these notes be sustained under the guaranty, when they were made for the express purpose of changing partnership transactions into individual negotiations, so as to shape a case within the terms of the guaranty. If, indeed, these notes could be referred back (as they certainly cannot be) to the original transactions in 1803, the facts would be equally fatal to the plaintiff, for he would be guilty of gross laches in not giving notice of the indorsements to the defendants during the space of twelve years, and in giving credit to the firm during all that time, without any communication with the defendants, on account of debts incurred under the guaranty. It is not, however, necessary to dwell on this view of the cause, because it is plain that the original notes of Sturgis, in 1803, to which alone the guaranty ever attached, were duly paid and extinguished, as they became due, at the several banks, by the substitution of new notes in the partnership name, which the defendants never undertook to guaranty.

Verdict for the defendants.

LEWIS v. BREWSTER.

(Circuit Court for Michigan: 2 McLean, 21-27. 1839.)

Opinion by the COURT.

STATEMENT OF FACTS.—To the four special counts in the declaration the defendant demurs, and takes issue on the common counts. The questions in the case arise on the demurrer, and there are some objections as to the manner in which the instrument is set out; but as the main point appears in the declaration, it is proper to advert to the obligation on which the action is founded. It is as follows: "July 27, 1838. I do hereby guaranty the eventual payment to George W. Lewis, of Boston, Mass., of the following named notes or obligations, given by Mead, Kellogg & Co., to the order of said Lewis, and payable at the Commercial Bank in the city of New York, viz.: One note for \$1,666.55, due two months from date; one note for \$1,666.39, due three months from date; one note for \$1,686.34, due four months from date; one note for \$1,689.37, due five months after date; one note for \$1,722.30, due six months from date, which said notes are given by said Mead, Kellogg & Co., to said Lewis, in payment for his account against them, which account is this day settled in full, as above. The above is done for a valuable consideration." Signed, "William Brewster."

§ 561. *Consideration essential to sustain a guaranty; but it may be credit given to the guarantor's principal.*

It is objected to the first count that it does not set forth a consideration for the undertaking of the defendant. But this objection seems not to be well founded. In the first count it is alleged that, in consideration the plaintiff, at the special request of the defendant, would sell and deliver to Mead, Kellogg & Co., merchandise to the amount of \$8,040.95, the defendant promised, whether in writing or not does not appear, to guaranty the payment of certain notes to be given by the purchasers for the same. And the plaintiff avers that the merchandise was sold, the notes taken on the 27th July, 1838, and that on the same day the defendant, in writing, guarantied the eventual payment of the same. Now it sufficiently appears in the declaration that the merchandise

was sold on the promise to guaranty the payment of the notes to be given, and that the guaranty was executed in pursuance of this promise. Here was a confidence and trust reposed in the defendant, which induced the plaintiff to sell the goods, and this constitutes a consideration for the guaranty.

§ 562. *Notice of acceptance of promise to guaranty not necessary, when.*

But it is alleged that the promise to guaranty the notes, not being in writing, was void, and that the declaration does not show that the defendant had notice of the acceptance of his guaranty. And the cases in 7 Pet., 113, and 12 Pet., 497, are referred to. These cases, however, as it regards the notice of the acceptance of the guaranty, are not analogous to the present one. This is a guaranty of the payment of certain notes specified, and, of course, is a recognition of the obligation of the original promise. It admits every legal requisite necessary to give effect to the obligation. Under the written guaranty now before us, there could be no notice of acceptance, for the execution of the instrument shows an acceptance.

§ 563. *Doctrine of consideration.*

That there must be a consideration to make a guaranty obligatory is admitted. But this consideration is generally found in the credit given to the guarantor, which induced the vendor to part with his property. If it be admitted that the guarantor was not discharged from his promise, it is contended the count is defective in not averring that the guaranty was in consideration of this liability. 4 John., 280. That the guaranty was given in consideration of the sale of the goods on the promise of the guarantor to be responsible, though not in terms averred, sufficiently appears from the facts stated in the first count. A special averment of this fact would have been more technical, and more, perhaps, in conformity to the correct rules of pleading; but it would not have given greater point or certainty to the count.

§ 564. *Guarantor is entitled to notice of default.*

That the holder of the notes was bound to use diligence is a doctrine well established; but it is not necessary to consider this point in reference to the commencement of suits on the notes and the proper averments in relation to the same, which it is contended are not to be found either in the first or the second, third and fourth counts. We will come at once to the great question in the case, which is, whether the holder of the notes was bound to give notice to the guarantor of their dishonor; and if this shall be resolved in the affirmative, whether the declaration should contain an averment that notice was given. This description of obligation is common in commercial transactions, and the principles which govern it have often come under judicial cognizance. On the part of the plaintiff it is contended that no notice was necessary, and that it is matter of defense for the defendant to show the damages he has sustained for want of notice. And to sustain this position 2 Hall's Rep., 199; 9 East, 348; 1 Holt's N. P., 153; 3 Moore, 15; 6 Moore, 521; 3 Brod. & Bing., 211; 1 Bing., 216; 2 Camp., 436; 10 Pet., 482, are cited. These are cases in which a notice to the guarantor need not be given, as where the drawer of the note guarantied is insolvent when it becomes payable; and in such a case it is matter of defense for the defendant to show that he has suffered damage for want of notice. It is a well established rule that the same degree of strictness in regard to giving notice to a guarantor is not necessary to charge him as to charge an indorser; and there are English authorities which favor the position taken by the plaintiff that the inquiry is whether the guarantor has been injured by want of notice. But the weight of authority in the English books

is against the position assumed, and in this view the American authorities are still stronger.

The undertaking of the guarantor is collateral, as much so as that of the indorser of a bill; and the reason for a notice to him is as strong as to an indorser. And if commercial convenience has dispensed with the same strictness in the former as in the latter, it still requires a reasonable notice. It is as necessary that the guarantor should endeavor to obtain an indemnity from his principal as an indorser; and it is on this ground that a notice is as indispensable in the one case as the other. In the case of *Reynolds v. Douglass*, 12 Pet., 498, the court say: "In this part of the record the question is fairly raised whether the insolvency of Haring, prior to or at the time of payment, will excuse the plaintiffs from making a demand on him and giving notice to the guarantors." And after referring to 9 Serg. & Rawle, 198; 1 Barn. & Cress., 10; 8 East, 242; 3 Kent's Com., 123; 2 Taunt., 206; 5 M. & S., 62; 3 Barn. & Cress., 439, the court remark: "The rule is well settled that the guarantor of a promissory note whose name does not appear on the note is bound without notice where the maker of the note was insolvent at its maturity." And again, in their opinion, the court say, in reference to the charge of the circuit court to the jury, "in their fifth and last instruction, the court charge the jury, that, to enable the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment, notice should have been given in a reasonable time to the defendants; and on failure of such proof the defendants are in law discharged." "This instruction, the court remark, rests upon the necessity of a personal demand of Haring by the plaintiffs. It has been already shown that this demand was unnecessary in case of Haring's insolvency." From this opinion it is clear that the court considered a notice to the guarantor of the dishonor of the note guaranteed indispensable, except in case of insolvency. But that where an insolvency at the maturity of a note is established, neither a demand nor notice is necessary. The same doctrine is laid down in the cases of *The Oxford Bank v. Haynes*, 8 Pick., 423; *Garrow v. Gills*, 9 Serg. & R., 202; *Greene v. Dodge*, 2 Ohio, 498; *Grice v. Ricks*, 3 Dev. Ala., R. E., 2; *Douglass v. Reynolds*, 7 Pet., 113.

There are some apparently contradictory decisions to those in the New York and other reports; but on a strict examination, they will be found, in general, to affirm the same principle. Where the guarantor has been held liable, without notice, it has been where the maker of the note guaranteed was insolvent when it became payable, or on account of a liability growing out of the original transaction. The undertaking of the guarantor in the present case was, not to pay absolutely or unconditionally, but to pay eventually; that is, if payment could not be obtained of the drawers. His undertaking was then conditional, and a notice of the happening of the condition which was to make his obligation absolute was necessary; and this we consider is the well established doctrine sanctioned by the supreme court. If the parties who ought primarily to have paid the bill or note were solvent at the time the same became due, and for some time afterwards, and only subsequently became insolvent, before notice or inference of actual damage from the want of notice to the party guarantying, or otherwise collaterally liable, will prevail until rebutted by actual proof, that if notice had been given payment would not have been obtained. *Chitt. on Bills* (ed. 1839), 474; *Philips v. Astling*, 2 Taunt., 206; *Holbrow v. Wilkins*, 1 Barn. & Cress., 10; *Bridge v. Berry*, 3 Taunt., 130;

Bishop v. Rowe, 3 Maule & Selw., 362; Cory v. Scott, 3 Barn. & Ald., 619. If this notice was essential to fix the responsibility of the guarantor, was it necessary to aver it in the declaration specially; or, is the general averment in the counts demurred to sufficient?

§ 565. *Necessary averments in pleading to excuse defective notice.*

Everything necessary to give the plaintiff a right of action must appear in the declaration; and a notice being indispensable to this right must, of course, be averred. The omission of an averment of notice, when necessary, will be fatal on demurrer or judgment by default. Cro. Jac., 432. This defect may be avoided by a verdict, except against the drawer of a bill. 1 Strange, 214; 1 Saund., 228, a; 4 Binn., 108; 7 Serg. & R., 310. But a general averment in a declaration on a bill of exchange "of all which the said promises the defendants had afterwards, etc., had notice," is sufficient. 3 John., 207. The general averment in this case is the same in all the counts, and is, "of all which the said defendant, on the 2d of September, 1839, at Detroit, had notice." This notice, as averred, was more than seven months after the last note became payable, and was, in fact, about the time this suit was commenced. Had the averment been "of which premises the defendant had due notice," it might have been held insufficient, as, under such an averment, the fact of the notice, and the circumstances under which it was given, would be matter of evidence. But the notice averred is special, as to the time it was given, which was near a year after the first note became due, and, as before remarked, more than seven months after the last one was payable; and no excuse is alleged why it was not given before. There are circumstances which will excuse the want of notice, and these should always be stated in the declaration. Chitt. on Bills, 212, 319; 1 Salk., 214; Vin. Ab., title Notice, A. 2. If a notice be necessary it must appear in the declaration to have been given in due time, or the excuse for not giving it must be stated. The averment of a notice after the lapse of so long a period, unaccompanied by an excuse for the delay, does not show the diligence which the law requires. It is, in fact, nothing more than the general averment of notice, which refers to the commencement of the suit, and is used in some cases more as a matter of form than substance.

In this respect we think the declaration is defective; and without examining the other points made in the argument in support of the demurrer, we sustain it on this ground. Leave given to amend declaration.

DENNIS v. RIDER.

(Circuit Court for Illinois: 2 McLean, 451-453. 1841.)

Opinion by the Court.

STATEMENT OF FACTS.—This action is brought on a promissory note. The defendants pleaded *non-assumpsit* and four special pleas, substantially, that Pierson was the security of the other defendants. That he gave notice to the agent of the plaintiffs that the principals were in doubtful circumstances, and requested him to commence suit. That his co-defendants were then solvent, and able to pay the amount, but the plaintiffs neglected to bring suit until, etc., at which time their co-defendants became insolvent. To these pleas the plaintiffs' counsel demurred. In this state there is an act entitled "An act for the relief of sureties, in a summary way, in certain cases," approved 24th March, 1819, which provides that the surety may give notice to the promisee or holder of the note, in writing, forthwith to sue, etc., and if he shall fail to do so he shall forfeit the right to recover from the surety.

§ 566. *At common law creditor need not sue maker upon being requested so to do by surety.*

The pleas are not filed under this statute, but at common law. It is not pretended that the notice to the holder of the note was given in the manner required by the statute. To sustain these pleas the case of *Paine v. Packard*, 13 John., 173, is relied on. In that case it was said, if an obligee, or holder of a note, who is requested by the surety to proceed without delay and collect the money of the principal, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be exonerated. That case was decided without argument, and no authority was referred to except a decision in 10 East Rep., 34. In the case in East there was a plea filed similar to the pleas in this case, which was not demurred to. Lord Ellenborough said: The only question is, whether the laches of the obligees, in not calling upon the principal so soon as they ought to have done, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties. I know of no such estoppel at law, whatever remedy there may be in equity. The defendants' counsel, also, relies on the case of *King v. Baldwin*, 17 John., 384. That was an appeal from the decision of the chancellor, before whom relief was asked by a defendant, against whom judgment, as surety, had been obtained. He pleaded to the suit, at law, that the plaintiff neglected to bring suit, although specially requested, on the ground that his principal was about to become insolvent. The court overruled the evidence under the plea. A motion was made for a new trial, but not prosecuted. And on the ground that the promisee might have recovered from the promisor, had the suit been prosecuted as requested, the bill was filed praying relief. Chancellor Kent dismissed the bill on the ground that the complainant was entitled to no relief. He examined the doctrine at large, and maintained that there could be no relief at law, and that the circumstances of the case entitled him to none in equity. In the court of errors Judge Spencer reviews the opinion of Chancellor Kent, and reaffirms the doctrine in the case of *Paine v. Packard*. The judges who decided that case were Thompson, Ch. Justice, Spencer, Vanness, Yates and Platt. The court of errors being equally divided, the presiding officer reversed the decision of the chancellor. Platt, Justice, changed his opinion, being convinced that the decision in *Paine v. Packard* was erroneous. Yates concurred with him, and, if I mistake not, Vanness.

In the case of *The Bank of Steubenville v. Administrators of Carroll*, 5 Ham., 207, the defendant pleaded that he signed as surety, etc., to which the plaintiff demurred, and the court decided that, if any change be made between the creditor and the surety, it discharges the surety, and that his defense may be set up at law as well as in equity. A case is cited in 14 Wend., 165, in which it was held that a notice to the agent of the promisee to prosecute the principal, by the surety, was sufficient. The rule in New York may be considered, perhaps, as settled by the decision above cited in the court of errors. A decision in that court establishes the law for the state of New York; but it is believed that, beyond the jurisdiction of that state, the decisions of the supreme court are chiefly consulted as authority.

§ 567. *Indorser discharged by giving the maker time.*

The rule is well established that where an indorser has become fixed by demand and notice, if the holder of the bill shall, for a valuable consideration, agree with the drawer or acceptor to give him more time, it discharges the indorser. *McLemore v. Powell*, 12 Wheat., 554; *Bank of United States v. Hatch*,

1 McL., 90; Same Case, 6 Pet., 250. This is upon the ground that the surety has a right, at any time after the bill becomes payable, to pay the holder, and be substituted to all his rights. Not that he is entitled, as has been ruled by several courts, to an assignment of the bill, because that is discharged by the surety, but he is entitled to all the collateral securities, such as mortgages, pledges of personal property, etc., which the creditor may hold. But if the creditor make a contract to extend the time of payment, this suspends this right of the surety, and he is consequently released. And so if the creditor, without the consent of the surety, changes the nature of the obligation of the principal in any respect. In these cases relief may be had at law. The question is not whether the surety has, in fact, been injured, but whether his right to pay the bill or note has not been suspended; or whether the contract has not been materially altered by the creditor and principal. But until the case of *Paine v. Packard*, in 13 Johns., and *The Bank of Steubenville v. Administrators of Carroll*, 5 Ham., no case has been found where relief to a surety beyond this has been given at law. The case of *Paine v. Packard* introduced a new rule. It was so considered by many of the most learned and able men who gave opinions in the case of *King v. Baldwin*, in 17 Johns. And this rule is essentially different from the one which, prior to that time, had been recognized at law. That was founded upon an essential change of the contract, either as to the time of payment or the acts to be done, without the assent of the surety. But the case of *Paine v. Packard* held, if the creditor neglected to prosecute the principal, on being required to do so by the surety, and the principal proved to be insolvent, the surety was discharged. And this without any indemnity offered by the surety, as to the costs incurred.

§ 568. *Diligence by creditor to bind surety.*

Now the rule has been, at law, that the creditor, beyond demand and notice, is not bound to active diligence; and there seems to be reason in this, for the surety confided more in the principal debtor than the creditor. The creditor, until the surety became bound, was unwilling to trust the principal. Now, if the creditor or the surety must be subjected to inconvenience and expense on account of this confidence, should it not fall upon the surety? He was the active agent in inducing the contract, and justice would seem to require that, to save himself from loss, he should again become active. And this is an established principle. In pursuance of former decisions he could pay the money and claim all the rights of the creditor, or he could file a bill, and, on the special circumstances of the case, ask the court to compel the creditor to bring suit. The New York rule, however, gives, at law, the same effect to a notice as results from a decree under the former rule. Now, the law having established the rule that a suit in chancery is necessary, it would seem not to be advisable to change it on mere notions of policy or convenience. But if this question were now open it might be considered a matter of doubtful policy to adopt the New York rule. There are many matters which, under that rule, it might become necessary to investigate, and which more safely and properly might be examined in chancery than at law. Complicated matters of fraud connected with the circumstances of the principal debtor might arise; the time of his insolvency, etc., which could not be well inquired into or understood without his answer, and his answer can only be required in chancery. In a plain case where the principal debtor was solvent when the notice was given, and afterwards became insolvent, it would seem the New York rule would be salutary. But such a case, it is presumed, would seldom occur. The former rule rested upon

the change of the contract. This was a matter of fact and of law which the jury, under the instructions of the court, could determine. But whether the surety had been injured by the neglect of the creditor to prosecute the principal debtor must often give rise to questions which can only be investigated in chancery. The old rule, therefore, seems to be safer and better than the new one; and this is, no doubt, the reason why the new rule has had so limited an influence.

Mr. Justice Story, in his *Equity Jurisprudence*, 1 vol., 592, sec. 639, says: If the debt is due and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility. In cases of this sort, he says, there is not, however, any duty of active diligence incumbent upon the creditor. It is for the surety to move in the matter. But if the surety requires the exercise of such diligence, and there is no risk, delay or expense to the creditor, or a suitable indemnity is offered against the consequences of risk, delay and expense, it seems that the surety has a right to call upon the creditor to do the most he can for his benefit, and if he will not, a court of equity will compel him. *Nesbit v. Smith*, 2 Bro. Ch., 579; *Hays v. Ward*, 4 Johns. Ch., 123. In the 322d page, sec. 327 of the same volume, Mr. Justice Story says: Whether the surety can thus compel the creditor to sue the principal or not, he has a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor as to all securities held by the latter for the debt, and to have the same benefit that he would have therein. *Longthorne v. Swinburne*, 14 Ves., 162; *Wright v. Morley*, 11 Ves. Jr., 12, 22. In the case of *Wright v. Simpson*, 6 Ves. Jr., 734, Lord Eldon admits that the surety might have a right to compel the creditor to proceed against the debtor under some circumstances. But then, in such a case, the surety is compellable to deposit the money in court for the payment of the creditor. So that in fact it is but the case of an indirect subrogation to the rights of the creditor, upon a virtual payment of the debt by such a deposit.

§ 569. *What indulgence to principal will release surety.*

A surety in a bond will be released when the obligee does some act which varies the terms of the original contract; but forbearance to sue is not such an act, and if the surety think otherwise, he should apply to the court of equity and compel the obligee to sue. *Burn v. Poang*, 3 Desaus., 604. The indulgence granted to a principal, which is to discharge from his engagement, must be of that kind whereby the value of the contract is changed, or whereby the creditor, without the consent of the surety and by his own act, puts it out of his own power to enforce the payment of the debt by the principal. It does not mean a mere forbearance to sue the principal, which a court of equity, on application of the surety, might direct him to do, on pain of foregoing his claim against the surety. *Buchanan v. Bordley*, 4 Har. & McH., 41. A surety, apprehending danger from the delay of the creditor, may come into this court and compel the creditor to sue the principal debtor on giving an indemnity against the consequences of risk, delay and expense. *Hayes v. Ward*, 4 Johns. Ch., 129. To require the creditor to sue the principal on a mere notice of the surety, without an indemnity, when the surety could not be included in the suit, would seem to be unreasonable. Upon the whole, we think that the case of *Paine v. Packard* is not sustained by authority, and, on principle, it is not recommended by such considerations of policy as should lead

to the adoption of the rule sanctioned by it. We think it safer to follow the old rule, which is well established in practice. The demurrer to the pleas is sustained. Judgment for the plaintiff, with stay of execution until the next term, by consent, etc.

ROSS v. JONES.

(22 Wallace, 576-594. 1874.)

ERROR to U. S. Circuit Court, Eastern District of Arkansas.

STATEMENT OF FACTS.—On the 31st of January, 1860, Rives gave to Bull his note, due November 1, 1861. Both of these parties were citizens of Arkansas. Bull indorsed it to Jones, of Tennessee. At maturity the note was duly protested, and notice given to Bull of its dishonor. In 1869 Bull died, and Ross became his administrator. In October, 1871, Jones sued Ross in *assumpsit* on his intestate's indorsement, and Ross pleaded the statute of limitations of five years, to which Ross replied that the statute of limitations did not run from June 1, 1861, to April 2, 1866, on account of the civil war, and that the suit was brought within five years, etc. Defendant's rejoinder was that the courts were closed from the month of May, 1861, to the month of March, 1865; without this, that they were so closed from June 1, 1861, to August 6, 1865. To this rejoinder plaintiff demurred, because it put in issue a matter of public law pleaded in the replication. The demurrer was sustained. The second plea was in effect a statute of Arkansas (Gould's Digest, 1015), which provides that any person bound for another as security in any . . . note . . . may require suit to be brought within thirty days from the time of notice, and if suit be not so brought by the holder and duly prosecuted, etc., the security shall be exonerated, etc. The plaintiff demurred also to this plea, and this demurrer being also sustained, judgment was rendered for the plaintiff.

Opinion by MR. JUSTICE CLIFFORD.

Two errors are assigned, as follows: 1st. That the court erred in sustaining the demurrer of the plaintiffs to the rejoinder filed by the defendant to the plaintiffs' replication to the first special plea of the defendant. 2d. That the court erred in sustaining the demurrer of the plaintiffs to the third plea of the defendant.

§ 570. *Statute of limitations of Arkansas—unsealed written contracts barred in five years from maturity.*

I. Unsealed written contracts are barred by the statute of limitations of that state in five years from maturity, and it appears that the note described in the declaration matured on the 1st of November next after its date, but the record shows that the indorser deceased on the 15th of November, 1869, leaving the note unpaid and outstanding. Under the laws of the state the general statute of limitations runs from the maturity of the contract to the granting of administration upon the estate of the decedent, when the general statute ceases to run and the statute of limitations applicable to the estates of deceased persons begins to run. *Brown v. Merrick*, 16 Ark., 612; *Biscoe v. Madden*, 17 id., 533. Hence the defendant pleaded that the cause of action did not accrue to the plaintiffs at any time within five years next before the grant of letters of administration upon the estate of the deceased indorser.

§ 571. *The statute of limitations was suspended in the insurgent states during the rebellion.*

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects or citizens of all commercial intercourse

and all correspondence with citizens or persons domiciled in the enemy country. Total inability, therefore, on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent, exists by the law of nations during the continuance of the war, but the restoration of peace removes the disability and opens the doors of the courts. Unquestioned right to sue is the *status* of the creditor if the contract was made during peace, but the effect of war is to suspend the right, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments and by the law of nations, not applicable to the contract at its date, but which comes into operation in consequence of an event over which he has no control. *Hanger v. Abbott*, 6 Wall., 539. Peace, it is said, restores the right and the remedy, but as that cannot be if the statute of limitations continues to run during the period the creditor is rendered incapable of suing, it necessarily follows that the operation of the statute is also suspended during the same period. Attempt is made to distinguish the case before the court from the case in which that rule of decision was first promulgated by this court, but it is clear that the attempt must be unsuccessful, as the same doctrines have since been applied in a case where a mortgagee, who was a citizen and resident of one of the Confederate States, brought a suit after the close of the war upon a bond and mortgage executed prior to the war by citizens of one of the loyal states, and the court held that the period from the proclamation of the blockade to the proclamation that the war was closed, must be deducted in the computation of the time which the statute of limitations of the loyal state had run against the right of action. *Brown v. Hiatts*, 15 Wall., 177.

§ 572. *The civil war was flagrant in Arkansas from June 1, 1861, to April 2, 1866.*

Extended discussion of that topic is quite unnecessary, as the oft-repeated decisions of this court have established the rule that the statute of limitations was suspended in the rebellious states during the existence of the late rebellion, and the express decision of this court is that the war was flagrant in that state for the whole period specified in the replication filed by the plaintiffs. *Batesville Institute v. Kauffman*, 18 id., 155. Viewed in the light of that decision, it is clear that the rejoinder filed by the defendant is sufficient, and that the ruling of the circuit court adjudging it bad was correct. *The Protector*, 12 Wall., 700; *Adger v. Alston*, 15 id., 555; *Semmes v. Insurance Co.*, 13 id., 158; *Levy v. Stewart*, 11 id., 253.

§ 573. *An indorser is not a surety, and his indorsee does not release him by giving time to maker.*

II. Due demand of the maker, protest and notice to the indorser of non-payment are admitted, and it is alleged that the indorser *subsequently*, by a certain notice in writing, required the plaintiffs, as holders of the note, to sue the maker and the indorser at a time when the maker was solvent and able to pay the same, and that the plaintiffs omitted for more than thirty days to comply with the terms of the notice, during which time the maker became insolvent. Based on these facts, the second defense set up is that the indorser was discharged by the neglect of the holders of the note to comply with the terms of that notice, which must depend in a great measure upon the nature of the obligation that the indorser assumed by his contract of indorsement. If the holder of a negotiable promissory note does anything, the effect of which is to suspend, impair or destroy the right of the prior parties to indemnity from those

otherwise liable over to them, he cannot resort to the parties affected by his conduct to make good the default of the maker of the instrument. *Bank v. Hatch*, 6 Pet., 258 (§§ 589-591, *infra*); *McLemore v. Powell*, 12 Wheat., 556; *Wood v. Bank*, 9 Cow., 194; *Bank v. Hanrick*, 2 Story, 416; *Newcomb v. Raynor*, 21 Wend., 108; *Byles on Bills* (11th ed.), 247, n. 1; 3 *Story on Notes* (5th ed.), § 413. Simple indulgence, however, or mere delay to enforce payment, without a binding contract to give time, will not, under the general rules of commercial law, have that effect, even in the case of a party occupying strictly the contract relation of a surety. *Philpot v. Briant*, 4 Bing., 721; *Story on Notes* (5th ed.), § 415.

Indorsers, it is sometimes said, are sureties, but their contract, which is a new one as compared with the maker of the note, differs in some important respects from that of the surety, who is a joint promisor with the principal, as the holder of such an instrument is under no obligation to use diligence to enforce payment against the maker in order to hold the indorser. *Bank v. Myers*, 1 Bailey, 418; *Powell v. Waters*, 17 Johns., 179; *Stafford v. Yates*, 18 id., 329; *Bank v. Rollins*, 13 Me., 205; *Page v. Webster*, 15 id., 256; *Bank v. Ives*, 17 Wend., 502; *Sterling v. Marietta and S. T. Co.*, 11 Serg. & R., 182; *Kennard v. Knott*, 4 Mann. & G., 474. Even in the case where the holder of a promissory note was, after the note fell due, called upon by the indorser to prosecute the maker, of whom the amount might then have been collected, but who afterwards became insolvent, and the holder neglected to do as requested, still it is held that such neglect will not discharge the indorser. *Trimble v. Thorne*, 16 Johns., 159; *Beebe v. Bank*, 7 Watts & S., 375. Judicial decisions of high authority deny that the indorser is to be regarded as a surety after his liability is fixed by due presentment, demand and notice of the dishonor of the note, and insist that when his liability is fixed by those acts of the holder, that he, the indorser, becomes a principal debtor himself, subject only to the condition that the holder shall do no act to suspend, impair or destroy his remedy over against prior parties to whom he has a right to resort for a remedy; and support to that law is certainly derived from the conceded fact that the indorser is answerable upon an independent contract, which makes it his legal duty to pay the note when duly presented and demanded and due notice is given to him of its dishonor; and also from the fact, which is also conceded, that he has not the same reason as may exist in common cases of suretyship to compel the creditor to active diligence against the maker, as he has in general the complete power, by paying the note, to reinstate himself in the possession and ownership of the same, and thus to entitle himself to a personal remedy against the maker. *McLemore v. Powell*, 12 Wheat., 556; 2 *Parsons on Notes and Bills*, 243-245; 3 *Kent* (12th ed.), 114.*

§ 574. *The contract of an indorser stated.*

Doubtless the indorser is in some respects a surety, but his principal relation to the instrument is that expressed by the commercial term applied to every party who contracts that obligation. Such a party to such an instrument contracts with the indorsee and every subsequent holder to whom the note is transferred, as follows: 1. That the instrument and antecedent signatures are genuine. 2. That he, the indorser, has a good title to the instrument. 3. That he is competent to bind himself in such a contract. 4. That the maker is competent to bind himself to the payment, and that he will, upon due presentment of the note, pay it at maturity. 5. That if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice being

given him of the dishonor, pay the same to the indorsee or other holder. Story on Notes (5th ed.), § 135; Story on Bills, § 108; 2 Parsons on Bills and Notes, 23; Ogden v. Saunders, 12 Wheat., 341; 3 Kent (12th ed.), 88; Bateman on Commercial Law, § 319. Confirmation that the indorser is not a surety in the general sense is also derived from the fact that he stands in the attitude of the drawer of a new bill, and that he is not primarily liable to make the payment, but only in case of the default of the maker and proof of due presentment, protest, and notice of dishonor, and that even then he cannot be joined with the maker, as the surety *proper* may be, because the maker and indorser are liable on different contracts. 2 Parsons on Bills and Notes, 25. Suppose that is so, when the theory is tested by the rules of commercial law, still it is insisted by the defendant that the contract of the indorser in this case was made in the state where he resides, and that the indorser, by the law of that state, is discharged, for the reason that the holder of the note omitted to seek his remedy against the maker, as thereto requested by the indorser.

§ 575. *A statute that says "surety" not construed to mean "indorser."*

Support to that defense as exhibited in the second assignment of errors is attempted to be drawn from the statute of the state where the indorser resides, which provides in effect that a surety in any bond, bill or note may give the holder notice to sue the principal in writing, and if the holder fails to do so within thirty days the surety shall be discharged. Gould's Digest of Statutes, 1015. Founded on that statute the defendant alleges that the indorsement was made in that state, and the allegation also is that the consideration of the note was a debt due from the maker to the plaintiffs, and that it was made payable to the decedent, and was by him indorsed merely as a means of procuring his liability for the payment of the said debt due to the plaintiffs. Grant that the contract of indorsement was actually executed in that state, still it is the better opinion that the case is not governed by the statute of that state already referred to, for the reason that the statute of the state does not include the contract of an indorser. Sureties in a note who become joint promisors with the maker, it may be conceded, are within the terms of that statute, as they stand in the same relation to the principal as in a bond given for the payment of money or the delivery of property. Authority to give the described notice arises immediately after the bond, bill or note falls due, which evidently refers to the lapse of time specified in the contract; but the absolute obligation to pay does not arise in the case of an indorser before notice of dishonor, which can never be given to the indorser till after the note is presented to the maker, and he has refused or neglected to fulfil his promise to pay, so that the notice in writing requiring the holder to sue the indorser with the maker would seem to be inapplicable before the liability of the indorser is fixed by demand of payment of the maker and his refusal to comply, and notice is given to the indorser of the dishonor of the note. Evidently the statute contemplates that the cause of action will accrue against the principal and surety at the same time, which is never the case with the indorser and maker. Such a notice may unquestionably be given by a surety proper, whether his contract is expressed in a bond, bill or note, as soon as the instrument falls due; but it would be unreasonable to suppose that an indorser would give such a notice before his liability had become fixed, as it may be that such a demand to sue would operate as waiver of the right to notice of the dishonor of the note. Nor is it necessary to extend the operation of the statute so as to include an indorser, in order to satisfy the literal scope of the language em-

ployed. "Persons, bound as security for another," are the words of the statute, which undoubtedly includes sureties proper in a bond, bill or note; but it would be extending the words of the statute beyond their reasonable meaning, to hold that it includes an indorser whose liability is fixed by the required notice of the dishonor of the bill or note. Beyond all doubt the statute is one passed in derogation of the common law, even if restricted to sureties in the general sense; but it would be even more so, if, by a broad construction, it could be extended to include indorsers upon bills of exchange and negotiable promissory notes.

§ 576. *Statutes in derogation of the common law construed strictly.*

Statutes passed in derogation of the common law, it is everywhere held, should be construed strictly; nor is there any subject matter to which that rule should be applied with greater intensity than where the attempt is made to change by local legislation the rules of commercial law applicable to that class of commercial instruments. Remedies of a statutory character, where the right to be enforced was unknown at common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied. *Lease v. Vance*, 28 Ia., 509. When a statute alters the common law the meaning shall not be strained beyond the meaning of the words, except in cases of public utility, as when the end in view appears to be more comprehensive than the enacting words. *Potter's Dwarries on Statutes*, 186. Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute. 9 *Bacon's Abridgment*, by Bouvier, 245; *Sedgwick on Statutes*, 2d ed., 267; 1 *Kent*, 12th ed., 461; *Broom's Legal Maxims*, 4th ed., 552.

§ 577. *Indorsee may sue either maker or indorser or both; and is not bound to any special diligence.*

Argument to show that the statute in question, if it be construed to include the indorser of a bill or note, is in derogation of the rule of the commercial law, is scarcely necessary, as it appears to be well settled that it is no part of the duty of the holder of a note which has been dishonored and due notice thereof given to the indorser, to sue the maker merely because the indorser requests him so to do. On the contrary the holder has his choice to sue any one of the parties to the note who is in default, and it is the duty of the indorser, if he desires to secure the amount against the maker, to pay the note himself and thus to entitle himself to bring a suit against that party. *Story on Notes*, 5th ed., § 115, a. Such a holder, says Judge Story, is perfectly at liberty to sue any or all the parties at his pleasure, and he is not bound to any diligence in seeking his reimbursement. Nor can the indorser insist that the holder should, upon his request, use any such diligence. His remedy is to pay the note and then to seek recourse against the maker or any other party liable over to him. *Id.*, § 419; *Beebe v. Banks*, 7 *Watts & S.*, 375. Such an indorser, that is, one whose liability is fixed by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety, as he has the right to pay the amount of the note to the holder, and to be subrogated to all his rights as against the maker. *Lenox v. Prout*, 3 *Wheat.*, 525; *Trimble v. Thorne*, 16 *Johns.*, 153; *Warner v. Beardsley*, 8 *Wend.*, 199; *Same v. Same*, 6 *id.*, 610; *Frye v. Barker*, 4 *Pick.*, 382; *Hunt v. Bridgham*, 2 *id.*, 581. None of these suggestions are intended to deny the well-known rule that the maker of the note is in general

the principal debtor, nor that all the other parties are in a special sense sureties for him; they, if indorsers, being liable only in case of his default unless they have waived demand and notice. Though all the other parties are sureties in respect to the maker, still they are not co-sureties, but each prior party is a principal in respect to each subsequent party. An indorser of a promissory note, though in the nature of a surety, is not for all purposes entitled to the privileges of that character, as he is answerable upon an independent contract, and it is his duty to take up the note when it is dishonored. *Ellsworth v. Brewer*, 11 Pick., 320. Unquestionably there is in some respects a resemblance between the indorser and a surety, but in others there is none, as he does not in any case lose his character of indorser, nor can he be made liable on the note without proof of due demand and notice. *Bradford v. Corey*, 5 Barb., 462. Proof of the kind, if the demand and notice are seasonable and in due form, removes every condition from his liability except that the holder will do no act to suspend, impair or destroy his right to indemnity from such other parties to the instrument as are bound to save him harmless. *Woodman v. Eastman*, 10 N. H., 359; *Warner v. Beardsley*, 8 Wend., 2d ed., 195 and note.

§ 578. *Negotiable notes are favored instruments.*

Negotiable promissory notes, like bills of exchange, are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality as for their universal convenience in mercantile transactions. Hence the law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to restrain or impede their unembarrassed circulation would be contrary to the soundest principles of public policy. Mercantile law is a system of jurisprudence recognized by all commercial nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. *Goodman v. Simonds*, 20 How., 364 (§§ 420-425, *supra*). Apply these several suggestions to the case, and it follows that the statute, when properly construed, does not include the indorser of a negotiable promissory note whose liability has become absolute by due notice of the dishonor of the note.

Judgment affirmed.

WILLS v. CLAFLIN.

(2 Otto, 135-142. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

§ 579. *Liability of assignor of note in Illinois.*

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—Clafin & Co., assignees of certain promissory notes, sued Wills, Gregg & Co., assignors of said notes, on their contract of assignment made in the state of Illinois. The inquiry is, whether a case of liability was made out on the trial, under the peculiar provisions of the statute of Illinois on the subject. This statute makes promissory notes assignable by indorsement in writing, so as to vest the legal interest in the assignee; but the liability of the assignor is not absolute, but conditional. He agrees to pay the note, if the assignee, by the exercise of due diligence, prosecutes the maker to insolvency; but if the institution of a suit against the maker would be unavailing, or if the maker, when the note falls due, is out of the jurisdiction of the court, and therefore beyond the reach of legal process, the assignor is equally as liable as if due diligence by suit had been used. *Gross' Comp.*, 1869, p. 462.

There was no attempt to coerce payment of the makers by suit; and the assignees assume that they were excused, under the circumstances, from instituting it. The declaration avers insolvency, non-residence, and that a suit would have been unavailing. On the trial, the circuit court, against the objection of the defendants, admitted evidence that a petition in bankruptcy was filed January 20, 1870, in the district court of the United States for the eastern district of Wisconsin, against Kimball and Butterfield, the makers of the notes sued on; and that a judgment was rendered against them January 29, 1870. The admission of this evidence is assigned for error on the ground that there was no allegation in either count of the declaration which justified it, or the charge of the court that the adjudication in bankruptcy excused the assignees from instituting suit against the makers.

§ 580. *Proof of adjudication in bankruptcy sustains allegation of insolvency of maker.*

There are two averments in the second count of the declaration, as follows: *First*, "And the plaintiffs aver that at the time when each of said promissory notes became, by its terms, due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent, and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof." *Second*, "And the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed became due and payable, or at any time since, or now, would have been and would be wholly unavailing." It is contended that these two averments must be treated as one, and that they mean that a suit against the makers would have been unavailing by reason of their insolvency. If this were so, it would by no means follow that the record was inadmissible to sustain that issue; but, be this as it may, these averments, as we construe them, are distinct and independent of each other. The first is complete in itself, because, if the makers were insolvent, it would have been idle to bring a suit against them. But there are other things besides insolvency which might render a suit unavailing; as, for instance, want of consideration in the note, or, as in this case, an adjudication in bankruptcy.

§ 581. *General averment that suit on note against maker would have been unavailing sufficient after verdict.*

The second averment was not limited to any particular cause, but was general in its character, and left the pleader free to show on the trial any reason why a suit would be unavailing. It does not contain specifications enough to enable the party to defend himself (*Crouch v. Hall*, 15 Ill., 264), and an objection by way of demurrer would have prevailed. But the question here is, not whether it is bad on demurrer, but whether it is good after verdict. "At common law, after verdict, if the issue joined be such as necessarily to require on the trial proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." 1 Chitty's Plead. (10th Am. ed.), 673, and cases cited in note. And this rule is adopted in Illinois. In *Greathouse v. Robinson*, 3 Scam., 8, it was held that the defendant, to avail himself of a defective averment in a declaration, must demur to it. "If he elects to plead to

the declaration, and go to trial, he has no right to insist upon the exclusion of evidence because some necessary averment is omitted or defectively set forth." There was, therefore, no valid reason why the record of the adjudication of bankruptcy should have been excluded. It was not only competent but conclusive evidence in support of the allegation that a suit against the makers would have been unavailing; for the bankrupt act prevents the institution and prosecution of suits against parties in bankruptcy. The first note was due January 18, 1870, two days before the petition in bankruptcy was filed; and the first term of court held at Chicago, after the note became due, was on the first Monday of the following month. At this time the adjudication in bankruptcy was in force and a suit against the bankrupts forbidden. There was parol testimony (received without objection) to show that the debts of the petitioners were settled, and the proceedings in bankruptcy dismissed; but there was nothing to fix the time when the order of dismissal was made. The burden of doing this rested on the defendants, and so the jury were told. As this view of the case is decisive of it, it is unnecessary to notice the other assignments of error.

Judgment affirmed.

MOTT v. WRIGHT.

(Circuit Court for Indiana: 1 Bissell, 53-58. 1865.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is an action of *assumpsit* on ten promissory notes, all dated in May, 1861. Four of them are payable six months after date, and six of them seven months after date. Their aggregate is \$5,219.90. They are all dated at the city of New York, and are made payable at the Bank of North America in that city. These notes were executed by John Wright to the defendant, Williamson W. Wright, and were by him indorsed in blank. *Non-assumpsit* is pleaded; and the trial of this issue is, by agreement, submitted to the court without a jury. It would be tedious to detail all the testimony. The following is the substance of the evidence: The notes and their indorsements were produced in evidence. For some time before they were made, John W. Wright was largely indebted to Robert Ellis, of New York. The debt evidenced by these notes had been kept afloat by what are called "renewal notes" made to Ellis. Of these, the notes sued on are the last series. To procure them Ellis sent his agent from New York to the residence of the maker and indorser in Indiana, with the notes then blank, to get them executed and indorsed. John W. Wright being then abroad, the agent called on Williamson W. Wright, the defendant, who, at the agent's request, indorsed the notes. Thereupon the agent left the notes in this condition with D. D. Pratt, an attorney of Indiana, with the request to him that he should ask the said John W. Wright to sign them and forward them to Ellis, in New York. Pratt did so. John W. Wright thereupon signed the notes in Indiana, and forwarded them by mail to Ellis, in New York. When the notes respectively fell due a demand for payment was properly made, and notices of their non-payment were duly given, according to the law merchant.

§ 582. *Due diligence against maker necessary to bind indorser.*

By the law of Indiana, the indorser of such notes as these is not liable, in consequence of their non-payment and notice thereof, to pay them. Due diligence to collect them from the maker by a suit against him must generally be used in order to fix the liability of the indorser. 1 G. & H. Stats., 448; Kel-

sey v. Ross, 6 Blackf., 536. By the laws of New York, it is otherwise. There, such notes are governed by the rules of the law merchant; and the indorser is liable, as on an inland bill. It becomes important, therefore, to ascertain whether the indorsements in question are governed by the laws of Indiana or the laws of New York. According to the evidence, if the Indiana law prevails, the plaintiff cannot recover, because he does not appear to have exercised the diligence which that law requires. But if the law of New York is to govern in this matter, then it is plain that the finding must be for the plaintiff.

§ 583. *An indorsement is a new and distinct contract, governed by the lex loci.*

It is settled in Indiana that the indorsement of a note is a new, distinct contract, and is governed by the law of the state in which the indorsement is made, and not by the law of the place where the note was executed. Hunt v. Standart, 15 Ind., 33; Rose v. Parke Bank, 20 id., 94.

§ 584. *Indorsement made in one state and delivered in another — law of latter state governs.*

The only question then is, Were these indorsements executed in Indiana or New York? The execution of an indorsement — and indeed of every written contract — includes in legal contemplation two essential things: the actual writing and signing of the instrument, and the delivery of it thus written and signed. In the case at bar it is very clear that the writings on the back of the notes were made by the defendant in Indiana. But to make those writings of any validity as a contract between the parties, they must have been delivered. Upon the evidence, were these notes, thus indorsed, delivered to Ellis in Indiana or in New York? It is a well settled rule of law that “a note has no binding effect until it is delivered. So, when indorsed by the payee. . . . No matter when or where notes are signed, they are *made* at the time and place and by the act of delivery accompanied by acceptance.” Edwards on Bills, 187; Hyde v. Goodnow, 3 Comst., 266. The same rule must apply to the indorsement of notes, because the reason is the same. Well may we therefore say, that no matter when or where an indorsement of a note is made, in legal contemplation the indorsement is *executed* by the act of delivery to and the acceptance of the indorsee. In this view the discussion seems to be narrowed down to the following inquiry: Was the act of John W. Wright in inclosing the notes, filled up, signed by him and indorsed by the defendant, in a letter directed to Ellis in New York and in placing the same in an Indiana postoffice, a delivery of the notes and indorsements to Ellis, and an acceptance of them by him? In view of the evidence I cannot think that in legal contemplation it was. The notes, as indorsed, were “renewal notes.” The acceptance of them would, I think, under the circumstances proved, have operated to extinguish the old notes in the place of which they were given? When they were received by Ellis in New York he might, so far as I can see, have refused to accept them and held on to the old notes. But when they came to his hands and he determined to take them in satisfaction of the old notes, the new notes with the indorsements on them were, I think, then and there, in legal contemplation, delivered and accepted. And I am inclined to the opinion that neither the notes nor the indorsements on them had any legal existence till that moment. It has been suggested by counsel for the defendant that if these notes had been lost on their way to New York, the plaintiff might have sued on them as lost instruments. But this, I rather think, is begging the question. He might have sued on them, under such circumstances, if there had previously been a legal, valid delivery and acceptance of them; otherwise not.

From the evidence I conclude that the arrangement between Ellis and John W. Wright was substantially this: that if the latter would send to the former certain notes well indorsed, he would receive them in lieu of the notes he then held of John W. Wright; and that till he did so receive them the arrangement was not consummated. Moreover, till Ellis had actually received these notes, he could not have negotiated them as he did to the plaintiff. The notes, as we have seen, were indorsed in blank, and were negotiated to the plaintiff by actual delivery. Indeed, they could not have been transferred to him in any other manner. Besides, it may well be asked whether, if these notes had been lost on their way to New York, Ellis would have been bound to deliver up the old notes as satisfied by the receipt of the new. I think that, in such a case, he might have maintained an action on the old notes. It should seem unreasonable to hold that the old notes were extinguished before the new were actually received and accepted. The case of *Cook v. Litchfield*, 9 N. Y., 279, appears fully to sustain the foregoing view. That case was much like the present. In both, the defendants were accommodation indorsers, and indorsed, out of the state of New York, notes payable in it. In the case referred to, the court say, "the defendant indorsed the notes for the accommodation of the maker. This appears from the fact that the notes came from the possession of the maker and not of the indorser, and were first negotiated in New York, and apparently for the benefit of Carew, the maker. So long as they remained in Carew's hands, there was no liability on the part of the indorser. The indorser's contract, therefore, must be regarded as having been made in New York, where the notes were delivered to Ryckman [the first indorsee] and the indorsement first became effective. The law of Michigan [where the indorsement was made] has no application to the case. The contract having been made in New York, the law of New York governs the case with respect to the sufficiency of the notice." With some doubt as to the justness of the views above expressed, I am inclined to think that, on the evidence, the law is with the plaintiff. Finding for the plaintiff accordingly. •

CAMDEN v. DOREMUS.

(3 Howard, 515-534. 1844.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—The agreement referred to by the court was to the effect following: That the Camdens had sold and assigned to Doremus, Suydams & Nixon, a note for \$4,219.90, negotiable and payable at the Commercial Bank of Columbus, Miss.; that the note was executed by Calhoun to Barrett, and indorsed by Barrett and Tarpley and the Camdens; that Doremus, Suydams & Nixon were to send the note to the Commercial Bank for collection, and if it was not paid they should use due diligence to collect it of the drawer and indorsers before calling upon the Camdens; and if it could not be made out of the drawer and indorsers, the Camdens, on being so informed, would pay it, principal, interest and costs. Signed by the Camdens, and by Doremus, Suydams & Nixon.

§ 585. *Objections must be specific.*

Opinion by MR. JUSTICE DANIEL.

No question has been raised on this record in reference to the original character of the instrument on which the action was founded as a negotiable and commercial paper, nor in reference to the duties and obligations of the parties.

arising purely from their positions as parties to such a paper. And for aught that the record discloses, every requirement of the law merchant, with respect to the note, or with respect to the rights of the indorsers thereof, appears to have been fulfilled. Presentment at maturity and within due time was made at the Bank of Columbus, Mississippi, and payment there demanded; the failure to make payment was followed by regular protest, and by like notice to all the indorsers. The exceptions specifically urged by the defendant in the court below, and pressed in his behalf before this court, grow out of an agreement signed by the firm of the Camdens and by the defendants in error at the time that the note of Calhoun was indorsed by the former to the latter, and which agreement, it is contended, bound the defendants in error to undertakings and acts beyond the usual duties incumbent upon indorsers and holders of negotiable paper, and without the fulfilment of which no right of recovery against the plaintiffs in error could arise. Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency or relevancy, or at its regularity merely, that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds county against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection, we would remark that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.

§ 586. *Agreement as to due diligence, fulfilment of.*

Recurring to the agreement signed by the parties at the time of the transfer of the note, and to the instructions given and refused at the trial, with respect both to that agreement and the proceedings had in fulfilment thereof, we will remark, as to the agreement itself, it is clear that it bound the indorsees to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. Their obligations, therefore, to these indorsers, could by no means be fulfilled by a compliance with such usual conditions. The lan-

guage of the agreement is explicit. The said Doremus, Suydams & Nixon were to send the note passed to them to the Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they were to use reasonable and due diligence to collect it of the drawer and two previous indorsers before they were to call upon the said Camdens, etc., etc. The obligation of the plaintiffs, as indorsees and holders, would have been fulfilled by regular demand, protest, and notice; from these a right of action would immediately have accrued. But the condition stipulated in the agreement is, that before they can have any right to make demand upon their indorsers, they shall diligently endeavor to collect of the maker and previous indorsers. With the view of showing a failure in the plaintiffs in fulfilling their contract, and of deducing therefrom their own exemption from responsibility, the defendants first offered a witness to prove a difference in the practice prevailing in eastern and western banks with respect to the management of paper deposited with them for collection; and inquired of the witness whether a note presented at a bank for payment on the last day of grace by a notary public, would be considered as having been sent to the bank for collection, within the meaning of the contract. This question, on motion of the plaintiffs' counsel, the court refused to allow, and rejected all testimony by the witness in relation to the practice of banks as to notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus. The ruling of the court on this point we think was proper. The note was made payable at the Commercial Bank of Columbus; by the agreement between the parties, it was moreover expressly stipulated that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. The next exception is taken upon an instruction asked of the court to the jury, that, unless it was proved to their satisfaction that the note was sent to the Bank of Columbus for collection by the plaintiffs, they must find for the defendant. The court responded affirmatively to the proposition that the note should have been sent to the Bank of Columbus for collection, but declared its opinion that by presentment and demand of payment of the note at maturity by the plaintiffs at the said bank, within banking hours, so as to make a legal demand on the makers, the requirement of the contract in this particular would be complied with. A nice distinction might be made between the language of the agreement and that of the instruction given upon this point. The distinction, however, we should deem to be more apparent and verbal than substantial, and not to be applicable either to the intention of the parties, or to the real merits of the case. The note was payable at the Commercial Bank of Mississippi. The maker of the note resided in the county in which the bank was situated; the indorsers, Barrett and Tarpley, who were to be looked to for payment before proceeding against the Camdens, were also residents of the state of Mississippi. Every party upon the note must be presumed to have been cognizant of its character, and to have known when and where it was payable, and was bound to prepare for his respective responsibility arising from his undertaking. Other notice than that to which the law entitled him from his peculiar position upon the note, he had no right to claim. It would be going too far, then, to imply any other right, or to admit it upon ground less strong than that of express and unequiv-

ocal contract. The language of the agreement we hold not to amount to this, and as being satisfied with the interpretation that the note should be regularly presented and payment thereof demanded at the Commercial Bank of Columbus, simply as one of the means of collection to be adopted before recourse should be had to the last indorsers.

But it has been contended that, had the note been placed under the management of the bank itself, notice might have been given by the bank to the maker and prior indorsers, before the maturity of the note, and that thereby provision might have been made to meet it when due. In reply to this argument, it may be said that the agreement itself expresses no such purpose or object, in requiring the note to be sent to the bank, and we do not think that such an object is necessarily implied in the requisition. In the next place, there is no proof that the bank would have given notice to the maker and indorsers, previously to the maturity of the note; nor is there anything in the record to show that this would have been in accordance with its practice in similar cases. Under the silence of the contract itself, and in the absence of proof *dehors* the agreement, we are not at liberty to set up a presumption, which neither the language of the agreement nor justice to the parties imperatively calls for.

§ 587. *Record of suit evidence of due diligence.*

The defendants also excepted to the opinion of the court given upon a prayer to instruct the jury that the record of the suit by the plaintiffs, against the maker and prior indorsers of the note, did not show due diligence as to those parties. This instruction the court refused, but, in lieu thereof, instructed the jury that the record was proper evidence to show due diligence on the part of the plaintiff, and that if they believed, from the evidence submitted in addition to the record, that the indorsers, Barrett and Tarpley, had left the state of Mississippi, were insolvent, and had left no property in the state at the time of the judgment in the said record, the plaintiffs were not bound to send executions to the counties in which those indorsers respectively resided at the time when the suit was instituted against them. This court can conceive no just foundation for this exception to the ruling of the circuit court. The condition to which the plaintiff was pledged was the practice of due, that is, proper, just, reasonable diligence; not to the performance of acts which were obviously useless, and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence. This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit, evidence which, in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact, and to him who would supply it. *Dulany v. Hodgkin*, 5 Cranch, 333; *Violett v. Patton*, id., 142 (§§ 553-555, *supra*); *Yeaton v. Bank of Alexandria*, id., 49. We hold, therefore, that, both as to the instruction refused and as to that which was given upon this prayer, the decision of the circuit court was correct.

§ 588. *Set-off against indorsee; effect.*

We come now to the last exception taken to the opinion of the circuit court upon the points presented to it. The defendant in that court insisted that, by

the law of Mississippi, the plaintiffs were entitled to a recovery of the full amount of the note, against the maker and indorsers, subject to no set-off between the maker and indorsers; and that, if the plaintiffs had, by their neglect, permitted a judgment for a smaller amount, the defendant was discharged from all accountability for the sum thus lost. The court refused so to lay down the law, because the record from the court in Mississippi furnished the only evidence to which the instruction prayed for referred, and no negligence appeared from the record in the prosecution of the suit against the defendants thereto. This refusal of the court was clearly right, and the reason assigned for it is quite satisfactory. The question to which the instruction asked was designed to apply was that of due diligence. The timely and *bona fide* prosecution of a suit is, perhaps, the highest evidence of due diligence. If, in the conduct of that suit, the party should be impeded or wronged by an erroneous decision of the tribunal having cognizance of his case, that wrong could on no just principle be imputed to him as a fault. It certainly does not tend to show him to have been the less diligent in the pursuit of his claim; and least of all should he be prejudiced thereby, when the error insisted on has been induced by the person who seeks to avail himself of its existence.

Upon the whole, we consider the rulings of the circuit court upon the several points before it to be correct. The judgment is, therefore, affirmed.

BANK OF UNITED STATES v. HATCH.

(6 Peters, 250-260. 1832.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of Ohio. The Bank of the United States, as holders, brought an action upon a bill of exchange jointly against Elijah Pearson, as drawer, and against William S. Hatch, as indorser, under a statute of Ohio authorizing such a proceeding. The marshal having returned the writ “not found” as to Hatch, the bank proceeded to take judgment against Pearson alone. The present suit is a *scire facias* against Hatch to make him a party to the same judgment, so that execution may also issue against him, according to the provisions of the same statute. The declaration and bill of exchange in the original proceedings have not been, as they ought to have been, sent up in the record, as they constitute a part of it; and for this imperfection a *certiorari* ought to have been awarded if anything material in it were now controverted by the parties. It appears from some exhibits in the proceedings that the bill of exchange was dated at Cincinnati on the 23d of May, 1820, and was as follows: “Sixty days after date hereof pay to the order of William S. Hatch, at the office of discount and deposit of the Bank of the United States, at Cincinnati, \$6,600, which charge to the account of yours respectfully, E. Pearson.” Addressed, “Mr. Thomas Graham, Cincinnati, Ohio.” It was indorsed by Hatch and accepted by Graham. Hatch pleaded the general issue *non-assumpsit*; and at the trial the jury found a special verdict as follows:

“And afterwards, to wit, at the December term of said court, in the year last aforesaid, came the parties by their said attorneys; and thereupon, for trying the issue joined, came a jury, to wit: William B. Van Hook, David Todd, John Larwell, Randall Stiver, Isaac N. Norton, A. R. Chase, Truman Beecher, J. R. Geddings, William Rayne, William A. Needham, Ira Paige and William A. Johnson, who, being impaneled, elected, tried, sworn and affirmed to try

the issue between the parties, upon their oath do say that E. Pearson made the bill of exchange, a copy of which is attached to the declaration of the said plaintiffs in the original suit against said Pearson, the drawer of said bill, and that the said bill was regularly indorsed by the present defendant, Hatch. They also find that on the 25th day of July, in the year 1820, said bill of exchange was duly protested for non-payment, and that, on said day last mentioned, and on the succeeding day, the said defendant Hatch was boarding at the house of Henry Bainbridge, in the city of Cincinnati; that on the 26th day of July, in the year 1820, the notary public by whom said bill was protested called at the house of said Bainbridge and inquired for said Hatch, and was informed by a Mr. Young that said Hatch was not within; the said notary then left a written notice of said protest with said Young, who was at that time in the house aforesaid, and requested him to deliver said notice to said Hatch, and that, in the summer of the said year 1820, said Young was a boarder at said house. They also find that a suit was commenced against said Pearson, the drawer of said bill of exchange, which suit stood for trial at the September term in the year 1822, of the circuit court of the United States for the district of Ohio. They also find that, previous to the year 1822, one Griffin Yeatman was confined on the jail limits of Hamilton county, in said state, on a *ca. sa.*, issued at the instance of, and on a judgment in favor of, said Pearson. That said Yeatman was a material witness for the plaintiff in a number of suits then pending in said court; that one George W. Jones, who was the then agent for plaintiffs, and one William M. Worthington, the then attorney for the plaintiffs, agreed with the said Pearson that, in consideration he, the said Pearson, would permit the said Yeatman to leave the said jail limits and attend said court during the term aforesaid, then the suit then pending in said court against said Pearson on said bill of exchange should be continued without judgment until the term of said court next ensuing said September term, A. D. 1822. That, in pursuance of this agreement, the said Pearson permitted the said Yeatman to leave said jail limits and attend said court, and that said suit against said Pearson was continued, agreeably to said agreement. Now, therefore, if upon this finding the court shall be of opinion that the plaintiff is entitled to judgment, then the jury find for the plaintiff to recover of the defendant the amount of said bill, together with the interest thereon; but if the court shall be of opinion, upon the said finding, that the defendant is entitled to a judgment, then, and in that case, the jury find for the defendant."

Upon this special verdict the court below gave judgment for the defendant. Two questions, arising out of the special verdict, have been argued at the bar: First, whether the notice to Hatch of the dishonor of the bill was sufficient. Secondly, if it was, whether the agreement between the bank and Pearson was a discharge of the indorser.

§ 589. *Sufficiency of notice left at boarding house.*

Upon the first point we are of opinion that the notice was sufficient. In cases of this nature the law does not require the highest and strictest degree of diligence in giving notice, but such a degree of reasonable diligence as will ordinarily bring home notice to the party. It is a rule founded upon public convenience and the general course of business; and only requires that, in common intendment and presumption, the notice is by such means as will be effectual. In the present case the notice was left at a private boarding house where Hatch lodged, which must be considered, to all intents and purposes, his dwelling-house. It was left, then, at the proper place, and if the delivery had been

to the master of the house or to a servant of the house, there could be no doubt that it would have been sufficient. *Stedman v. Gooch*, 1 Esp., 3. The notary called at the house, and, upon inquiry of a fellow-boarder and inmate of the house, he was informed that Hatch was not within. He then left the notice with the fellow-boarder, requesting him to deliver it to Hatch. The latter must necessarily be understood, by receiving the notice under such circumstances, impliedly to engage to make the delivery. The question, then, is, whether such a notice, so delivered, does not afford as reasonable a presumption of its being received as if delivered to a tenant of the house. This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of civility as this. In our large cities, many persons engaged in business live at boarding-houses in this manner. It is not always easy to obtain access to the master of the house, or to servants who may be safely intrusted with the delivery of notices of this sort. A person who resides in the house, upon a footing of equality with all the guests, may well be supposed to feel a deeper interest in such matters than a mere servant, whose occupations are pressing and various, and whose pursuits do not lead him to place so high a value upon a scrupulous discharge of duty. We think that a stricter rule would be found inconvenient, and tend to subvert rather than to subserve the purposes of justice. No case exactly in point has been cited at the bar. That of *Stedman v. Gooch*, 1 Esp., 3, approaches near to it; but there the notice was left with the woman who kept the house at which the party was a lodger. No stress, however, seems to have been laid upon this circumstance, to distinguish it from the case of a delivery to any other inmate of the house, either servant or fellow-boarder.

§ 590. *Giving drawer a continuance releases indorser.*

The other question is one of more nicety and not less important. It appears from the special verdict that the contract with Pearson, for the continuance of the suit on this very bill, without judgment, until the next term of the circuit court, was for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agents of the bank. What, then, is to be deemed the true construction of it? Did it amount to no more than an agreement that that particular suit should stand continued, leaving the bank at full liberty to discontinue that on the morrow, at their discretion, and to commence a new suit and new proceedings for the same debt? Or was it intended by the parties to suspend the enforcement of any remedy for the debt for the stipulated period, and rely solely on that suit for a recovery? We are of opinion that the intention of the parties, apparent on the contract, was to suspend the right to recover the debt until the next term of the court. It is scarcely possible that Pearson should have been willing to give a valuable consideration for the delay of a term, and yet have intentionally left avenues open to be harassed by a new suit in the interval. Indeed, no other remedy, except in that particular suit, seems to have been within the contemplation of either party. If the bank had engaged, for a like consideration, not to sue Pearson on the bill for the same period, there could have been no doubt that it would be a contract suspending all remedy. What substantial difference is there between such a contract and a contract to suspend a suit already commenced, which is the only apparent remedy for the recovery of the bill during

the same period? Is it not the natural, nay, necessary intendment, that the defendant shall have the full benefit of the whole period as a delay of payment of the debt? It is no answer that a new suit would be attended with more delay. That might or might not be the case, according to the different course of practice in different states; and, at all events, it would harass the party with new expenses of litigation. But the true inquiry is, whether the parties did or did not intend a surceasing of all legal proceedings during the period. We think that the just and natural exposition of the contract is, that they did.

§ 591. *Discharge of indorser after his liability is fixed.*

If this, then, be the correct exposition of the contract, the case clearly falls within the principle laid down by this court in *M'LeMORE v. Powell*, 12 Wheat., 554. That was the case of a voluntary agreement, without consideration, by the holder with the drawer of the bill, for delay, after the parties had been fixed by due notice of the dishonor of the bill. The court held that the agreement was not binding in point of law, and, therefore, it did not exonerate the indorser. On that occasion, the court said: "We admit the doctrine that, although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it," etc. "If the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him." The same reasoning applies with full force to the present case. If the bank could not have any remedy on the bill to recover payments, but was bound to wait until the next term of the circuit court, the defendant Hatch, as indorser, could not, by paying the bill, place himself in a better situation. He would be liable to the same equities, under the agreement suspending the remedy, as the bank. The same principles which this court adopted in the case of *M'LeMORE v. Powell*, 12 Wheat., 554, will be found illustrated and confirmed in an able opinion of Mr. Chancellor Kent in *King v. Baldwin*, 2 Johns. Ch., 554, and applied to a case between principal and surety. There are other authorities to the same effect: *Gould v. Robson*, 8 East, 576; *Laxton v. Peat*, 2 Camp., 185; *Hubbly v. Brown*, 16 Johns., 70; *Bayley on Bills*, 234. There is a recent case in England which approaches very near to the circumstances of the present case. We allude to *Lee v. Levi*, 1 Carr. & P., 553. In that case the holder, after suit brought against the acceptor and the indorser, had taken a cognovit of the acceptor, for the amount of the bill, payable by instalments; and, at the trial of the suit against the indorser, Lord Chief Justice Abbott thought that this was a giving time which discharged the indorser, and the jury found a verdict accordingly. That case afterwards came before the whole court for revision (6 Dowl. & Ry., 475), and was then decided upon a mere collateral point, viz.: That the defense having arisen after suit brought against the indorser, should have been taken advantage of by special plea, and could not be given in evidence under the general issue; so that the ruling of the lord chief justice was not

brought directly into judgment. It was not, however, in any measure overruled.

Upon the whole, we are of opinion, upon the ground of the agreement stated in the special verdict being a virtual discharge of the indorser, that the judgment of the circuit court ought to be affirmed, with costs.

IN RE GOODWIN.

(Circuit Court for Missouri: 5 Dillon, 140-144. 1879.)

Opinion by TREAT, J.

STATEMENT OF FACTS.—A motion was made by the assignee to expunge the claim of the bank. Issues have been framed, and the cause heard. Goodwin, Behr & Co. were the makers, and Hoeber the indorser of a note for \$6,000, which the bank discounted. Before the same became due, the bank *knew* that the makers were such solely for the *accommodation* of the indorser. The bank then discounted a note of said indorser at ninety days for \$5,000, passed the proceeds of the discount to his private account which he kept with said bank, and he gave his check for \$6,000, which was charged against said private account. As the indorser's note for \$5,000 was not secured by an indorser thereon, the bank retained the original note for \$6,000, and seek to have the same allowed against Goodwin, Behr & Co.'s estate in bankruptcy. There are two propositions, either of which is fatal to the claim: 1st. Hoeber, the indorser, paid the note by his check for the \$6,000, which extinguished the bank's demand thereon. 2d. If that be not so, the bank, knowing that Hoeber was primarily liable (Goodwin, Behr & Co. being mere accommodation makers), received payment of at least \$1,000 thereon from Hoeber, and extended to him the time of payment for the balance for ninety days without the assent of the accommodation makers.

§ 592. *One known to be in fact an accommodation maker must be treated as such, and will be released by extension to principal.*

The legal rule in such cases is that if the holder of the note is informed that the maker is only nominally such, but actually an accommodation maker for the indorser, he must deal with the paper and the parties with reference to their true relationships to the obligation. The makers were sureties, and an extension of time to Hoeber, the actual principal, without the assent of the surety, was a discharge of the surety if the bank precluded itself from enforcing at once the original obligation. It is true that matters have been called to the attention of the court which show peculiar equities as between Goodwin, Behr & Co. and Hoeber, but the bank does not represent said equities. The authorities are not seemingly in accord. If, however, the bank is held, by information given subsequent to the discount of the \$6,000 note, to be dealing with the transaction as if Hoeber were the maker, and Goodwin, Behr & Co. the indorsers, then the receipt of part payment from Hoeber, and an extension of time to him for a consideration as to the balance due, discharged the sureties. The English courts, while insisting on the strict rule as to the extension of time to the principal without assent of the surety, criticise the reasons given in some cases in support of the rule. May it not be that the true reason is found in the maxim, "*in hac foedera non veni*" (I have not entered into this agreement)? A surety enters into an obligation, the elements of which are time, etc. If the obligation is to be prolonged beyond the prescribed time, whereby there can be no legal remedy in his behalf until the end of the new

period, is there not virtually an effort to hold him bound to a changed or new contract as to time, when the financial and other conditions of the parties may have undergone an entire change in the interval? The conclusion is that the bank is not entitled to prove the \$6,000 note, or any part thereof, against the estate of Goodwin, Behr & Co., and judgment will be entered accordingly.

§ 593. *Accommodation maker regarded as principal debtor in English courts of law.*

Opinion by DILLON, J.

In England an accommodation maker is, in *courts of law*, regarded as the principal debtor, although the creditor or holder knew, at the time of making the note, that it was given by the maker to the payee without consideration (Byles on Bills [4th ed.], 191, where the cases are cited; 1 Parsons on Notes and Bills, 325, and notes; 3 Kent, 104; Story on Bills, secs. 291, 368, 432, 434); and therefore the extension of time by the holder to the acceptor without the consent of the payee and indorser will not discharge the acceptor,—nothing will discharge the maker but payment or release. The leading case is *Fentum v. Pocock*, 5 Taunt., 192, 1 Marsh., 14, which has been frequently approved in England and in this country. The cases are referred to by Mr. Parsons (1 Notes and Bills, 325), and in *White & Tudor's Leading Cases in Equity* (vol. 2, 4th Am. ed., p. 1917). There is no decision of the exact point by the supreme court of the United States. The nearest approach to it is in *Sprigg v. Bank of Mt. Pleasant*, 10 Pet., 257; *Lenox v. Prout*, 3 Wheat., 520, and *Creath v. Sims*, 5 How., 192, 206. The American cases rest on the authority of the English cases,—particularly *Fentum v. Pocock*, and those which follow it.

§ 594. — *but not in English courts of equity.*

But in *equity* it is otherwise, and the real relation of the parties to the note, bill or bond determines their rights in all cases where the holder has knowledge of that relation. And it has recently been expressly decided by the queen's bench, the court of chancery, and by the house of lords, that the rule of law that if the creditor contracts with the principal debtor to give him time, the surety is discharged, applies to bills of exchange and promissory notes; and that it makes no difference, in the application of the rule, that at the time of contracting the debt the surety was believed by the creditor to be the principal debtor. *Overend, Guernsey & Co. v. Oriental Financial Corporation*, Law Rep., 7 Ch., 142, A. D. 1871 (S. C., Law Jour., N. S., vol. 41, Eq., 332), affirmed in the House of Lords, Law Rep., 7 H. L., 348, 1874; *Ervin v. Lancaster*, 118 Eng. C. L. (6 Best & S.), 571; *Bailey v. Edwards*, 116 id. (4 Best & S.), 761; *Pooley v. Harradine*, 90 id. (7 El. & Bl.), 431; *Taylor v. Burgess*, 5 Hurl. & N., 1; *Greenough v. McClelland*, 105 Eng. C. L. (2 El. & El.), 424.

595. *Rule that where creditor contracts with principal debtor to give him time surety is discharged applies to notes. Accommodation acceptors or makers are held as sureties.*

The facts in the English case first cited are, in all essential respects, similar to the case now under consideration, and the principle involved is precisely identical. The accommodation acceptors were held to be sureties as against a holder who did not know that they were accommodation acceptors at the time he discounted the bills, but who, *after knowledge* of that fact, gave time by a valid contract, to the party who was in fact the principal debtor, without the knowledge or consent of the accommodation acceptors; and the holder's action at law against the acceptors was restrained. I will not enter upon a lengthened

discussion of the subject. These cases settle the law of England, and overrule the cases on which the American decisions to the contrary rest. I am inclined to think the doctrine of the court of chancery and of the house of lords rests upon sound principles, and that a creditor who actually knows that a given party is a surety on the contract ought not to be permitted to change that contract, or vary the surety's rights by a new contract, without his consent — unless, indeed, the surety has, by express stipulation, as in *Sprigg v. Bank*, *supra*, declared in the contract that he is a principal, and thereby estopped himself to plead and show that he was such, and entitled to the privileges and rights of a surety. I affirm the decision of the district court on the strength of the recent English cases referred to, and regret that the case is such that my judgment cannot be reviewed by the supreme court.

Affirmed.

FINDLAY v. BANK OF UNITED STATES.

(Circuit Court for Ohio: 2 McLean, 44-59. 1839.)

Opinion of the Court.

STATEMENT OF FACTS.—This bill was filed by the complainants to procure certain credits on certain judgments obtained by the Bank of the United States, against Findlay, in his life-time, as the surety of Sutherland. Findlay, and one Thomas Irwin, who some years ago deceased, indorsed three several notes to the Bank of the United States, for Sutherland, on which judgments were entered the 13th July, 1824, for \$5,619.71; the 7th June, 1825, for \$5,330.13; the 23d July, 1828, for \$5,508.75. To secure the payment of these notes a mortgage to the bank was executed by Sutherland, the 25th September, 1829; and at December term, 1828, a decree was entered for \$20,623.32, and a sale of the mortgage premises ordered. Another mortgage, bearing the same date, was executed by Sutherland to the bank, to secure the payment of four several notes — two of which were indorsed by Joseph Hough. On the two unindorsed notes judgment was entered the 15th July, 1824, for \$2,726.25, and the 23d July, 1827, on one of the other notes for \$4,841.36. On the other note, for \$4,346, due 25th August, 1827, no judgment was obtained. A *scire facias* was issued on this mortgage, and a judgment obtained for \$16,011, at July term, 1828. The judgment for \$5,619.71, against Findlay, Sutherland and Irwin, and that for \$2,726.25, against Sutherland only, were levied 10th November, 1824, on certain real property.

On the 5th November, 1821, John Busenbach obtained a judgment in the court of common pleas, for Butler county, against Sutherland, which was levied 27th October, 1826, on a part of the property covered by the prior levy. The above judgments against Findlay were also levied on his property the 16th June, 1827. In the spring of 1829, Findlay and Sutherland frequently solicited the bank to take the property mortgaged and levied upon at certain prices stated; and afterwards, the 29th June, 1829, an agreement, in writing, was made between the bank and Sutherland, by which the latter agreed to convey to the bank the property levied upon, and also that covered by the mortgages, for the sum of \$25,794. This sum was produced, probably, by adding to the prices originally talked of, \$1,000 upon a lot in Cincinnati, and deducting from the same \$1,260, the balance due on the Busenbach judgment. In addition to the above sum, the bank agreed to pay Mrs. Sutherland \$3,000 for her right of dower; and it was agreed that the proceeds of the land covered by the mortgage, to secure the payment of the two unindorsed notes

of Sutherland, and the two notes indorsed by Hough should be first applied in payment of Hough's liability; and that the residue of such liability should be discharged out of the proceeds of the property conveyed, exclusive of that which was mortgaged to secure the payment of the notes indorsed by Findlay; and it was stipulated that the property should be offered by the marshal at public sale. Sutherland executed the conveyances in pursuance of the agreement; and the property was publicly sold by the marshal, and credited by him on the several executions and order of sale under which it was sold. The proceeds of the mortgaged property were applied in discharge of the liabilities which the mortgages were intended to secure; and the proceeds of the levied property were apportioned between the judgment against Sutherland and Hough, and the two against Sutherland only. The bank purchased the property at the marshal's sale for less than the contract price. For the property levied on, the bank agreed to give the sum of \$5,939, and this property was struck off by the marshal at the sum of \$5,206.53. On the 10th September, 1830, the bank conveyed the lot in Cincinnati (conveyed to it under the contract with Sutherland for \$10,000) to D. Griffen for the consideration, as named in the deed, of \$19,000. These are the principal facts out of which this controversy has arisen.

§ 596. *To give jurisdiction, it is as necessary to allege citizenship of defendants as of complainants.*

Before the merits of the case are considered, it may be proper to notice an objection which arises to the jurisdiction of the court from the parties to the suit. The complainants are citizens of Ohio, and Timothy Kirby, alleged to be the agent of the bank, and Samuel Gray, administrator of Sutherland, and Thomas D. Carneal and Lewis Whiteman, administrators of Irwin, whose citizenship is not alleged, are made defendants. To give jurisdiction to the court, it is as necessary to allege the citizenship of the defendants as of the complainants. This is in the nature of an original bill, and calls for the exercise of chancery powers; and if the defendants named are citizens of Ohio, it is clear the court cannot, as the parties now stand, take jurisdiction of the case. It is true the whole object of the bill is to have certain credits entered on judgments of this court; but the right of the complainants depends on the construction of an instrument dated long after the judgments, and of certain equitable liens, as between the sureties of Sutherland. This objection may be obviated by discontinuing the bill as to Kirby, who is not a necessary party; by making the administrators of Irwin co-complainants, and by discontinuing the bill as to the administrators of Sutherland. If the estate of Sutherland cannot be affected by a decree in this case, as it most clearly cannot be, his administrators are not indispensable parties in the case. In addition to this, the proof in the case shows that Sutherland died insolvent. With this intimation, which may be a matter for future consideration, the questions made in the argument will be examined.

The complainants insist that they are entitled to a credit on the judgments against Sutherland and Findlay for the fair value of the Cincinnati lot, or the sum for which it was sold by the bank, deducting therefrom a reasonable amount on account of dower. At the time Sutherland conveyed this lot to the bank, the title was, to some extent, embarrassed; and there is no proof that the sum at which it was estimated was less than its value. There is no allegation of fraud in the conveyance of the lot to the bank for the price agreed; and if such an allegation were made, it would not be supported by the

fact that some fifteen months afterwards the lot was sold by the bank at an advance of \$8,000. Within this time an outstanding claim was bought in by the bank, the right of dower was paid for, and the property may have risen in value.

§ 597. *Fraudulent conveyance as against surety.*

A debtor has an undoubted right fairly to convey his property in satisfaction of a debt, without the assent of his surety. If such conveyance be made fraudulently, with the view of injuring the surety, it should be set aside. But if the parties act in good faith, and the transaction is characterized by fairness and propriety, though without the knowledge of the surety, he has no ground to complain, much less to set aside the conveyance. But in this case there is satisfactory evidence that Findlay, admitting him to be the surety of Sutherland, was desirous that the lot should be conveyed to the bank for a sum less than that which was agreed to be paid for it. The conveyance of this lot, and the other property, was made by Sutherland under the agreement which fixed the price at which the whole property was taken by the bank; and if this agreement, in so material a part as this, shall be set aside, how can any part of it be enforced? And if the agreement does not stand, the sales by the marshal, being public and in pursuance of legal process, must stand. This would reduce the gross sum for the property much below the price allowed in the agreement. In no point of view, as it regards the price of the property conveyed, is there any ground on which to set aside this agreement. There is neither hardness, unfairness, fraud nor want of assent of the surety on which to give relief.

The counsel for the bank insist that the evidence in the case does not show that Findlay was the indorser on the notes, without any interest in them, for the benefit of Sutherland. The notes were indorsed by Findlay and Irwin, and were discounted for the benefit of Sutherland. He is treated as the principal by the bank, in the negotiations respecting the property, in giving the mortgages, and, finally, in the conveyance of the property to the bank. In the agreement between Sutherland and the bank, respecting the property to be conveyed, the judgments are referred to as "against Sutherland and others as his securities." It is true that the judgments are not in form entered against the indorsers as sureties, but this does not lessen the force, and, indeed, the conclusiveness, of the facts admitted. The parties to the agreement evidently looked more to the facts, with which they were familiar, than the technical description of the judgments. But, independently of this admission, there is enough in the facts of the case to show that Findlay was surety. If Sutherland were not principal, why did he give the mortgages to secure the payment of all the notes? Why did he negotiate with the bank to take property in payment of them? And why did he, finally, convey all his property to the bank? No doubt is entertained of the suretyship of all the indorsers on the notes specified.

§ 598. *Contribution and subrogation.*

The relationship of principal and surety being established between Sutherland and Findlay, if this relationship continue, under the circumstances of this case, it may be proper to inquire whether the complainants would be entitled to the priority of the judgment against Sutherland and Findlay first levied, of which they have been deprived to some extent under the agreement. The proceeds of the property, bound by this lien, were applied to pay the judgment and note for which Hough was liable. This great head of equity is derived from the civil law, and is founded upon the immutable principles of justice and benevolence. It protects the rights of sureties as between themselves, compel-

ling a just contribution from each; and as against their principal, by subrogating them, on the payment of the debt, to all his rights. And it will, under certain circumstances, interpose its powers, and prevent the principal from impairing or destroying the collateral indemnities which he holds from his debtor; or, if destroyed, will, to the same amount, relieve the sureties. And this does not embrace securities taken at the time the debt was created only; for where the principal in a bond, having been sued, gave bail, against whom judgment was entered, the original sureties having paid the debt, obtained a decree for the assignment of this judgment. *Parsons v. Braddock*, 2 Vern., 608; *Wright v. Morley*, 11 Ves. Jr., 22; 3 Bligh., 590, 591; 6 Ves., 805; 1 Story's Eq., 477; 1 Ves., 339; 2 Ves., 569, 570; 2 Johns. Ch., 560; 4 Johns. Ch., 323.

§ 599. *Relationship of principal and surety ceases after judgment.*

But the great question in this case is, whether, after judgment, the relationship of principal and surety exists. The affirmative of this question is earnestly and ingeniously maintained by the complainants' counsel. They rely upon certain statutory provisions and the decision of the supreme court of the state. By the eighth section of the act to regulate judgments and executions, passed 24th February, 1824, it is provided that, in all cases where judgment is rendered upon any bond, sealed bill, promissory note, or other instrument of writing, in which two or more persons are jointly and severally held and bound, if it shall be made to appear to the court that one or more of said persons so bound signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk, in entering the judgment, to designate the principal and sureties, and the execution is required to issue first against the principal, whose property shall be exhausted before execution shall issue against the surety. And in the ninth section of the act to regulate proceedings where banks or bankers are parties, passed February 2, 1824, it is provided that a bank may bring a joint action against all the drawers or indorsers and declare for money lent, etc. These statutes introduce a new principle in pleading, and in the rendition of judgment in certain cases; and they seem to have been, in the mind of the legislature, in some degree connected. They were passed at the same session. That which authorized a joint proceeding against all the drawers or indorsers, and which, by construction, authorizes a procedure against all drawers and indorsers, being first enacted, seemed to require a protection to sureties which was given in the second statute. This statute provides a new remedy for sureties unknown to the law, but it does not establish any general principle, or change the relation of principal and surety as it before existed. The remedy affords summary relief to a surety against the hardship or inconvenience of a joint judgment, as authorized by the previous statute; but it does nothing more than this. And it might be a matter of doubt, if the relationship of principal and surety exist after judgment, whether equity could interpose in a case where this plain and adequate relief at law had been neglected. Unless this be made an exception to the general rule, equity could give no relief except upon special ground of fraud or circumstances which prevented or rendered ineffectual the remedy at law.

The case of *Dixon v. Ewing*, 3 Ham., 280, is considered by the counsel as conclusive of the present question. That was a bill in chancery which stated that the complainants joined in a title bond to Ewing, as the securities of one Foot, for the conveyance of a tract of land. They had no interest in the transaction. Foot failed to convey the land. Suit was brought on the bond and a judgment obtained. Execution on the judgment was issued and levied on the

personal property of Foot. The levy was afterwards discharged by the plaintiffs' attorney, without their knowledge, and the property was returned to Foot. And the court enjoined the plaintiffs at law to the amount of the value of the property levied on. In their opinion the court say, "our statute for the relief to bail and sureties is a beneficial one, and although this case, as it now stands, is not within its letter, it is within its spirit, at least, so far as injurious preferences are attempted." This decision rests upon general principles, and not upon the construction of a statute. If it involved the construction of a statute of the state, it would, under our practice, constitute a rule of decision for this court. But standing, as it does, upon principles of general law, it can only be considered as the authority of a high and enlightened court. In this view it will be regarded, and if it shall fail to establish the rule on this subject, it cannot fail to command the highest respect. The decision is in point, and, if it be conformable to law, it is conclusive of the question under consideration.

A case similar in principle, and not very dissimilar in facts, came before the supreme court of the United States, and is reported in 3 Wheat., 520. In that case a judgment was obtained against the maker of the note, and a separate judgment against the indorser. The indorser, fearing the failure of the maker of the note, called upon the agent of the plaintiff and requested an execution to be issued. It was issued, and the indorser offered to point out property to the marshal on which he might levy the amount of the judgment; and proposed to indemnify him for so doing. The execution was recalled by the plaintiff's agent, and the maker of the note became insolvent. In their opinion the court say, "although the original undertaking of an indorser of a promissory note be contingent, and he cannot be charged without timely notice of non-payment by the maker, yet, when the holder has taken this precaution, and has proceeded to judgment against both of them, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the indorser; or if he issues an execution, he is at liberty to make choice of the one which he thinks will be most beneficial to himself without consultation with the indorser." And they add, "if the indorser suffers any injury, by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case he may take under his own direction the judgment against the maker." The assignment of the judgment was provided for by the statute of Maryland. It is insisted that the language of the court, in this case, means nothing more than to "distinguish the position of the indorser after judgment, from that of conditional liability, which he occupies before it." But is this the full import of the decision? Do not the court say, after judgment, the plaintiff is not bound to take out execution against the principal, or if issued, to have it levied, though property be shown to the marshal, and an offer be made to indemnify him; and this in a case where the principal became insolvent, and all recourse against him was lost. If the relation of principal and surety existed after the judgment, and the surety had an equitable right to do what he did do, he had good ground for relief. But the court take this position from the surety. They tell him that his liability is in no respect affected by the conduct of the creditor, and that he is bound, absolutely bound, to pay the judgment.

§ 600. *The liability of a surety is in no respect affected by the conduct of the creditor after judgment.*

The same principle is decided by Chancellor Kent in the case of *Bay v. Tallmadge*, 5 Johns. Ch., 312. That was a case where there was a postponement of

an execution against the principal, without the assent of the sureties, and to their injury. But the chancellor says, "the postponement did not discharge the sureties from their obligation to pay the judgment against them." "Their privileges as bail," he says, "were lost, and they had become fixed as principal debtors." And he further remarks, "I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes then too late to inquire into the antecedent relations between the parties. Those relations become merged in the judgment." My researches have not enabled me to find a single case, except the one cited from the Ohio reports, where relief has been given on the ground that the relation of surety subsists after judgment. There are many cases where a court of chancery has acted on this relationship and given relief before judgment. In some instances, under very peculiar circumstances, it has required the principal to use peculiar diligence. And in all cases where the surety has paid the debt of his principal, equity will substitute him to all the rights of the creditor. This doctrine is learnedly discussed by Chancellor Kent, in the case of *Williard v. Cheeseborough*, 1 Johns. Ch., 408; and by Mr. Justice Story, in his *Treatise on Equity*, 1 vol., under the head of Substitution; 2 Johns. Ch., 562; 3 Merivale, 579; 2 Fonb., 302, n. 1. 17 Ves., 517, 520, are, also, full on the point. In the case of *Hays v. Ward*, 4 John. Ch., 123, Chancellor Kent, under peculiar circumstances, enjoined a suit at law against a surety until the creditor had pursued his remedy on a mortgage for the same debt. But these cases all proceed upon equities held to exist prior to the judgment, or upon the fact of payment of the judgment by the surety. And this doctrine, when examined, will be found consistent with the principles of justice. A rule which would make the liability of a surety depend upon contingencies until all the resources of the principal were exhausted, and that by a strictly legal course, would seem to regard the protection of the surety more than the safety of the creditor. It would be inconvenient in practice, and not suited to a commercial community.

The accommodation indorser agrees to pay on condition of demand and notice. And why should he be permitted to vary his contract, or excuse himself from its performance? By paying the money he is substituted to all the means of coercion against the principal which the creditor could use; and, also, to all the collateral indemnities he holds. And after judgment against him, this is the only relief, it would seem, which the law gives him. It is as ample a one as can be afforded, and imposes no hardship of which the surety has a right to complain. In the present case Findlay's character, as surety, was merged in the judgments; and he could claim, as surety, no equities but the right of substitution on the payment of the judgments. If Findlay be regarded as a principal, and equally liable with Sutherland to pay the judgments, it is not perceived on what ground he can ask the interference of this court.

§ 601. *Rights of a creditor who has a claim on two funds, and of one who also has a claim on one of such funds.*

The position assumed by the counsel is admitted, that where a creditor has a claim on two funds, and another creditor has a claim on one of the funds, equity will either restrain the creditor from going against the fund liable to both, or, on its exhaustion, will substitute the creditor of this fund to the rights of the other. But how can this doctrine be made to apply in the present case? The defendants are all principals, and Sutherland, the owner of the property,

is bound to pay all the judgments. And by a conveyance of his property he does pay one in full and others in part. Now, is there any principle of equity which will restrain him from doing this? I confess I know of none. The complainants insist that it was not the intention of the bank to make an application of the proceeds of the lands conveyed to it by Sutherland, different from that which the law would make. Mr. Jones, the agent of the bank, does state in his deposition that he objected to the clause in the agreement which provided that Hough's liabilities should be first discharged, and that it was agreed that this clause should be altered. But this statement is not corroborated by Mr. Wood, who drew the agreement, and no alteration of it was ever made. On the contrary, it appears that the bank permitted satisfaction to be entered of the judgment against Hough, which sanctioned this part of the contract.

§ 602. *Parol evidence is not admissible to vary or alter a written agreement.*

It would be extremely dangerous to admit parol evidence to vary or alter a written agreement. The rule is well settled, that such evidence cannot have this effect, especially where the written agreement has been acted on and confirmed, and there is no fraud. The marshal, it appears, credited the amount of his sales on the respective executions and order of sale; and this, it is insisted, is obligatory on the bank, and must fix the rule by which the proceeds of the lands conveyed must be applied. The credits thus entered show, it is urged, the election of the bank, which being made, cannot be changed. On the other side it is contended that the credits were entered by the marshal without the direction of the bank, which looked to the agreement for the application of the proceeds, and not to the marshal. It is very clear that the act of the marshal in this respect cannot bind the bank, especially where a different application of the proceeds had been made by the parties. The marshal's sale was provided for in the agreement, probably, with a view to perfect the title, and give to Sutherland the benefit of any advance of price for which the lands might sell. They sold for less than the contract price, and of course the sale could have no effect on the contract. We must look to the contract, and not to the marshal's sale and return, for the sum to be credited and the mode of its application. The agreement does not change, except as to the judgment against Sutherland only, the legal application of the proceeds of the mortgaged premises. It provides that the judgment, including interest and costs of \$5,462.20 and the note, including interest, amounting to \$4,779.88, shall be first satisfied and discharged out of said sum of \$25,794, so far as derived from the property mortgaged to secure said judgment and note; and the residue to be satisfied out of the proceeds derived from the other property, not interfering with the amount received from the property mortgaged for other purposes.

The balance remaining due on the above judgment and note, after exhausting the mortgage given to secure their payment, is, by the agreement, to be paid out of the proceeds of the lands not mortgaged. And no ground is perceived which authorizes this court to change this application of the proceeds of this property. It disregards the priority of the judgment against Findlay, but of this, as has been stated, his representatives cannot complain. He stands as a principal in the judgments, and can be considered in no other light, until the judgments shall be satisfied. The judgment against Sutherland only was secured by mortgage, but the proceeds of this mortgage, under the agreement, were applied in the payment of Hough's liabilities. So that that judgment stands without any special provision for its payment. It is insisted that this judgment shall be paid out of the proceeds of the property not covered by the

mortgages, on the ground that the bank had a right to make such an application. The bank undoubtedly might have provided in the agreement for the payment of this judgment in the manner stated, but it has not done so; and the court, under the peculiar circumstances of this case, will not direct the credit to be thus entered. This judgment must stand with the judgment against Findlay, both of which were entered on the same day, and levied at the same time, to be discharged, in proportion to their respective amounts, out of the proceeds of the property levied on. It is agreed in the contract that the premises described shall be taken by the bank, subject to the judgment of Busenbach. If the bank, in the language of the agreement, received the property subject to this judgment, no deduction should be made from the consideration stated, on account of it. Indeed it would seem that this judgment was deducted from the general amount, before the contract was drawn. The calculations can be made and the credits entered in conformity with this opinion.

PHILLIPS v. PRESTON.

(5 Howard, 278-294. 1846.)

ERROR to U. S. Circuit Court, Eastern District of Louisiana.

STATEMENT OF FACTS.—Preston was an accommodation indorser for Barrow, and Phillips was a second indorser. They agreed, at the time of making their indorsements, that they would share any losses equally. This suit was brought to recover a share of an alleged loss.

Opinion by MR. JUSTICE WOODBURY.

The points which have been argued in this case are in part connected with matters of form, and in part with what is substance. We shall dispose of the first before proceeding to examine the last.

§ 603. *Refusal to allow "peremptory exceptions" not error if party objecting received substantial benefit of them.*

The principal objection in respect to form is, that the court below refused to receive what are called in the practice of the state of Louisiana "peremptory exceptions." These are of two kinds—one as to form, and one as to law. Those in this case were offered as "peremptory exceptions, founded in law." By the Code of Practice in Louisiana, art. 345, such exceptions "may be pleaded in every stage of the action previous to the definitive judgment." 1 Louisiana, 315; 4 Martin (N. S.), 437. Hence, though offered here after the pleadings were read, they are admissible, while peremptory exceptions relating to form would not be then admissible. See art. 344. The only doubt as to their being duly offered arises from the provision in the three hundred and forty-sixth article, which requires them to "be pleaded specially," and they are not here in the precise form of a special plea at common law. But, in the absence of any adjudged cases to the contrary, we are inclined to think that, under the liberal and general pleading in use in Louisiana, these exceptions must be considered as "specially pleaded," when set forth as they were here in writing, and in a specific or detailed form, and judgment prayed on them in favor of the present plaintiff. Has he then been deprived of the advantage attached to them? That is the important inquiry. On examination of the record it will be seen that he had the benefit of all these exceptions, first in a motion in arrest of judgment. Again, he had the benefit of all the important matter in those exceptions by the bill which was afterwards filed and allowed,

and upon which this writ of error has been brought. We cannot, therefore, perceive that he has suffered any by the refusal of the court to receive these peremptory exceptions when first offered. The case in this respect is like one at common law, where the defendant should propose to demur generally to the declaration, but, being refused, objects to the sufficiency of it to cover various portions of the evidence as it is offered, and also objects to the sufficiency of the declaration in arrest of judgment. He thus, by a subsequent bill of exceptions to the rulings on the testimony and on the sufficiency of the declaration, obtains every advantage that he could have had under his general demurrer, and thus suffers nothing which requires a reversal of the judgment and a new trial for his relief.

§ 604. *Refusal to allow clerk to take down evidence not error when no appeal can be taken.*

The next objection of a formal character is, that the court below refused, though requested by the original defendant, to have the clerk take down in writing and file the testimony of the witnesses and the documentary evidence. It is true that by a statute of Louisiana, passed July 20, 1817, their courts are directed to have the testimony taken down "in all cases where an appeal lies to the supreme court, if either party require it." It is also true that an act of congress, passed May 26, 1824 (4 Stats. at Large, 62), has made the practice existing in Louisiana the guide to that in the courts of the United States, when sitting in that state, except as it may be modified by rules of the judge of the United States court. And it is further shown in this record, that the district judge there, November 20, 1837, adopted the practice of Louisiana, as then existing, in all cases not of admiralty jurisdiction. In a cause once decided by this court, which was connected with this point, *Wilcox v. Hunt*, 13 Pet., 378, it was remarked that the plea put in there as a part of the state practice, as the latter had not been adopted, was not received. But the practice there standing differently from that which is urged in this case, that decision does not control the present one. In considering, then, the propriety of the ruling of the court here, it is first to be noticed that, by the words of the statute, this testimony is to be taken down and filed only in those cases "where an appeal lies." That means, of course, a technical appeal, where the facts are to be reviewed and reconsidered, for in such an one only is there any use of taking them down. But in the present case no appeal of that character lay to this court, but merely a writ of error to bring the law and not the facts here for re-examination. To construe the act of 1824 as if meaning to devolve on this court such a re-examination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give to it an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. *Parsons v. Bedford*, 3 Pet., 448. In a case of chancery or admiralty jurisdiction it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. *Livingston v. Story*, 9 Pet., 632; *McCollum v. Eager*, 2 How., 64. In this case, likewise, it would be totally useless to have all the facts taken down in that manner, because, if so taken and sent up here, it would be irrelevant and improperly burdening the record, as much as the whole charge and opinion of the judge, instead of the naked points excepted to. See twenty-eighth rule of this court, and *Zeller v. Eckert*, 4 How., 297, 298. If a case comes up in that manner, this court never reconsiders or re-examines all the facts, but merely the law arising on them, as if a bill of exceptions had been properly filed. This

has been decided already in *Parsons v. Armor*, 3 Pet., 425; *Minor v. Tillotson*, 2 How., 394. Beside these considerations, showing that neither the words of the statute, nor the reasons for it, reach a case like this, there is another in the practice and laws of Louisiana, which shows that this provision does not extend to a cause like the present in this court. There the court of appeal, even in cases at law, often decides on all the facts as well as the law; but not so here. The court there may be substituted for a jury by consent of the parties in a trial at law, and were in this case below. But no such power can be conferred on this supreme court by parties in cases at law; and, as before shown, it exists under acts of congress merely in cases in equity and admiralty. To conclude on this point, then, it will be seen that the plaintiff in error, notwithstanding the refusal to have the clerk take down this evidence, has enjoyed all the benefit of it under his bill of exceptions, where it was material, and he wished to raise any question of law on it, and has enjoyed it as fully as if the whole had been taken down and filed. And thus he loses nothing and suffers nothing by the court refusing to do what we think neither the language nor spirit of the law requires in a case like this. *Parsons v. Bedford*, 3 Pet., 433.

§ 605. *Objection that trial by jury was not allowed is too late after party proceeds to trial before court.*

There are two other objections of form, which appear on the record and may well be noticed, though they are not embodied in the bill of exceptions. One is as to the waiver of a trial by jury in this case in the court below. After a hearing there, it was urged that, the waiver not having been entered on the record, the court was not authorized to proceed without a jury. But it would hardly be permissible for a party to proceed without objection in a trial of facts before the court, in a case at law in a state where the statutes permitted it, and the habits of the people under the civil law inclined them to favor it, and then, after a decision might be announced which was not satisfactory, to offer such an objection as this. From its not being incorporated into the bill of exceptions, or argued at the hearing before us, a strong presumption arises that it has been abandoned.

§ 606. *Right of surety to sue his co-surety in a federal court.*

The other objection is spread upon the early part of the record, and was a proper one for the consideration of the court in that stage of the case, as it went to its jurisdiction. This was urged on the ground that the notes mentioned in the petition of the plaintiff below belonged or ran originally to R. Barrow, a resident of Louisiana, in the same state with the defendant, and that his title was assigned to the plaintiff, and thus the latter cannot sue the defendant in this court, if Barrow could not. This position would be well taken under the provision in the eleventh section of the judiciary act of 1789 (1 Stats. at Large, 78), if the original plaintiff had instituted his suit upon the notes as assignee of them. See *Towne v. Smith*, 1 Woodb. & M., 115; *Bean v. Smith*, 2 Mason, 252; 16 Pet., 315; *Turner v. Bank of North America*, 4 Dal., 8-11; *Montalet v. Murray*, 4 Cranch, 46. But so far from that, he does not declare at all on the notes. He sets out a separate and different contract as his ground for recovery, resting on an original agreement between him and the defendant; and does not set out any assignment of those notes to himself by Barrow. Even if he counted on the notes, but not on or through an assignment of them, this court would have jurisdiction. 6 Wheat., 146; 9 id., 537; 2 Pet., 326; 11 id., 801; 3 How., 576, 577; 1 Mason, 251; 1 McL., 132. The judge below, then, properly overruled this objection.

§ 607. *Collateral agreement of co-sureties to share loss pro rata is founded on good consideration and is provable by parol; authorities; evidence.*

We come next to the only remaining question in this case, which branches into five or six different exceptions. It is a question of substance, and in some respects is not without difficulty. It is whether the ground upon which the objection going to the jurisdiction was overruled is well founded in the declaration and the facts, by showing a separate and independent contract, and one which had a good consideration in law. On looking to the petition, it will be seen that it sets out a sale of land between other parties; the mode of payment stipulated; the agreement between the plaintiff and defendant to become indorsers of certain notes, and divide between them any loss; the subsequent failure of the purchaser to pay the notes; the settlement of them by the plaintiff, and his right under the agreement and facts to recover of the defendant one-half of the amount. The whole claim proceeds on the collateral agreement, and there is no pretense of grounding the suit, as holder or indorsee, on any promises contained in the notes or in the indorsements on them. There is also a good consideration for this collateral agreement. It is the promise of the plaintiff beforehand to lose one-half, if the defendant would become a surety with him and lose the other half, and the actual payment afterwards of the whole by the plaintiff. Being then a collateral agreement by parol, which is sued, it stands free from the objection to the parol evidence offered to prove it. Were the action on the notes, and this evidence offered to contradict them, it would be entirely different; because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports. Civil Code of Louisiana, art. 2256; *Stone v. Vincent*, 6 Mart. (N. S.), 517; 15 La., 539; 10 id., 205; 1 Pet. C. C., 84; *Bank of United States v. Dunn*, 6 Pet., 59; 3 Camp. N. P., 56, 57; 9 Wheat., 587; 1 Mart. (N. S.), 641; *Chitty on Bills*, 541; 12 East, 4; 4 Barn. & Ald., 454. So, between the contracting parties, likewise, all prior conversation is supposed, as far as binding, to be embodied into the written contract. 4 La., 269; *Taylor v. Riggs*, 1 Pet., 591; 8 Wheat., 211. But the parol evidence here is not offered in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note, or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires in such cases, and this evidence is plenary and entirely satisfactory to substantiate the separate contract. It is true, at the same time, that, after a prior indorser has paid a note, he cannot recover, even in an action, not on it, but for contribution of one-half from a second indorser, if they were not in fact joint sureties, nor in fact made any collateral contract whatever, nor in fact had any communication whatever as to their liability. *McDonald v. Magruder*, 3 Pet., 474; 3 Har. & Johns., 125; 7 Johns., 367. But the present is a case differing, *toto celo*, from that. Here, by a deliberate arrangement before a public notary, and by the positive evidence of two witnesses, the two indorsers were co-sureties, and specially agreed to bear any loss equally between them; and the right to recover is, therefore, entirely clear. 3 Pet., 477; *Douglas v. Waddle*, 1 Hamm., 413, 420; *Deering v. The Earl of Winchelsea*, 2 Bos. & Pull., 270.

There are two or three other views connected with this part of the case which may be usefully adverted to, but by which we do not decide it. Thus, where a person like Phillips, the original defendant, was not a party to a

note, but put his name on the back of it, parol testimony has been deemed competent to show the real object for which it was placed there; and especially if it did not contradict any legal implication from the name being there. And hence, under circumstances like these, where, as in Louisiana and some other states, it is implied by law that such a person puts his name there as a surety or guarantor, no objection exists to parol proof to that effect. 10 Louisiana, 374; *Lawrence v. Oakey*, 14 id., 386; *Nelson v. Dubois*, 13 Johns., 175; *Dean v. Hall*, 17 Wend., 214; 5 Mass., 358; 12 id., 281; 1 Vermont, 136; *Ulen v. Kitteridge*, 7 Mass., 233; 4 Wash., 480; 5 Serg. & R., 363. In *White v. Howland*, 9 Mass., 314, he is held to be liable as if signing with the maker as a surety. But however much, in some states, the practice may go beyond this in suits between the parties to the agreement, as in 1 Hamm., 420, and 5 Serg. & R., 363, it could generally not be competent to prove anything by parol, in actions on the note, contrary to what is written or to what is implied in law. *Bank of United States v. Dunn*, 6 Pet., 59. And in other states and in other circumstances, where the inference of law is not that such a name is placed there as a surety, it is very doubtful whether, in a suit on the note, proof that he did it only as a surety is competent. 6 Mart. (N. S.), 517; *Bank of United States v. Dunn*, 6 Pet., 59. In England, in the case of such a name on the back of a bill of exchange, the person may be treated as a new drawer (*Chitty on Bills*, 241); and if the payee there has also indorsed the note the implication deemed most proper is, that another name on the back is that of a second indorser, and should so be held in the hands of third persons. *Chitty on Bills*, 188, 528; *Holt's Nisi Prais*, 470; 5 Ad. & Ell., 436; 6 Nev. & Man., 723. So, 6 Mart., 517. It will be seen, however, that these last are generally cases of actions on the notes or bills of exchange themselves, while the present case is not brought on the note itself, but on a distinct and collateral contract.

Another suggestion bearing on the case might be, that in Louisiana the surety, when paying, may step into the shoes of his creditor, if he pleases, by subrogation, and enjoy all his rights against the debtors or other sureties. *Hewes v. Pierce*, 1 Mart. (N. S.), 361; *Callihan v. Tanner*, 3 Rob. (La.), 299; Civil Code of Louisiana, art. 2157. But there the suit is probably in the creditor's name, and not, as here, in that of the surety. So, in some countries where the civil law prevails, such a contract as this, deliberately made before a notary, and by him reduced to writing by request of the parties, would, in law, be deemed equivalent to a contract in writing; and on that ground be admissible even in a suit on the note between the original parties to it. The doings of the parties thus have a sort of public form given to them, *quasi* judicial, and they are bound by them, though not signed by the parties. 2 Domat's Civil Law, b. 2, tit. 1, § 1, art. 28, and tit. 5, § 5, pp. 661, 662. It would be there deemed an act of too much deliberation by the parties, and of too much formality before that public officer, to be treated merely as an ordinary verbal arrangement. *Coop. Justinian*, 586; 3 Burr., 1671; *Story on Bills*, § 277. But, though the Louisiana code, founded chiefly on the civil law, may not expressly abrogate such a doctrine, it does not in terms make records by a notary valid, unless signed by the parties, or consisting of copies of papers signed by the parties and acknowledged before witnesses. Civil Code, arts. 2231, 2413; 8 Mart. (N. S.), 568; 10 La., 207, 354. And though the paper containing this is signed by the parties to the sale, and attested by witnesses, it is not signed by Preston and Phillips, the parties to this arrangement.

It is not necessary, however, to decide absolutely on the effect of either of

these last views. Deeming the action here to be founded on the collateral agreement, and deeming the evidence offered to be competent, for the reasons first stated under this head, these conclusions will virtually dispose of the last six exceptions contained in the record of this case. Thus, as to Barrow's deposition, the admission of which was the ground of one of these exceptions, it is clearly competent to prove this separate parol contract in a suit on that, and not on the note. So the certificates and notices, also excepted to, were properly proved as a part of the collateral transaction under the general expressions in the petition, and not as notices that should be specially set out in a declaration, where notes are counted on by a holder. In a case like that, the averment of them and the proof are highly material, but in the former case they are rather historical and merely a part of the *res gestæ*, without its being essential to give them in detail. The original plaintiff avers in the petition that the notes were protested, and that he was obliged to pay them, which would not have been the case without due notices; and this is quite enough in an action on a collateral undertaking. So the notary's evidence, which is another of the exceptions, becomes under this aspect entirely competent, and the written memorandum made by him at the time, which is another objection, was also admissible evidence to refresh his memory, if not *per se* of the facts stated in it. Greenl. Ev., §§ 436, 437. That it was admissible to refresh his memory, see *Smith v. Morgan*, 2 Moody & R., 259; *Horne v. McKenzie*, 6 Clark & F., 628. Other cases say such a memorandum is admissible itself to go to the jury. Greenl. Ev., § 437, note; 1 Rawle, 182; *Smith v. Lane*, 12 Serg. & R., 84; 2 Nott & McC., 331; 15 Wend., 193; 16 id., 586-598. If this last be a rule controverted, the writing here was "the act of sale," and contained other matters as to the transaction in connection with this as the whole terms of sale, which were clearly competent, and the whole properly went together to the jury as exhibiting the progress and character of the transaction, beside being admissible to refresh the memory of the witness. *Bullen v. Michel*, 2 Price, 422, 447, 476. So the evidence of the sale of Carr's property and of the transfer of it to the original plaintiff, Preston, by the sheriff, and the terms of the transfer, though objected to, are mere links in the chain of the transaction, and unexceptionable in that view; and were, like the evidence of the former sale to Carr by Barrow, duly authenticated.

Upon the whole case, then, we are happy to find that no legal objection seems to be tenable against making the original defendant meet an engagement which, on the record, he appears to have been bound in honor and justice, no less than law, faithfully to discharge. Although the court have deemed it proper thus to deliver an opinion on this case, as it has been argued by the counsel for the plaintiff in error, yet the death of the plaintiff has since been suggested; and no appearance is entered for the defendant. We shall not, therefore, enter judgment in conformity to the opinion until the defendant or the representatives of the deceased appear.

M'DONALD v. MAGRUDER.

(3 Peters, 470-479. 1830.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was a writ of error to a judgment rendered by the circuit court of the United States for the county of Washington, in the District of Columbia, in an action of *indebitatus assumpsit*, brought by the

first indorser of a promissory note against the second indorser, to recover half its amount. The note was made by Samuel Turner, Jr., and indorsed George B. Magruder, John G. M'Donald. At the trial of the cause a case was agreed by the parties, and the judgment of the circuit court was rendered in favor of the plaintiff, on a verdict given by the jury, subject to the opinion of the court.

§ 608. *Indorser liable to subsequent indorsee.*

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the same note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount.

§ 609. *Indorser without consideration is not liable.*

This is the regular course of business where notes are indorsed for value. But it is contended that, where less than the amount is received, the indorser is responsible to his immediate indorsee only for the sum actually paid; consequently, if nothing is paid, the mere indorsement does not bind the indorser to pay his immediate indorsee anything. If B. indorses to C. the note of A., without value, and A. fails to take it up, it is, as between B. and C., a contract without consideration, on which no action arises. This is undoubtedly true, if C. retains the note in his own possession; and may be equally true, if he indorses it for value. When he repays the money he has received he is replaced in the situation in which he would have been had he never parted with the note. If he puts it into circulation on his own account, new relations may be created between himself and his immediate indorsee, which may be affected by circumstances. In the case under consideration the note took the direction intended by all the parties. It was indorsed by Magruder, for the purpose of enabling Turner to discount it at the bank. To insure this object, Turner applied to M'Donald, who placed his name also on the paper. No intercourse took place between the indorsers. No contract, express or implied, existed between them, other than is created by their respective liabilities, produced by the act of indorsement. What are these liabilities? The first indorser gave his name to the maker of the note for the purpose of using it in order to raise the money mentioned on its face. He made himself responsible for the whole sum, upon the sole credit of the maker. His undertaking is undivided. He does not understand that any person is to share this responsibility with him. But either the bank is unwilling to discount the note on the credit of the maker and his single indorser, or the maker supposes his object will be insured by the additional credit given by another name. He presents the note, therefore, to M'Donald, and asks his name also. M'Donald accedes to his request, and puts his name on the instrument. If the maker passes the note for value, the liability of M'Donald to the holder is the same as if that value had been received by M'Donald himself. Why is this? No consideration is received by M'Donald, and this fact is known to the holder and discounteer of the note. But a consideration is paid by the holder to the maker, and paid on the credit of M'Donald's name. He cannot set up the want of a consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promisee to another is as valid a consideration as if paid to the promisor himself.

§ 610. *First indorser liable notwithstanding a second indorser's indorsement.*

In what does the claim of the second on the first indorser differ from that of the holder on the second indorser? Neither has paid value to his immediate indorser; but the holder has paid value to the maker on the credit of all the names to the instrument. The second indorser, if he takes up the note, has paid value to the holder, in virtue of the liability created by his indorsement. If this liability was founded equally on the credit of the maker and of the first indorser, if his undertaking on the credit of both subjects him to the loss consequent on the payment of the note, how can the contract between him and his immediate indorser be said to be without consideration? If it be true, as we think it is, that Magruder, when he indorsed the note and returned it to the maker to be discounted, made himself responsible for its amount on the failure of the maker, if this responsibility was then complete, how can it be diminished by the circumstance that M'Donald became a subsequent indorser? How can the legal liability of a first indorser to the second, who has been compelled to take up the note, be changed otherwise than by an express or implied contract between the parties? This question has arisen and been decided in the courts of several states. *Wood v. Repold*, 3 Har. & J., 125, was a bill drawn by A. Brown, Jr., at Baltimore, on Messrs. Goold & Son, of New York, in favor of G. Wood & Co., and indorsed by G. Wood & Co., and afterwards by Repold, the plaintiff. The bill was drawn and indorsed for the purpose of raising money for the drawer, and was discounted at the Bank of Baltimore. On being protested for non-payment, it was taken up by Repold, and this suit brought against the first indorser. Payment was resisted, because the indorsement was without consideration for the accommodation of the drawer; but the court sustained the action. The same question arose in *Brown v. Mott*, 7 Johns., 361, on a promissory note, and was decided in the same manner. In that case the court said that, if he had taken it up at a reduced price, it would seem that he could only recover the amount paid. Undoubtedly, if M'Donald had been compelled to pay a moiety of this note, he could have recovered only that moiety from Magruder. The case of *Douglas v. Waddle*, 1 Hamm., 413, was determined differently. This case was undoubtedly decided on general principles; but the custom of the country and a statute of the state are referred to by the court as entitled to considerable influence. The weight of authority as well as of usage is, we think, in favor of the liability of the first indorser.

§ 611. *Successive accommodation indorsers are not co-sureties.*

The claim of Magruder has also been maintained, on the principle that they are co-sureties, and that he who has paid the whole note may demand contribution from the other. The principle is unquestionably sound, if the case can be brought within it. Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. Magruder and M'Donald might have become joint indorsers. Their promise might have been a joint promise. In that event, each would have been liable to the other for a moiety. But their promise is not joint. They have indorsed separately and successively, in the usual mode. No contract, no communication has taken place between them which might vary the legal liabilities these indorsements are known to create. Those legal liabilities, therefore, remain in full force. Upon this question of contribution, the counsel for the defendants in error rely on two cases reported in 2 Bos. & Pull., 268 and 270. The first, *Cowell v. Edwards*, was a suit by one surety on a bond against his co-surety for contribution. It was intimated by the court that each surety

was liable for his aliquot part, but not liable at law to any contribution on account of the insolvency of some of the sureties. The party who had paid more than his just proportion of the debt could obtain relief in equity only. The second case, *Sir Edward Deering v. The Earl of Winchelsea*, *Sir John Rous* and the Attorney-General, was a suit in chancery, in the exchequer. Thomas Deering had been appointed receiver of fines, etc., and had given three bonds conditioned for faithful accounting, etc. In one of these the plaintiff was surety; in another, Lord Winchelsea; and, in the third, Sir John Rous. Judgment was obtained on the bond in which the plaintiff was surety, and this suit was brought against the sureties to the two other bonds for contribution. It was resisted on the ground that there was no contract between the parties, they having entered into special obligations. The lord chief baron was disposed to consider the right to contribution as founded rather on the equity of the parties than on contract, and the court decreed contribution. In this case the parties were equally bound, were equally sureties for the same purpose, and were equally liable for the same debt. Neither had any claim upon the other superior to what that other had on him. The parties stood in the same relation, not only to the crown, to whom they were all responsible, and to the person for whom they were sureties, but to each other. Under these circumstances, contribution may well be decreed *ex equali jure*. But, in the case at bar, the parties do not stand in the same relation to each other. The second indorser gives his name on the faith of the first indorser, as well as of the maker. The first indorser gives his name on the faith of the maker only. Unquestionably these liabilities may be changed by contract; but, no contract existing between these parties, it is not a case to which the principle of contribution applies.

No notice has been taken of the form of the action. It is admitted that Magruder, having paid the whole note, may recover a moiety from M'Donald, if their undertaking is to be considered as joint; if he, as first indorser, is not responsible to M'Donald for any part of it which M'Donald may have paid. The judgment is to be reversed, and the cause remanded, with directions to set aside the verdict, and enter judgment as on a non-suit.

LIDDERDALE v. ROBINSON.

(12 Wheaton, 594-598. 1827.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—The question to be decided in this cause is certified to this court on a division of opinion from the judges of the Virginia district. The bill is filed to recover a sum of money of Robinson's estate; and the debts being numerous, and the assets probably insufficient to satisfy the whole, the right of priority becomes a material object among the creditors.

§ 612. *Indorser's right of priority as a judgment creditor.*

The particular demand upon which this question is certified is that of one Smith, who was joint indorser with Robinson, on a bill of exchange drawn by one Roots, and returned under protest. The bill, of course, must have been drawn payable to Robinson and Smith, and being taken up by them, and the latter having paid more than a moiety in satisfaction of the debt, his administrator now claims of the estate of Robinson the amount by which Smith's payments exceeded the moiety. There is no question on his right to come in for that sum as a simple contract creditor; but he claims precedence, and the rank of a judgment creditor, under a particular provision of the laws of Virginia

in force at Robinson's death, and under an equitable principle, according to which he who pays a debt of a superior dignity is suffered to rank in the application of assets according to the dignity of the debt satisfied; or, in other words, is substituted for the creditor who held the prior debt. The terms of the Virginia act are these: "All bills of exchange which are or shall be protested shall, after the death of the drawer or indorser thereof, be accounted of equal dignity with a judgment; and the executors or administrators of every such drawer or indorser shall suffer judgment to pass against them for all debts due upon protested bills of exchange, before any bond, bill or other debt of equal or inferior dignity, under the penalty of being obliged to pay the same out of their own proper goods." The priority, therefore, of the holder of the bill of exchange, as well against the estates of the indorsers as the drawer, is unquestionable; but the other creditors insist that, as between the co-indorsers, the rights of Smith against the estate of Robinson must be determined by the nature of the action to which he would have been put at law to recover back what he paid above his moiety, that is, *assumpsit* on simple contract. But both on principle and authority we are induced to think otherwise.

§ 613. *Subrogation of indorser who pays note or bill.*

What have the creditors of Robinson to complain of? They are only referred back to the situation in which they were before they were relieved by the application of Smith's funds to the payment of the bill of exchange. If the bill of exchange still remained in the hands of the holder unsatisfied, his right to a priority from Robinson's estate, as to the moiety of the bill, would be unquestionable; and if relieved from that state by the money of Smith, it is but right that Smith should have refunded to him that sum which they, without that payment, would certainly have been obliged to relinquish. This is in perfect analogy with that class of cases in which real assets have been decreed to make good to simple contract creditors sums that have been taken from personal assets, and applied to relieve the real estate (8 Ves., 382), or to satisfy specialty creditors. *Gibbs v. Ougier*, 12 Ves. Jr., 413. That a surety who discharges the debt of the principal shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves, in many respects, regarded as sureties. 2 Vern., 608; 11 Vesey, 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But in the cases last cited, we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step further to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment. And accordingly we find the *dictum* expressed in *Robinson v. Wilson*, 2 Madd., 434, in pretty general terms, "that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal." If the parties in this cause be considered as claiming under assignment from the holder of the bill, and each as assignee of the claim against his co-indorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction has been made by the surety without taking an actual

assignment of the debt. The first in order of time was that of Burrows and Brown *v.* M'Whann and Campbell, administrators of Carnes, 1 Desaus., 409.

This was a case exactly the parallel of the present in all its circumstances. The parties were co-securities to one Banks, in a bond to Warrington, and had contributed, but unequally, to the satisfaction of the judgment obtained against them jointly on the bond. They had taken no assignment of the judgment, and Brown and Burrows, who had paid most, prayed to be let in as judgment creditors of Carnes, their co-obligor, in right of the judgment obtained by the creditor, Warrington. There was, in this case, satisfaction also entered formally on the judgment, but as this was obtained by the management of Carnes' administrators, it was treated as a nullity, and the complainants had a priority decreed to them in right of the judgment against themselves, conjointly with Carnes, their co-obligor. The next case was that of Eppes, Executor of Wayles, *v.* Randolph, 2 Call, 125, in which the surety to a bond, having paid it off, but having taken no assignment from the creditor, filed his bill to charge the real estate of the principal, upon the ground that he had succeeded to the rights of the creditor by the mere act of satisfying the bond. It was not questioned that such would have been the effect of an assignment, nor that the aid of the court would have been granted to compel the creditor to assign; but the claim to relief was insisted upon, on the ground that, without such assignment, the surety could only be considered in the rank of a simple contract creditor, and, as such, neither having a preference to other simple contract creditors, nor the rights of a creditor by specialty, to charge the assets descended.

This is precisely the defense set up in the present case; but in the case of Wayles *v.* Randolph, the court decided that the surety succeeded to the rights of the creditor, and decreed satisfaction accordingly out of the remaining assets, both real and personal (p. 189); modifying their decree, however, so as not to affect the executor with a *devastavit* for any payment made before the filing of the bill. In the year 1802, the same point was decided in the courts of Virginia in the case of Tinsley *v.* Anderson, 3 Call, 329. In this case, a creditor filed his bill to compel mortgagees and judgment creditors to subject the estate of one Anderson to a sale, that prior incumbrances might be cleared away, so as to let him in for satisfaction; and in applying the proceeds of the mortgaged property, the court was called upon to decide this question in all its latitude. In delivering their decree, the language of the court is "that for all sums paid by sureties, they ought to be placed in the situation of the creditors whose debts they have paid or are bound to pay." That this, then, is the settled law of the state in which this contract and this cause originated cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on a general principle, and on authorities of great respectability in other states. We will, therefore, order it to be certified to the circuit court of Virginia district that John Smith, executor of John Smith, deceased, is entitled to satisfaction from the assets of the estate of John Robinson, with the priority of a judgment creditor of the deceased.

Certificate accordingly.

HALL *v.* SMITH.

(5 Howard, 96-103. 1846.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Thornton sued Smith, who gave him two notes, indorsed by McCaleb and by Kent as sureties, whereupon Thornton discontinued

his suit. These notes not being paid at maturity, Thornton brought suit against McCaleb, who was arrested, and procured one Lemmon as bail. Lemmon became McCaleb's bail because he was an intimate friend of McCaleb's father-in-law, Hall, and believed that he would save him (Lemmon) harmless. This Hall promised verbally to do, and finally paid the balance due on the notes, which were then assigned to him, and he brings suit against Smith to recover the money he paid out for his use. On a certificate of division, the questions propounded were (1) whether the plaintiff could recover, and (2) if not, could the defendant offer evidence that Smith and McCaleb were both citizens of Mississippi when the notes were given, and thus bar plaintiff from suing as assignee.

§ 614. *Surety of a surety paying debt of principal may recover from principal.*

Opinion by MR. JUSTICE WAYNE.

Upon the trial of this cause in the circuit court two points were made, upon which the judges differed in opinion; and it has been certified to this court, as is provided for in the sixth section of the act of 1802, entitled "An act to amend the judicial system of the United States." 2 Statutes at Large, 159. From the evidence, we think that all the persons in this transaction became privies in the same contract to secure the payment of a debt due by the defendant to Thornton. The payment of it, therefore, by any one of them other than the debtor, was a payment at his request, and an express *assumpsit* to reimburse the amount. But, suppose such a privity not existing between the parties, the evidence shows it also to be a case of the surety of a surety paying the debt of a principal, under a legal obligation, from which the principal was bound to relieve him. Such a payment is a sufficient consideration to raise an implied *assumpsit* to repay the amount, though the payment was made without a request from the principal. *Tappin v. Broster*, 1 Carr. & P., 112; *Exall v. Partridge*, 8 Term R., 310; *Child v. Morley*, id., 610. We shall decide the first point certified to be answered in the affirmative, which makes it unnecessary to notice the second.

SWEENEY v. EASTER.

(1 Wallace, 166-175. 1863.)

STATEMENT OF FACTS.—Plaintiffs bring trover against defendants to recover the value of certain notes indorsed for collection by plaintiffs to Harris & Co., bankers, and by them indorsed for the same purpose to Sweeny, R. F. & Co., who collected the notes and retained the proceeds to satisfy a balance due them from Harris & Co., who had become insolvent.

§ 615. *Competency of partner as witness to explain indorsement of firm who are indorsers.*

Opinion by MR. JUSTICE MILLER.

The first exception was to the admission of R. H. Harris, of the firm of Harris & Sons, as a witness. Neither that firm nor any of its members were parties to the suit, nor is it pretended that the witness was in any manner interested in the event of it. But it is claimed that because the name of the firm of which he is a partner is indorsed on the negotiable paper which is the subject matter of this suit, he cannot, being a party to such paper, be permitted to invalidate or contradict it, or vary its legal import. The objection as thus stated embraces two distinct propositions. *First*, that a party to a negotiable instrument shall not be permitted to impeach or render invalid the paper with

which he thus stands connected. *Second*, that he cannot be permitted to contradict or vary the legal import of the original paper, or such indorsement as he may have made on it by parol testimony. The latter objection applies to the character of the evidence, without regard to the person offered as a witness, and would be as effectual against testimony from the mouth of a person who had no connection with the paper as from an indorser or maker of it.

This is not a suit on the paper, or against any of the parties to it. It is an action of trover for the wrongful conversion of the paper, in which plaintiffs seek to recover its value. The firm of Harris & Sons sent it to defendants, who were their banking correspondents, for collection; and they made a special indorsement on it, thus: "*Pay Sweeny, R., F. & Co., for collection. SAM. HARRIS & SONS.*" Now, does this testimony of the witness, to the effect that Harris & Sons were not the owners of the paper, and did not sell it to defendants, or intend to give them any lien on or title to the paper, or its proceeds when collected, contradict or vary the legal import of this indorsement? We cannot see that it does. It rather explains the transaction in perfect conformity with the real meaning and effect of the indorsement. The words "for collection" evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds. If defendants acquired any interest in the paper, it was not by virtue of that indorsement, but by some course of dealing with Harris & Sons, or by some other matter outside of the indorsement. The character of this indorsement also takes the case out of the rule asserted in the first proposition embraced by the exception. Perhaps no subject connected with commercial paper has been more the subject of controversy, and of opposing and well-balanced judicial decisions, than the proposition here relied on. It was first laid down in the English courts in the case of *Walton v. Shelley*, 1 Term, 296, and afterwards held the other way in *Jordaine v. Lashbrook*, 7 id., 601. This court, however, has steadily adhered to the doctrine of *Walton v. Shelley*, and we are referred by counsel for plaintiffs in error to our own decisions on this subject in 6 Pet., 51; 8 Pet., 12; 3 How., 73; 13 How., 229. The rule propounded in *Walton v. Shelley* is, that a person who has placed his name on a negotiable paper as a party to it shall not afterwards, in a suit on such security, be competent as a witness to prove any fact which would tend to impeach or invalidate the instrument to which he has thus given his name. The reason of it is, that it is against good morals and public policy to permit a person who has thus aided in giving currency and circulation to such paper to testify to facts which would render such paper void, after he has thus imposed it upon the public as valid, with all the sanction which his name could give it. *Walton v. Shelley*, 1 Term, 296; *Bank of United States v. Dunn*, 6 Pet., 57; *Bank of Metropolis v. Jones*, 8 id., 16. The indorsement in the present case was not intended to give currency or circulation to the paper. Its effect was just the reverse. It prevented the further circulation of the paper, and its effect was limited to an authority to collect it. No principle of public policy would be violated, nor any fraud upon innocent holders of the paper would be perpetrated, by permitting the parties who made that indorsement to testify to facts which are in perfect harmony with its language and its intent. Again, the testimony does not tend to invalidate the paper, or any indorsement on it. The defendants could not have recovered of Harris & Sons on that indorsement if the notes had been protested in their hands; and

they were therefore deprived by that testimony of no right which the indorsement gave them; nor was such indorsement impeached or impaired by the testimony. This exception must be overruled.

§ 616. *Competency of evidence to establish knowledge that firm were not owners but mere collectors of paper.*

The second exception was taken to the refusal of the court to grant an instruction to the jury prayed by plaintiffs in error. The instruction asked is as follows: "And the private practice of Harris & Sons, in transmitting negotiable paper having time to run, whereby they intended to distinguish between negotiable paper discounted by them and that received for collection, as given in evidence by the witness Harris, is not competent to charge the defendants with notice as to whether the paper in controversy was discounted by and belonged to the said Harris & Sons, or was transmitted for collection, unless the jury shall find, from all the evidence in the case, that the defendants had knowledge of such private practice; and in the absence of such knowledge the defendants were authorized to treat such paper according to what it purported on its face, and the general custom of bankers in the District of Columbia and elsewhere, offered in evidence." This prayer contains two propositions; the one relating to the knowledge of defendants of certain private modes of doing business of Harris & Sons, and the other to what the jury were authorized to infer from certain other circumstances in the absence of such knowledge on the part of defendants. The instructions which were given by the court and which are in the record were full and sound on the first of these propositions, and, we think, were all that was necessary on both branches of the prayer. But the second branch of the instruction asked is objectionable because it referred to the jury the interpretation of the indorsement on the paper, and also required of them to determine the case on the face of the paper and the custom of bankers alone, without reference to the special facts proven in regard to the course of dealing between defendants and Harris & Sons. The charge of the court left all these matters of fact to the jury for their consideration after a full and fair statement of all the principles of law which were necessary to a sound verdict.

We see no error in the record, and therefore the judgment of the circuit court is affirmed with costs.

BLAIR v. FIRST NATIONAL BANK OF MANSFIELD.

(Circuit Court for Ohio: 2 Flippin, 111-115. 1877.)

Opinion by WELKER, J.

STATEMENT OF FACTS.—This suit is brought against the bank upon the following promissory note:

"\$5,000.

MANSFIELD, OHIO, August 11, 1873.

"Ninety days after date I promise to pay to the order of R. H. McMann, cashier, five thousand dollars at the First National Bank of Mansfield, in New York exchange. Value received.

WILLARD HICKOX."

Indorsed: 1st. "Pay D. P. Dildine, Esq., cash or order.—R. H. McMann, Cashier."

2d. "Pay J. A. Blair, or order.—D. P. Dildine."

The petition alleged the assignment by R. H. McMann, cashier of the bank, for and on behalf of the bank, to D. P. Dildine, before due and for a valuable

consideration, and by said Dildine, before maturity and for a valuable consideration, to the plaintiff, and avers the proper demand and notice on maturity to the First National Bank, etc. The defendant answers, as a defense, that the note was received by the said R. H. McMann without any consideration therefor, and indorsed to Dildine, cashier, without any consideration to said National Bank, and solely as a matter of accommodation for said Hickox; that Hickox was largely indebted to the bank at the time of the execution of said note, and that he and said McMann unlawfully and fraudulently colluded and combined to cheat the bank, and with said purpose and intent Hickox executed the note to McMann, and with said purpose and intent, and without any authority in law or fact therefor, McMann unlawfully and fraudulently indorsed and delivered said note to Dildine without receiving any consideration therefor for said bank. To this answer the plaintiff files a general demurrer. The answer does not deny the assignment and transfer of the note by McMann, cashier, to Dildine, and by Dildine to the plaintiff, before maturity. We may, therefore, in considering the plaintiff's demurrer and the sufficiency of defendant's answer, regard the assignment to have been made before maturity and for valuable consideration paid by the plaintiff. That being so regarded, all that part of the answer as to the consideration of the note, or its assignment to the plaintiff, constitutes no defense to the note in the hands of the plaintiff if he be an innocent holder of the note.

§ 617. *A note payable to A., "cashier," is a note payable to the bank.*

The answer and demurrer raise two questions for determination: 1st. Whether the note payable to McMann, cashier, is a note payable to the bank? 2d. Whether McMann, as such cashier, had authority to assign the note? As to the first point: The case of *Bank of Genessee*, 19 N. Y., 313, was a suit on a note payable to "the order of S. B. Stokes, Cash.," at the Bank of New York, and by him indorsed by the name of "S. B. Stokes, Cash." It was held by the court that the note was payable to the bank. Judge Denio in that case says: "In the absence of any evidence to connect the bill with defendant's bank, he would be regarded as the payee and indorser individually, and the abbreviation affixed to his name would be considered as *descriptio personæ*. But when it has been shown that he was the defendant's cashier, the presumption would be that the note payable in that form was the property of the bank, and when he indorsed it with the addition mentioned, and sent it to the plaintiff in an official letter for discount, it was the same thing as requesting the plaintiff to discount on behalf of the defendant's bank." It was also held in that case, "that there being nothing in the circumstances to put the indorser upon inquiry, and he having discounted the bill in good faith, he was entitled to recover against the bank, although the bill was indorsed for the accommodation of a third party, the bank having no interest in it, but its governing officer authorized the indorsement and application for discount." In 1 Wallace, 234, it is held by the court: "That where negotiable paper is drawn to a person by name with addition of 'cashier' to his name, but with no designation of the particular bank of which he was cashier, parol evidence is allowable to show that he was the cashier of a bank which is plaintiff in the suit, and that in taking the paper he was acting as cashier and agent of that corporation." These cases, I think, settle that the National Bank was the owner of this note, although payable to McMann as cashier, and that it was the paper of the bank.

§ 618. *A cashier has authority to assign notes.*

2d. Had he authority to transfer and indorse the note? In *Morse on Banks*

and Banking, 151, it is said, in speaking of the powers of a cashier, that "all its negotiable paper he may negotiate and transfer in its behalf, and to this end he may indorse it over, so as to bind the bank like any ordinary indorser on similar paper." Again: "The outside party dealing with him (cashier) in good faith, and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is the inherent power of the cashier, which he exercises simply by virtue of his office, to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon inquiry, to go behind this authority. If the agent exceeds it, the matter lies wholly between himself and principal." See, also, 29 N. Y., 554. Again: "That the cashier, by his indorsement of negotiable paper on behalf of the bank, will always bind the bank to the full extent that any individual indorser of like paper and in like form would be bound, unless the holder of the indorsed paper took it with actual notice of some fact rendering the indorsement irregular and invalid." It will be seen by the authorities that the powers of a cashier are very large. He is the general agent of the bank for all its banking transactions. Whether he have specific authority to do certain things or not, if within the scope of his general duties, the outside world have a right to presume the authority, and his acts bind the bank.

§ 619. *Presumptions in favor of authority of a cashier of a bank.*

In this case the note was payable to the cashier of the bank, and by him indorsed in the regular course of business, we have a right to presume, to Dildine, cashier of another bank, and by him to the plaintiff. What circumstances of suspicion were there about the transaction to put the plaintiff on his guard that appear in the answer? It is a common practice among banks to receive negotiable paper, and forward, after indorsement by the cashier, to another bank, and there rediscount the same. There is no allegation in the answer that any of the matter therein set up was brought to the knowledge of the plaintiff, or that there were such circumstances surrounding the transactions therein set forth to put the plaintiff upon inquiry in purchasing the note. The admitted relation of McMann to the bank was such that any person had a right to suppose the transaction was in the usual course of business. In the absence of these facts in the answer, I do not think it a good defense, and the demurrer thereto will be sustained.

CHILDS v. CORP.

(Circuit Court for Vermont: 1 Paine, 285-289. 1810.)

Opinion by LIVINGSTON, J.

STATEMENT OF FACTS.—The object of this cross-bill is to have a credit on the mortgage mentioned in the pleadings in this cause, for the amount of a certain bill of exchange for £1,000, which it is alleged has been lost to the complainant by the negligence of the defendant. It appears that on the 29th November, 1803, the defendant sold to the complainant a bill of exchange for £1,000, which had been drawn by Robert Bird & Co of New York, on Bird, Savage & Bird, of London (both houses composed of the same persons), and which had been protested for non-acceptance and non-payment. For this bill the complainant gave the defendant his promissory note for \$3,418.79, payable in the July following. The bill remained in the hands of the defendant, who gave his receipt for it, promising to return it to the complainant on due payment of his note. The note not being paid the complainant was sued and judgment obtained against him; after which, to secure the amount of the judgment and

some other demands, he gave the defendant three other promissory notes, dated the 8th of October, 1805, for \$1,749.93, each payable the 1st of April, 1806, 7 and 8, with interest, and executed a mortgage on certain real estate in Vermont. On the execution of this mortgage the receipt above mentioned was given up, but the bill remained in the defendant's hands, without any written agreement respecting it.

Thus far there is no dispute about facts between the parties. The complainant asserts that he expected the defendant would have delivered him the bill on receiving the new securities, but that he refused to do so, agreeing, however, that he would hold it for his benefit and endeavor to collect the money due thereon for his use; which he neglected to do, to the great loss of the complainant. The defendant admits that the bill remained with him as "a further security for the moneys due from the complainant, until the same were paid by the complainant, or by the receipt of moneys on the bill, which he was authorized to receive and apply toward his demands against the complainant," but denies that "he was obliged to use any endeavors or be at any trouble or expense in endeavoring to collect the bill." Without stating that he had taken any measures to obtain payment, he alleges that he was unable to do so by reason of the insolvency of the parties to it.

It becomes necessary, then, to recur to the testimony, to ascertain the understanding of the parties at the time of leaving this bill with the defendant, which must determine the obligation and duty thereby imposed on him. In settling this question, the defendant's letter of the 9th of April, 1805, to his attorney, Mr. Foote, has been thought material. In this he desires Mr. Foote to take up the receipt he had given to the complainant, adding, "That it was understood, and he meant thereby to have it understood by his attorney and Mr. Childs, that whatever he might recover on said bill should be for his benefit." Without going further, it would be very difficult to say that the defendant was at liberty to be entirely passive about the recovery of the moneys due on this bill of exchange. He resided in the city of New York, and the complainant at Colchester, in Vermont, at the distance of more than three hundred miles from each other. By consenting to retain the bill, and apply what was received on it to the complainant's credit, he put it out of the power of the latter to use any diligence for its recovery. The complainant, without the bill or protest, which was also in the defendant's hands, could not prove any debt, either under the commission against the house in England, or under the separate commission against Robert Bird in this country. He could not but believe that the defendant would do thus much, at least, or return him the bill, to enable him to do it himself. He could not suppose — nor could it have been the intention or understanding of those gentlemen — that the bill was to remain among the papers of the defendant, without a single effort on his part to secure to himself the dividends which might be declared on it — which must have been the sole object of his retaining it. If he found the trouble or expense too great, he should have relinquished his agency, and apprised the complainant of his unwillingness to incur either; and means might then have been taken by the complainant to prevent the loss which it is alleged has happened. But if, from the very nature of the transaction, some diligence was not imposed on the defendant, the testimony of Peaslee and Henry seems to remove every doubt. The first, who was employed by the complainant to come to some arrangement with the defendant, and who is mentioned in his letter to Mr. Foote as the person with

whom he had had a good deal of conversation on Mr. Childs' concerns, says that the defendant "retained the bill in his own hands, and that it was an understanding between Mr. Corp and himself, that he was to act upon the bill, and to account to Childs for whatever the bill might net." In another place he says, "He was directed by Mr. Childs to make a regular demand of the bill, but he did not, because Mr. Corp inclined to hold the bill; from whom he understood that he would act for Mr. Childs, and collect what he could of the bill, and account with him for whatever he should collect." The other witness is not less explicit. Mr. Henry says, "That in 1807, two years after the interview between Mr. Corp and Mr. Peaslee, he called on him, at the request of Mr. Childs, and informed him that it was his wish to have the bill, in order to obtain a dividend, which the witness had learned was declared on all the debts of the company; but the defendant declined giving it to him, alleging that he would endeavor to obtain the dividend himself, and would not give out of his hands any security he had."

§ 620. *Liability for negligence in not collecting bill.*

The court is bound to conclude from this testimony, as well as from the internal evidence of the transaction, that the defendant was considered by the complainant, and was regarded by himself, as his agent to act for him, as the witness expresses it, and to collect what might become due on this bill. Whether he were obliged to sue, or to attach property of the drawers, or not, it is unnecessary to say, because that is not the negligence imputed to him; but the court is of opinion that with the full knowledge which he had of their bankruptcy, it was at least his duty to have used that ordinary diligence and care which no man, however negligent, would have omitted in his own concerns, that of proving the debt, and thus taking a chance of dividends which might be made. This was the only way left to collect anything, and certainly when he promised to act for the complainant, and to endeavor to obtain the dividends, nothing short of this could be a compliance with his engagement. The trouble of such a step would be trifling, and the expense very inconsiderable.

§ 621. *Measure of damages for negligence in not collecting bill.*

The court, however, does not think with the defendant's counsel, that Mr. Corp has made himself liable for the whole bill, but only for so much of it as shall appear to have been lost by his negligence. Such an indemnity is all the complainant can ask, and beyond this a court of equity will not readily go. It is impossible, however, from any evidence before us to say what credit the complainant is entitled to on his mortgage. The depositions of Mr. McCall and Mr. Henry leave it too uncertain what might have been received without some further inquiry. The court, therefore, before a final decree, thinks it proper to refer it to the master to report what dividends have been declared and paid to persons holding bills of exchange drawn by Robert Bird & Co., in this country, on Bird, Savage & Bird, in England, and not accepted by them, either by the assignees of the latter, or by those of Robert Bird, and to reserve all further directions until the coming in of his report.

§ 622. *Generally.*—All indorsers or assignors of a writing obligatory or other negotiable paper become equally liable with the original maker or obligor on receiving due notice of the non-payment of the instrument. *Campbell v. Jordan*, Hemp., 534.

§ 623. *Indorser a joint maker.*—If an indorser put his name on the back of a note at the time it was made, as surety for the maker, and for his accommodation to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. *Rey v. Simpson*,* 22 How., 341.

§ 624. Indorsement before delivery makes the indorser liable as a principal maker. *Best v. Hoppie*, * 3 Colo. Ty, 187.

§ 625. A person who indorses a note at the request of the payee, before the negotiations in which it is given are closed, is liable as an indorser. *Yeager v. Farwell*, 13 Wall, 6 (§§ 1027-28.)

§ 626. Accommodation acceptor liable as maker.—An accommodation acceptor for the drawer is deemed the principal and primary debtor as to the holder of the bill; and this, generally, whether he be known as accommodation acceptor or not; but as to the drawer he is a mere surety. *In re Babcock*, 3 Story, 393. See §§ 5, 278, 364, 498.

§ 627. Stockholders held principal debtors.—Under the charter of the Merchants' and Planters' Bank of Savannah, which provided that the persons and property of the stockholders should at all times be liable, pledged and bound for the redemption of the bills and notes in proportion to the number of shares that each individual might hold, *held*, that the stockholders were not sureties, but principal debtors. *Hatch v. Burrows*, 1 Woods, 439.

§ 628. If, under the provisions of the charter of a bank, a stockholder is deemed a principal debtor in proportion to the amount of stock he owns, he is liable to redeem the bills at their face, no matter what the plaintiff paid for them; and the fact that the assignees of the bank had assets in their hands sufficient to pay the bills is no defense to an action against the stockholders, after the bills have been presented to the bank and payment refused. *Ibid*.

§ 629. Indorsement in blank.—The presumption is that an indorser in blank intended to make himself liable as an indorser of an ordinary negotiable note, and that he is entitled to all the rights of such an indorser. *McComber v. Clark*, 3 Cr. C. C., 6.

§ 630. Indorser a guarantor.—If an indorser's indorsement was subsequent to the making of a note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as guarantor. *Rey v. Simpson*, * 22 How., 341.

§ 631. Joint maker.—A note was upon its face joint and several. *Held*, that it could not be shown that one of the makers was in fact a surety. *Great Western Ins. Co. v. Pierce*, * 1 Wyom. Ty, 45.

§ 632. Liability of principal to surety, when contracted.—The liability of principal to surety is contracted when the instrument is signed. *In re Perkins*, 6 Biss., 185.

§ 633. Where one is only second indorser.—If a note was intended for discount, and an indorser put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as second indorser in the commercial sense, and entitled to the privileges of such an indorser. *Rey v. Simpson*, * 22 How., 341.

§ 634. Special agreement to be liable as indorser.—W. T. & Co., delivered E., an indorser, two notes made by E. and H., payable to W. T. & Co., taking from him a written agreement binding himself, his heirs and executors to pay the two notes "in the same manner and to the same extent in all respects as though the said two promissory notes had been drawn and made payable to my order and by me indorsed to the said W. T. & Co." *Held*, that E. was liable on this contract the same as if he had indorsed the two notes, the contract having been made for a valuable consideration, i. e., the delivery of the notes. *Pinnes v. Ely*, * 4 McL., 178.

§ 635. Consideration of guaranty.—Where the consideration of the guaranty was stated to be \$1, the guarantor having acknowledged receipt thereof is estopped to deny it. *Lawrence v. McCalmont*, 2 How., 445.

§ 636. A valuable consideration, however small (\$1), or nominal, if given and stipulated for in good faith, is in the absence of fraud sufficient to support an action of guaranty. *Ibid*.

§ 637. Where one consideration—viz., an extension to a debtor—for a promissory note was legal and another was illegal on account of usury, the former was held sufficient to sustain the contract. *Oates v. National Bank*, 10 Otto, 239 (§§ 397-404).

§ 638. Interpretation.—A letter of guaranty should receive a fair and reasonable interpretation, so as to effectuate its objects. *Lawrence v. McCalmont*, 2 How., 445.

§ 639. Notice.—What is reasonable notice to the guarantor of the principal's default is a question for the jury. *Ibid*.

§ 640. Agreement as to liability; proof of.—In an action against one who had indorsed a note in blank, after protest, *held*, that parol evidence was admissible to prove an agreement that the defendant should not be liable unless the maker should prove to be insolvent. *Taylor v. Scholfield*, 2 Cr. C. C., 315.

§ 641. Guaranty construed.—An assignment not in the usual form, but containing an express guaranty or promise by the assignor for the ultimate payment of the note, does not change or vary the assignor's liability from that of an ordinary assignor where no such guaranty is expressed. *Dent v. Ashley*, * Hemp., 53.

§ 642. Altering guaranty by parol.—A guaranty cannot be altered or contradicted by parol evidence. *Clarke v. Russell*, * 8 Dal., 415.

§ 643. Letter of introduction not a guaranty.—A general letter, introducing parties "as a house on whose integrity and punctuality the utmost dependence may be placed," and wishing that "you will render them every service in your power," followed by a second letter which referred to the first as "a letter of recommendation," and added, "We have now to request that you will endeavor to render them every assistance in your power," does not amount to a guaranty. *Ibid*.

§ 644. General rule as to suing maker before assignor.—Assignee must show due diligence in endeavoring to recover from the maker before he can recover from the assignor. He must show that he prosecuted suit against the maker in reasonable time; that execution has been delivered to the proper officer to be served, and that it has been ineffectual. *Mandeville v. Mackenzie*, * 1 Cr. C. C., 23; *Dunlop v. Silver*, 1 Cr. C. C., 27; *Dean v. Marsteller*, * 2 Cr. C. C., 121; *Dulany v. Hodgkin*, * 5 Cr., 333; *Dent v. Ashley*, * Hemp., 55. This is the rule in Virginia and Kentucky. *Bank of U. S. v. Weisiger*, * 2 Pet., 331; *McIver v. Kennedy*, 1 Cr. C. C., 424. Also in Indiana. *Morgan v. Tipton*, 3 McL., 330. See, also, *Lemmons v. Choteau*, * Hemp., 85.

§ 645. Under the Kentucky statute notes pass by assignment instead of indorsement, and the assignee cannot recover from his assignor unless he uses all legal process and due diligence to recover from the maker. What is due diligence as to maker stated. *Bank of United States v. Tyler*, * 4 Pet., 366.

§ 646. The time intervening between issuing execution and placing it in the marshal's hands was thirty-one days, and the time from the return of one to the issuing of another execution was thirty days. *Held*, due diligence. *Ibid*.

§ 647. Where the maker of a note is wrongfully released from prison by the jailer, the assignee must sue the jailer and his sureties before he can resort to the assignor. *Ibid*.

§ 648. That the maker is an unsettled and transient person, without averring insolvency, will not excuse the holder from using due diligence. *Lemmons v. Choteau*, * Hemp., 85.

§ 649. The fact that the indorser has been secured by pledge of collaterals will not excuse the holder from prosecuting the maker to insolvency. *Dulany v. Hodgkin*, * 5 Cr., 333.

§ 650. The assignee of a bond or note is bound to use due diligence by suit to recover the debt from the maker of the note, before he can resort to the assignor, unless it is unnecessary or impossible to sue the obligor by reason, for example, of his notorious insolvency or removal from the state. If the assignee show merely a bare demand of the maker it is not enough to prove diligence. He should have instituted suit without delay against the maker, held him to bail, if bail was demandable, and have pursued him to insolvency by taking him upon a *ca. sa.* *Dent v. Ashley*, * Hemp., 55.

§ 651. It is not essential to due diligence that the assignee take out execution returnable on a rule day against the maker. *United States v. Tyler*, * 4 Pet., 366.

§ 652. The Indiana statute provides that the indorsee of a note shall have recourse against the indorser only after "having used due diligence in the premises." *Held*, that the indorsee of a note secured by mortgage on lands in another state need not exhaust that security before he sues the indorser. *Swigget v. Seymour*, * 4 Biss., 220.

§ 653. The insolvency of the maker obviates the necessity of suing him before suing an indorser. *Martin v. Cole*, 14 Otto, 30 (§§ 235-237).

§ 654. Where it is the duty of the holder to sue an indorser before an action on the note is barred against the maker, by limitation or prescription, so that the indorser may, if he choose, bring such action against the maker, the holder satisfies the requirements of the law and makes a legal demand by commencing an action against the indorser before the time of limitation or prescription expires, although the trial of such action may not be held until after it expires. *Bird v. Louisiana State Bank*, 3 Otto, 96 (§§ 1059-1061).

§ 655. Request to sue; non-compliance.—If the holder of a note past due be requested to proceed against the maker, but neglect to do so until the principal becomes insolvent, the surety will not be held liable. *Martin v. Skehan*, * 2 Colo. T'y, 614.

§ 656. Bank charter; necessity of suing maker obviated by.—Under the charter of the Bank of Alexandria, it is not necessary to sue the maker of a note in order to create a right of action against the indorser. *Bank of Alexandria v. Wilson*, 1 Cr. C. C., 168; *Yeaton v. Bank of Alexandria*, 5 Cr., 49.

§ 657. Insolvency of maker; evidence of; discharge from prison.—Where the drawer is discharged from imprisonment for debt under an insolvent act, such discharge is sufficient evidence of insolvency to excuse delay or even neglect in getting out execution against his person or property, even though the creditor did not insist upon the thirty days' imprisonment made by the statute a precedent to discharge of the debtor from prison. *Bank of the United States v. Weisiger*, * 2 Pet., 331.

§ 658. Where promissory notes were guaranteed by persons whose names did not appear thereon, it was held that the guarantors were not exonerated by want of notice of the maker's default if he was insolvent when the notes matured. *Reynolds v. Douglass*, 12 Pet., 497.

§ 659. Creditor taking note as conditional payment; duty; delay.—A debtor gave a note of a third person to his creditor. The creditor refused to accept it in satisfaction of the debt, but agreed to hold it and to credit whatever should be paid upon it to the debtor. It was sent to the bank where it was payable, but was not paid, and was kept by the bank until the maker became insolvent. *Held*, that the creditor was not negligent and chargeable with the loss of the note, the debtor having knowledge of, and acquiescing in, his disposition of the note. *Westphal v. Ludlow*, 2 McC., 506.

§ 660. Bailee of draft; diligence to collect it.—The bailee of a draft, whether for pay or to collect it, must use due diligence to collect it. He will be liable for negligence. 8 Op. Att'y Gen., 125.

§ 661. Borrower of note; negligence of.—If A. loan the note of a third person to B., B. must use due diligence to recover the amount due by it; and if the debt is lost by the insolvency of the maker and by B.'s want of diligence, B. must pay the amount of the note to A. *Higbie v. Hopkins*, 1 Wash., 230.

§ 662. Conditional payment; diligence required.—One who receives a note as a conditional payment of a debt due him must use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. But he is not bound to bring suit upon the note. *Douglass v. Reynolds*, 7 Pet., 114.

§ 663. Taking the promissory note of a third person as a conditional payment for goods sold and delivered, and the institution of a suit against the vendee upon his indorsement, does not preclude an action by the vendor upon the original consideration until suit against the maker of the note. It is sufficient if he has used due diligence to receive the money on the note. *Clark v. Young*, 1 Cr., 181.

§ 664. Discharge of maker releases surety.—The consent of the holder of a note to the discharge of the maker, if without the permission of the surety, releases the latter. *In re McDonald*,* 14 N. B. R., 477.

§ 665. The guarantor of a note, the holder of which has forfeited his right to prove his claim against the estate of the maker, a bankrupt, by his attempt to obtain and hold a fraudulent preference, cannot prove against the estate, he being already exonerated by the act of the creditor. *In re Ayres*, 6 Biss., 48.

§ 666. Prior indorser; release of.—The release of a prior indorser by the holder discharges all the subsequent indorsers. *Hawkins v. Thompson*,* 2 McL., 111.

§ 667. Extension; release of surety.—To constitute an extension there must be a valid contract which the court would enforce in favor of the principal against the creditor. *Ex parte Balch*,* 2 Low., 440.

§ 668. The taking of new security by the holder of a promissory note, and giving time to the maker, if done without the consent of the indorser, discharges him from liability on the note. *Bank of United States v. Lee*, 3 Cr. C. C., 288; *White v. Burns*, 5 Cr. C. C., 123; *Cope v. Hunt*, 4 Cr. C. C., 293.

§ 669. Extension effects a release whether there was damage or not. *Ex parte Balch*,* 2 Low., 440.

§ 670. Extension in consideration of a third person's acceptance releases indorsers. *Cooper v. Gibbs*,* 4 McL., 396.

§ 671. Agreement in consideration that the maker would assign to the holder the amount due the holder on the note out of a judgment that the maker expected to obtain in a short time, that the holder would give time on the note and not bring suit until after the next court; and time was accordingly given. *Held*, a release of the surety. *Varnum v. Milford*,* 2 McL., 74.

§ 672. Taking new security; release.—The maker of a note transferred all his interest in his firm to his accommodation indorser to secure him against loss, the indorser agreeing in consideration of such transfer to save the maker harmless from liability on the note. *Held*, a release of the maker and an intervening indorser. *In re Wilder*,* 3 Fed. R., 859.

§ 673. A. was lessor of a plantation. B., the lessee, borrowed of C. money on notes, to secure which it was agreed that the cotton raised on the plantation should be shipped to the complainant C., nothing being said as to what was to be done by C. with it or its proceeds. Further security was given C. by a mortgage executed by A. The notes were partly paid. The next season C. made B. additional advances, secured by deed of trust of all the crops to be raised, which stipulated that the proceeds of such crops should be applied, (1) to paying for supplies furnished the second season, and (2) to paying the balance due on the notes. Complainant sought to foreclose. A. set up in defense that the first agreement provided that all

the crops of cotton raised on the demised premises should be applied to the payment of the notes, and that the cotton should be shipped to the complainant by B. for that purpose as rapidly as it could be prepared for market; that the second agreement was in fraud of the first, and released A. as a surety, since it diverted a portion of the crops to a different purpose from that originally intended. The agreement as set up by B. in defense was not proved, however, and it was held that to release A. as surety a subsequent agreement between his principal and the creditor must be shown that placed the surety in a worse condition than when he became surety; that such agreement not being proved, the subsequent arrangement and the deed of trust had no effect on the liability of A., the mortgagor. *Roach v. Summers*, * 20 Wall., 165.

§ 674. Agreement to postpone prosecution; release.—An agreement by the holder to postpone the prosecution of a suit against the maker, in consideration of his permitting one A., whom he had confined to the jail limits on a *ca. sa.*, to go outside of such limits to testify in another suit of the holder against third parties, is a release of an indorser. *United States Bank v. Hatch*, * 1 McL., 90.

§ 675. Extension by renewal; release.—Payment of a note was duly demanded and refused. Notice was given to the payee, who was also the first indorser, for the accommodation of the maker and another. Afterwards an arrangement was made with the holder and the subsequent indorsers, without the consent of the accommodation indorser, to prolong the credit on the note, and to discount, by way of renewal, bills drawn by the maker and one of the indorsers, and accepted for the amount of the original note. *Held*, that the accommodation indorser was discharged. *Seventh Ward Bank v. Hanrick*, * 2 Story, 416.

§ 676. Extension after judgment no release.—After judgment the relation of principal and surety which existed before judgment between the maker and indorser of a note ceases, both the note and the contract of indorsement becoming merged in the judgment; and a creditor who, after judgment against the maker and indorser, gives time to the maker does not thereby release the indorser. *King v. Thompson*, * 3 Cr. C. C., 146.

§ 677. After judgment rendered in favor of the indorsee of a negotiable instrument, against both maker and indorser, the latter becomes liable as a principal debtor. He may pay the judgment and become subrogated to the rights of the indorsee under the judgment against the maker. If the indorsee has got out an execution against the maker on his judgment and then countermands the order to levy it, this does not release the indorser from liability, for the indorsee has a right to control the execution against either the indorser or the maker without reference to the wishes of either. It might be different, however, if the indorsee had agreed with the indorser to levy execution immediately against the maker, but should neglect to do so, thereby throwing the indorser off his guard and causing him to lose an opportunity to make the money out of the maker's estate, by paying the judgment and proceeding himself under it against the maker. *Lenox v. Prout*, * 3 Wheat., 520.

§ 678. Where the indorsee of a note secured by mortgage, having obtained judgment against the maker, granted him two years' indulgence, it was held to release the indorsers. *Morgan v. Tipton*, 3 McL., 339.

§ 679. The holder of a note, after obtaining judgment against the maker, and after execution, and before the return day, in consideration that the maker would pay \$100, agreed to extend the time until the ensuing fall. *Held*, not to release the surety. The maker being bound to pay the whole of the judgment, the payment of \$100 upon it constituted no legal consideration, and the agreement for the extension being a *nudum pactum* did not release the surety. *Low v. Underhill*, * 8 McL., 376.

§ 680. Extension with the indorser's assent, or reserving his right to sue maker.—An extension given a maker by a holder will release an indorser, but not if the indorser assent to it, nor if the extension be granted with an express reservation of the indorser's rights to sue the maker. *Eldredge v. Chacon*, * Crabbe, 296.

§ 681. An assignment by a maker for the benefit of creditors, containing an extension, and signed by an indorser, will not operate to release such indorser from liability on the note, especially if it be scheduled by the maker in his assignment as a preferred claim to be first paid. *Ibid*.

§ 682. After demand and notice the indorser is not discharged by giving time to the maker. *The Bank v. Abbott*, * 3 Cr. C. C., 94; *Corbett v. Woodward*, 5 Saw., 403.

§ 683. Forbearance to sue, no release.—Forbearance to sue will not release the indorser, unless an agreement for delay for a definite time is made upon a good consideration which deprives the holder of the right to sue on the note. *Varnum v. Bellamy*, * 4 McL., 87.

§ 684. A mere agreement with the drawers for delay, without any consideration for it, and without any communication or assent of the indorser, is not a discharge of the latter after he has been fixed in his responsibility by refusal of the drawee and due notice to himself. *McLemore v. Powell*, * 12 Wheat., 557.

§ 685. Agreement to stay execution held no release.— An attorney, to collect a note, took from the maker a confession of judgment, with a stay of execution until the second term. It was proved that, had the attorney brought suit upon the note, he could not have recovered judgment and issued execution, under the practice of the court, until the second term thereof after commencing suit. *Held*, not such an indulgence to the maker as would release an indorser, especially as no authority was given to the attorney to give an extension, and especially as the indorser had waived his right to object by consenting to the attorney's proceedings. *Suydam v. Vance*, * 2 McL., 99. Citing *Hallett v. Holmes*, 18 Johns., 28; *Bruen v. Marquand*, 17 Johns., 58.

§ 686. Attorney; agreement not to sue; held not a release.— An attorney is not authorized to agree not to sue upon a note in consideration of receiving from the maker a small sum of money to be applied upon it and a number of debts due the maker, with authority to collect them and apply the proceeds upon the note. *Varnum v. Bellamy*, * 4 McL., 87.

§ 687. Giving chattel mortgage, no release.— Sureties on a note are not released by the giving of a chattel mortgage by their principal, such mortgage not extending the time of paying the note. *Meguiar v. Groves*, * 1 Fed. R., 279.

§ 688. Extension after discharge of maker in bankruptcy.— An extension, given the maker after his discharge in bankruptcy, will not release a surety. *Fernan v. Woodruff*, 5 McL., 350.

§ 689. Guaranty of third person.— The guaranty of a third party to pay the note does not discharge the indorser. *Corbett v. Woodward*, 5 Saw., 403.

§ 690. Delay of trustee to sell security, no release.— The trustee in a deed of trust given to secure a note did not sell the property till it had depreciated so as to become inadequate security. Demand and proper notice having been given, *held*, that the indorser was not released. *Bank of Alexandria v. Wilson*, 2 Cr. C. C., 5.

§ 691. Partner's note to his firm; surety's liability.— One-half of a note made by F. to his own firm of M. & F., upon dissolution belongs to him, and the liability of his sureties would be lessened one-half. *McMicken v. Webb*, * 6 How., 292.

§ 692. Forbearance after levy.— After judgment against makers and levy of execution on their property they executed a delivery bond and the property was released. The condition of the bond having been broken, a second *fi. fa.* was issued and levied upon property which, however, was not sold, by order of plaintiff's attorney, until some time afterwards, and then only a small part of the note was realized. *Held*, that the forbearance, being without consideration and terminable at any time, did not release the sureties. *Creath v. Sims*, 5 How., 192.

§ 693. Surety; subrogation — indemnity — concurrent remedies.— A surety who seeks relief by requiring the creditor to proceed against the principal must offer to indemnify the creditor in his proceedings against the principal, and must offer to pay whatever the principal fails to pay under the creditor's proceedings. The creditor (holder of a bill) may proceed in bankruptcy against the drawee, and may also attach property of the drawers until he has recovered the whole of his debt. Any surplus over his debt obtained by the attachment suit will go to the estate of the bankrupt, and the creditor, if he does not pursue the attachment suit himself, is bound to allow the bankrupt's assignee to do so for the benefit of the bankrupt's estate. *In re Babcock*, 3 Story, 393.

§ 694. Set-off.— A. and B. were accommodation makers, indorsers or acceptors of various bills for the benefit of C. They were not, however, co-sureties, although B. had undertaken to accommodate C. upon the express understanding that he was to incur no liability; but this was not communicated to, or agreed to by, A. B. made a bill for the accommodation of C., which was discounted, and the proceeds applied to pay another bill on which A. was liable as an accommodation acceptor. *Held*, that B. did not thereby acquire a right of action against A.; and when A. sued B. on a bill of which B. was acceptor, but which A., being an accommodation indorser upon it, had paid, that B. could not set off the bill he had paid against A. There is no presumption that several accommodation parties are co-sureties for each other. On the contrary the law is well settled that all the parties upon accommodation paper are to be treated as parties to business paper, and subject to the strict principles of commercial law applying to such paper; and that where there is no agreement to the contrary, the legal conclusion is that each party stands in the same relation to the others as on business paper. *Robinson v. Kilbreth*, * 1 Bond, 592.

§ 695. Contribution.— Unless there is a contract so to do, an accommodation indorser is not bound to contribute with an accommodation maker to pay a note made for the benefit of a third person. *Law v. Stewart*, * 3 Cr. C. C., 411; *McCarty v. Roots*, * 21 How., 432. But see *McDonald v. Magruder*, 3 Cr. C. C., 298; *Magruder v. McDonald*, * 3 Cr. C. C., 299.

§ 696. Successive indorsers.— Successive indorsers of commercial paper are not liable for contribution. *McCarty v. Roots*, * 21 How., 432.

§ 697. **Collateral promises to pay.**—A promise to pay a bill when able to do so must be accepted by the promisee with an agreement on his part to wait. He loses his right to proceed upon this promise if he sues upon the bill before the promisor is able to pay it. *Craig v. Brown*,* 3 Wash., 508.

§ 698. An indorser is not bound by a promise to pay where the promise is made in ignorance of the fact that he has been discharged. *Good v. Sprigg*,* 2 Cr. C. C., 172.

§ 699. Indorsers of a demand note discharged by failure to demand payment of it within a reasonable time are not bound by a new promise to pay it, unless it be made with a knowledge of all material facts affecting their rights. *Martin v. Winslow*, 2 Mason, 241 (§§ 786, 787).

§ 700. A bill of exchange not being paid at maturity, the drawer agreed to pay it as soon as he should be able, if the holder would give him time. *Held*, that the extension was a new consideration, sufficient to uphold the promise, upon which *assumpsit* was maintainable. *Lonsdale v. Brown*, 4 Wash., 149.

§ 701. Where an accommodation indorser, after the note became due, promised to pay it, *held*, that the promise applied exclusively to the note, and could not be used in support of a count for money had and received. *Page v. Bank of Alexandria*,* 7 Wheat., 35. See §§ 5, 278, 364, 498, 626.

§ 702. **Sale of note taken in payment for goods.**—If a vendor take a note of his vendee, without agreeing to receive it in satisfaction, and then transfers the note, he exposes the vendee to a responsibility to pay it to the holder, which, so long as it continues, is a bar to an action against the vendee on the original contract of sale, upon which the vendor can sue only after getting back the note, and having it in his power to return it to the vendee. *Parker v. United States*, Pet. C. C., 262.

§ 703. A principal may sue on a bill indorsed to his agent; if the rule were otherwise, there would be an exception in favor of the United States. *United States v. Barker*,* 1 Paine, 156.

§ 704. **Returning bill to remitter.**—If the holder of a bill, whether as agent or creditor of the remitter, send it back to the latter, the party to whom it is thus sent may not only sue in his own name, but may at the trial strike out his own subsequent indorsement, and fill up all the preceding blank indorsements, so as to make them correspond with the title set forth in his declaration. *Ibid*.

§ 705. The return of a bill to an indorser, with protest for non-acceptance and non-payment, is presumptive evidence that the indorsees who thus return the bill were merely agents to collect it, and the indorser to whom it is returned may sue upon it, although no re-indorsement to him is made. *Dugan v. United States*,* 3 Wheat., 172; *United States v. Barker*,* 1 Paine, 156.

§ 706. The holder having a right by law to recover on a bill from the indorser, evidence of a custom in the trade between this country and England, that the English merchant must return it immediately on protest to the indorser, and that if he call upon the drawer for payment he exonerates the indorser, is inadmissible. The law being settled, evidence of a contrary usage is not competent. *Brown v. Jackson*,* 2 Wash., 24.

§ 707. **Parol agreement as to liability of indorser.**—Where a note is payable to order, and the payee indorses it after dishonor, he is entitled to demand and notice; and in an action by a remote indorsee, he cannot prove an agreement with his immediate indorsee that he was not to be liable as indorser. *Cox v. Jones*,* 2 Cr. C. C., 370.

§ 708. **Trustee for bank not liable as indorser.**—An act of congress prohibited national banks from loaning money and taking mortgage security therefor. The A. National Bank, being desirous of loaning B. money, agreed that B. should make his note and mortgage therefor to C., who should indorse the note to the bank, and thereby transfer to it the mortgage. This was done and the bank subsequently sued C. as indorser. *Held*, that he was merely the trustee of the bank and not liable as an indorser, having indorsed the note solely for the convenience of the bank and without consideration. *National Bank of Rising Sun v. Brush*,* 6 Fed. R., 132.

§ 709. **Special agreement as to liability.**—An agreement made by the president and cashier of a bank with an indorser, that the signing of his name is mere matter of form and that he will not be held liable, does not bind the bank. *United States Bank v. Dunn*, 6 Pet., 51.

§ 710. **Attorney's agreement not to hold indorser on — Judgment.**—In an action against the maker the indorser believed he had a good defense to the note, but was assured by the plaintiff's attorney that the maker had ample means out of which to make the amount of the note, and that if he (the indorser) would confess judgment on the note he (the attorney) would proceed at once to make the amount out of the assets of the maker. The indorser confessed judgment as desired, but the plaintiff neglected to proceed against the maker. *Held*, that the

attorney had authority so to stipulate with the indorser, and that the plaintiff was barred from proceeding against the indorser. *Union Bank v. Garey*, 5 Pet., 90; *Garey v. Union Bank*, 3 Cr., 238.

§ 711. *Agreement construed.*—A. indorsed B.'s bill of exchange on C. in London to D., and wrote D. as follows: "On receiving advice of the acceptance by C. of B.'s bill of exchange on said C. in favor of and indorsed by me to you for £394 sterling, please pay to S. and H. (creditors of A.) or order, such balance as may be due to me on account of the above bill after deducting therefrom the \$300 advanced to me by you on account thereof." D. accepted this order thus: "The amount due me is \$289.25 for premium of insurance, \$583.70 balance per account current, and \$500 advanced you in Philadelphia; in all \$1,373.04, which being deducted out of the proceeds of the bill on London, I promise to account for the balance to the above mentioned gentlemen." *Held*, that this acceptance, being only a promise to pay out of the proceeds of the bill, and it not being in fact paid, H. could not sustain an action against D. for the money. The bill not being paid, the promise to pay out of its proceeds was at an end. Subsequently D. wrote A. that "as soon as the fate of the bill is decided I will account with your creditors in due time," adding in a postscript, "as E. is responsible for the bill in London, I shall charge the amount to him, and be responsible for the same to your creditors." *Held*, that one of these promises of payment being conditional and the other appearing to be absolute, they were so inconsistent as to require the court to construe them to ascertain their meaning, and they were construed to mean that D. would account to the creditors for the proceeds of the bill in case it should be paid by the drawee; or if not, that D. would charge the bill to E. if, as the writer supposed, *he was responsible for the same*; and in that event, also, D. would himself become responsible to the creditors of A. It turned out that E. was not responsible for the bill and D. was not on this ground held liable. *Hutz v. Karthause*,* 4 Wash., 1.

§ 712. *Authority to collect.*—A valid power of attorney is sufficient to authorize the attorney to place the name of his principal (the payee of a draft) upon the back of it, and to receive the money upon it. *Kimbro v. First Nat. Bank*,* 1 MacArth., 415. As to collection agents, see AGENCY, VII.; BANKS, VIII.

§ 713. *Agent to collect; negligence in not suing; insolvency excuses.*—Where a bill is given to an agent to collect, and he is sued for the amount of it, he shows sufficient diligence and excuses his failure to collect it by proving that the acceptor was insolvent when the bill matured. *Thomas v. Page*,* 8 McL., 167.

§ 714. In the discount, collection, negotiation and transaction of business in reference to notes and bills, branch banks sustain the relation of agents of a common principal—i. e., the parent bank, which may limit or control their agency according to its own pleasure. *United States Bank v. Goddard*, 5 Mason, 366 (§§ 1012-17).

VI. DEMAND.

SUMMARY—*Note must be presented*, § 715.—*Draft on a bank in another city*, § 716.—*By clerk of notary*, § 717.—*Death of maker; indorser becoming administrator*, § 718.—*Days of grace*, §§ 719-725.—*Note falling due on Sunday*, § 726.—*Payable after sight*, § 727.—*Payable on demand*, § 728.—*Delay in presenting sight draft*, § 729; *or checks and drafts generally*, § 730.—*Place of demand*, §§ 731-735.—*Personal demand*, §§ 736-738, 744.—*Opinion of clerk that drawee will accept; diligence in giving notice*, § 739.—*Excused by a state of war*, § 740.—*Drawer of check having no right to draw*, §§ 741, 742.—*Check paid with a draft*, § 743.—*Averments of demand and notice*, §§ 744, 745.

§ 715. Where a notary makes demand he must present the paper whose payment he is demanding, and his protest must recite such presentment, else it will not be admissible to prove presentment. *Musson v. Lake*. §§ 746, 747.

§ 716. A check drawn on a bank in another city should be presented, not by mail, but by express. The holder should not take a draft in payment of it instead of cash, and if he does so he takes the draft at his own risk, and if it is not paid, he cannot sue the drawer of the check for the value of the goods the check was given for. *Farwell v. Curtis*, §§ 748-750.

§ 717. Although usage in London and Liverpool authorizes the clerk of a notary to make demand of a note, yet the law does not, strictly speaking, allow him to do so. In any case the protest must be made by the notary, and if by the clerk in the name of the notary, the protest is invalid. *Sacridor v. Brown*, § 751. See § 830.

§ 718. If the maker of a note die before it matures, and an indorser become his administrator, demand must be made upon the indorser as administrator, in order to sustain an action against him as indorser. *Magruder v. Union Bank of Georgetown*, §§ 752, 753.

§ 719. By the common law money payable by contract is due on the last day named, and the promisor has until the last hour of the day to pay in. But the custom of commerce with reference to negotiable paper extends the time by giving three days' grace, but requiring payment during business hours of the last day. This custom varies according to usage. A usage allowing four days of grace existing in the banks of a city for twenty or twenty-five years, and generally known and acquiesced in, is good, and a demand need not be made until the fourth day. And although such custom should be pleaded, yet if proof of it is made without objection, the lack of an averment of such custom cannot be made available after judgment. *Renner v. Bank of Columbia*, §§ 754-759. See § 841.

§ 720. Parties are presumed to draw bills in reference to the usage, as to time of presentment for payment, of the bank where they make their bills payable. A usage to present bills on the fourth day after maturity is valid and applies as well to promissory notes. *Bank of Washington v. Triplett*, §§ 760-768.

§ 721. Payment of a time bill never presented for acceptance ought to be demanded on the last day of grace. A demand of payment previous to that day will not authorize a protest. This rule is the same whether the bill has been presented for acceptance or not. *Ibid.*

§ 722. Presentment presumed to have been made at the proper hours of a day. *Wiseman v. Chiapella*, §§ 769-772.

§ 723. Evidence of a usage of merchants, as to presenting foreign bills of exchange, is competent to show their understanding of what is reasonable time. *Wallace v. Agry*, §§ 773-776.

§ 724. A bank changed its usage by holding paper discounted until the fourth day of grace, and then making demand, and, where the fourth day came on Sunday, demand was postponed until Monday. Only four instances of such presentation on Monday were shown, and no notice of the usage was shown to have been given. *Held*, not a good usage, and a delay until Monday not due diligence. *Adams v. Otterback*, §§ 777-780.

§ 725. Payment must be demanded upon the day when the note or bill falls due. *Mitchell v. Degrand*, §§ 781-784.

§ 726. If a note or bill falls due on Sunday, demand and notice should be given on the preceding Saturday. *Doremus v. Burton*, § 785.

§ 727. Where a bill is payable a certain number of days after sight, the time begins to run from the date of legal presentment and acceptance, and not from the date upon which information may be casually given the drawee of the existence of the bill. *Mitchell v. Degrand*, §§ 781-784.

§ 728. A note payable on demand must be presented within a reasonable time, or its indorsers will be discharged. What is a reasonable time is a question of fact for the jury. *Martin v. Winslow*, §§ 786, 787.

§ 729. Though there must be no unreasonable delay in presenting a sight draft for acceptance, yet this is a matter governed by the course of trade, and the circumstances of each particular case. Whether a detainer in Boston of a bill drawn on London at sixty days' sight from the 6th of July to the 29th of September was unreasonable or not, held a question for the jury. *Wallace v. Agry*, §§ 773-776.

§ 730. It is laches to delay presentment of a check or draft for beyond a day, where holder and drawee both reside in the same place. *Farwell v. Curtis*, §§ 748-750.

§ 731. Presentment of a bill of exchange for payment at the acceptor's place of business is sufficient, although it be closed and no one is present. *Wiseman v. Chiapella*, §§ 769-772.

§ 732. It is no longer required, where an acceptor has removed from town, to make an effort to find out his place of business or residence in order to make demand. *Ibid.*

§ 733. Where a note is silent as to the place of demand, parol evidence is admissible to show an agreement to make demand at a particular bank. *Brent v. Bank of Metropolis*, §§ 788-791.

§ 734. A demand of payment made at a hotel without explanation is not sufficient. *Adams v. Otterback*, §§ 777-780.

§ 735. A bill of exchange was addressed "To Messrs. Cox & Cowan, New York, N. Y.," who wrote across its face "Accepted; Cox & Cowan," without otherwise indicating where it should be presented for payment. The drawer, acceptors and indorser resided in Kentucky, and the bill was drawn, accepted and indorsed there. The acceptors' place of business was also in Kentucky, but they frequently resorted, for business purposes, to a place in New York, and the bill was presented for payment and protested for non-payment at that place, although a bill naming no place of payment should ordinarily have been presented to them for payment at their Kentucky place of business. *Held*, that the bill being addressed to the drawees at New York, and accepted by them without explanation or condition, the law construes the instrument as having become payable at the place designated by the address as the place where the acceptance took place, and that a presentment and protest at the place in New York, frequented by the acceptors, was sufficient. *Cox v. National Bank*, §§ 792-800.

§ 736. A personal demand need not be made on the maker of a note purporting to be payable at a particular bank. *Brent v. Bank of the Metropolis*, §§ 788-791.

§ 737. The facts that the indorsers were active in procuring the accommodation for the maker; that it had been continued for years without a personal demand on the maker; that it was the usage of the bank, when the maker of an accommodation note resided out of the city, to require as a condition of the loan that a demand at the bank should be sufficient; that this accommodation would have been continued only on this condition, and that the note purported to be payable at the bank, are sufficient to show an agreement to dispense with a personal demand on the maker. *Ibid.*

§ 738. A removal of the maker from the state or jurisdiction in which he resides and in which his note is payable excuses the holder from making actual demand upon him for payment. *M'Gruder v. Bank of Washington*, §§ 801, 802.

§ 739. Where a bill is presented for acceptance, and the drawee's clerk informs the holder that the drawee is absent upon military duty, but expresses the opinion that the bill will be accepted, the holder is not bound to treat this as a non-acceptance of the bill. He may properly wait until next day as a reasonable time to ascertain the intentions of the drawee, and such delay will not be deemed laches on his part. But if he elects to consider the bill as dishonored, and protests it for non-acceptance, he is bound by that act, and must give no notice by the next practicable mail to the parties whom he means to charge for the default. If no such notice is given, the drawer is released from all liability, although on the next day the holder sees the drawee, who then accepts the bill. *Mitchell v. Degrand*, §§ 781-784.

§ 740. A holder of negotiable paper is relieved by a state of war from the obligation to make demand upon the maker when the paper matures. It is necessary, however, for the holder, in order to charge an indorser of such paper, to make demand upon the maker within a reasonable time after it becomes possible by the close of the war. But he will be excused even then from making demand on the maker, if the maker has provided the indorser with funds to pay the paper. The indorser in such case becomes the principal debtor, to charge whom demand is not necessary. Whether the maker's funds are placed in the indorser's hands for the purpose of being applied to pay the note or bill, is a question of fact. So held where they were funds of the maker derived by the indorser from assets of a firm, of which himself and the indorser were partners. *Ray v. Smith*, §§ 803-806.

§ 741. Viewing a check in the light of a bill of exchange, a drawer who has no funds in bank, and no right to draw a check upon it, cannot complain of want of due presentment or want of due notice. *In re Brown*, §§ 807-811.

§ 742. One who has in the hands of the drawee but a part of the funds necessary to meet his draft, and no reasonable expectation of the drawee's paying his draft, has no right to presentment or notice of non-payment. *Ibid.*

§ 743. A check paid with a draft may be considered as dishonored. *Farwell v. Curtis*, §§ 748-750.

§ 744. A declaration against indorsers on a note must aver either a personal demand on the maker, or an agreement excusing a personal demand on him. An averment of demand at a particular bank, where the note was payable, is, after verdict and judgment, a sufficient averment of an excuse for not making personal demand. *Brent v. Bank of the Metropolis*, §§ 788-791.

§ 745. Averments of presentment and protest for non-acceptance, and of notice of same to the drawers, are sufficient to maintain an action on the bill. If the declaration also avers presentment for payment, protest for non-payment, and notice thereof, such averments are surplusage and need not be proved. *Wallace v. Agry*, §§ 773-776.

[NOTES.— See §§ 812-879.]

MUSSON v. LAKE.

(4 Howard, 262-286. 1845.)

Opinion by MR. JUSTICE M'KINLEY.

STATEMENT OF FACTS.— The plaintiffs brought an action of *assumpsit*, in the circuit court of the United States for the southern district of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said state, by Steele, Jenkins & Co., for \$6,133, payable twelve months after the 1st day of February, 1837, to R. H. and J. H. Crump, and addressed to Kirkman, Rosser & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant. On the trial of the cause the

plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected, because it did not appear in the protest that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion. Which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

§ 746. *A protest that does not recite presentment is not admissible to prove demand.*

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling. Story on Bills, § 325. Bankruptcy, insolvency, or even the death of the acceptor, will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. Chitty on Bills, 7th London ed., 246, 247; Story on Bills, 360; 5 Taunt., 30; 12 Wend., 439; 2 Doug., 515; Warrington v. Furber, 8 East, 245; Esdaile v. Sowerby, 11 East, 117; 14 East, 500. The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill, upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story on Bills, § 361; Hansard v. Robinson, 7 Barn. & Cress., 90. Mr. Justice Story has given the form of a protest now in use in England, in his treatise on bills of exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for non-payment." Story on Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment of it for payment or acceptance. Story on Bills, § 360. But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte*; and the evidence contained in the protest is credited in all foreign courts. Chitty on Bills, 215; Rogers v. Stephens, 2 Term R., 713; Brough v. Parkings, 2 Ld. Raym., 993; Orr v. Maginnis, 7 East, 359; Chesmer v. Noyes, 4 Camp., 129. The evidence contained

in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists that the statute of Louisiana, and the interpretation given to it by the supreme court of that state in the case of *Nott v. Beard*, 16 La., 308, have so changed the law merchant as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific, if, in the protest, it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled that, before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for or demand of payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient. To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that demand of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word demand is used in it, and that the word presentment is not; and they refer to the statute, also, to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they, being public officers, the presumption of law is that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. This is substituting presumption for proof, in violation of all the rules of evidence. With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord Tenterden, C. J., said on this subject, in delivering the judgment of the court of king's bench, in the case of *Hansard v. Robinson*, before referred to. He said: "The general rule of the English law does not allow a suit by the assignee of a *chose in action*. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" This extract, we think, furnishes a full answer to all that has been said by the supreme court of Louisiana to prove that it is not necessary to present the bill to the acceptor for

payment, and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been to give authority to notaries to give notices in all cases of protested bills and promissory notes, and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: "That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand, and by certificate added to such protest, to state the manner in which any notices of protest to drawers, indorsers or other persons interested were served or forwarded; and, whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated." It seems to have been taken for granted by the legislature that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute. The manner of the

demand must, therefore, mean the presentment of the bill for either acceptance or payment; and the circumstances of the demand, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear that bills payable at sight and after sight are within the meaning of the statute, because it provides for a demand of payment of the acceptor of a bill. Now, how can there be an acceptor of a bill without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows that without the word presentment and the word demand also, the plain meaning of the statute could not be carried into effect. A bill payable at a fixed period after its date need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity, but a bill payable at sight or after sight can never become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of such a bill under the decision of the supreme court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted that, by fair and necessary construction, the word presentment is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the supreme court of Louisiana has changed the law merchant in any of these respects.

§ 747. *The law of the place of drawing or indorsing a bill governs the drawer's or indorser's contract.*

There is, however, another question, entirely independent of the statute and the decision of the supreme court of Louisiana, which may be decisive of the case before this court, and that question is, Whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter state. Story on Bills, § 366; 4 Pet., 123; 2 Kent's Comm., 459; 13 Mass., 4; 12 Wend., 439; Story on Bills, § 76; 4 Johns., 119; 12 Johns., 142; 5 East, 124; 3 Mass., 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298. Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the supreme court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi, the custom of merchants has been adopted as part of the common law; and by that law and their statute law this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury,

ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill, which is ordered to be certified to the circuit court accordingly.

Justices McLEAN and WOODBURY dissented, holding that the protest was admissible in evidence. WOODBURY, J., held that it should have been left to the jury to find whether the note was present when demand was made.

FARWELL v. CURTIS.

(Circuit Court for Wisconsin: 7 Bissell, 160-166. 1876.)

Opinion by HOPKINS, J.

STATEMENT OF FACTS.—The real point of the defense is, whether a check given by defendant on the 5th of April, 1875, for \$800, was and is to be held as a payment. The parties have stipulated the facts to be as follows: That on the 5th day of April, 1875, the defendant, a resident of New Lisbon, in this state, purchased goods of plaintiffs in Chicago, their place of business, to the amount of \$800 and over, and on that day gave his check to the plaintiffs for the sum of \$800, upon the bank of New Lisbon, a banking house doing business in that place, to apply as payment towards the goods so purchased by him to that amount; that the plaintiffs on the same day sent the check per mail to the bank, the drawees, with instructions to collect and return; that there is a daily mail between Chicago and New Lisbon; and the check was received at the bank of New Lisbon on the morning of the 7th of April, and was paid out of the defendant's funds on deposit in the bank, there being sufficient for that purpose, and charged to his account; that the bank, on the 7th of April, sent to the plaintiffs, through the mail, a draft for the amount of the check on the Union National Bank, Chicago, which was received by them on the morning of the 9th, which they on that day deposited in the Bank of Montreal, of Chicago, for collection, which was on the 10th of April presented to the Union National Bank for payment, and not paid, and was returned on the same day to the plaintiffs, who, on the same day, wrote the New Lisbon Bank that the check would go to protest if not paid on Monday, and to defendant that it was not paid, and asking him "to poke up the bank on the matter." Not being paid, it was protested on Monday, the 12th, of which defendant was notified per mail. It is further stipulated that the bank of New Lisbon could have paid said check in money up to the 10th day of April; but that on the close of the day's business on that day it stopped payment, having up to that time paid all checks presented for payment; that the bank had not the funds in the Union National Bank to meet the draft when they drew it, nor authority to draw it without funds. These are the material facts established by the evidence, and the question is, whether the plaintiffs were guilty of such negligence in presenting the check and demanding payment as to discharge the drawer.

§ 748. *Presentment of check by mail not due diligence.*

The practice of sending checks by mail to the drawee I think is not usual, and has not received much judicial consideration, and not any direct sanction that I can find. In Morse on Banking, page 334, he says it is a good presentment, and cites for his authority, *Bailey v. Bordenham*, 10 Law T., N. S., 422. I have examined that case, and it gives some countenance to his assertion. but I think the point is not absolutely decided. In these days when such facilities

are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object. In this case there is a daily mail, by railroad between Chicago and New Lisbon, and a daily express also, with route agents and local agents, which furnished ample opportunities for presentation at the bank counters, as early as the morning of the 7th of April, and probably on the morning of the 6th, if it had been sent by the first opportunity. But if sent by the last train on the 6th, it would have reached New Lisbon on the morning of the 7th, and could have been collected and returned so as to have reached the plaintiff by the morning of the 8th of April. To send by mail to the drawees with instructions to collect and return, under such circumstances, is hardly equivalent to a demand at the counter for payment. The bank could not have paid the currency if it had it; there was no one to pay it to. The admission is that the bank was paying and had the money to pay up to and including the 10th, so that if the money had been asked on the 7th it would have been paid. Now, as the plaintiffs adopted another course than the one which the exercise of ordinary care and diligence would have dictated, and loss has resulted by reason of it, they should stand it.

§ 749. *A check paid with a draft may be considered as dishonored. What is laches in presenting check or draft.*

But it may not be necessary to settle this point, as Morse, who says a presentation by mail is good, as well as the case cited by him to support the assertion, says, also, that when the holder sends by mail to the drawee directly, if the money does not come back by the return mail, notice of dishonor should be given. Adopting this rule would not relieve these plaintiffs, for they did not comply with it; the money did not come back by the next mail, nor was the check protested as required. But, instead of the money, on the 9th, four days after the receipt of the check, a draft came back on the Union National Bank, but that was not presented until the 10th for payment, and was not protested until the 12th, so that, conceding that the presentation by mail was sufficient, the plaintiffs were guilty of laches in not presenting the draft before the 10th. This delay is inexcusable, according to any rule of diligence that I know of, so that, assuming that Mr. Morse states a safe and satisfactory rule, it does not exonerate these plaintiffs from laches. But, I think, if the time is extended beyond what it would have been if sent by the usual and ordinary modes, that is, by express, or to some party to present, and beyond the period established by law as reasonable for presentation, and a loss happens by reason of the failure of the drawee, the payee of the check is alone chargeable unto it. For instance, in this case, it is admitted that the bank had the money to pay the check up to and including the 10th, so that, if payment had been demanded in the usual way, it would have been paid, and if the parties chose to make the drawee their agent, and the drawee as their agent sent a worthless draft instead of the money, which he would have paid to any party presenting the check at the counter, and charged the check to the drawer, the same as if paid in money, so that he had no right to enforce his claim or power to protect himself, the payee, instead of the drawer, should incur the loss that ensued by the subsequent failure. The charge to defendant's account was made on the 7th of April, in the morning, and the check marked paid, and what was done after that time was done by the bank at plaintiffs' request and as their agent, and whether in good or bad faith on the part of the banker, the defendant is not to blame or chargeable therewith, or for any loss resulting therefrom.

§ 750. *Rule as to time within which bank checks should be presented.*

The common or commercial law has fixed certain times within which checks must be presented to the drawees for payment, and when it appears that the bank was paying during that time, and the drawer's account was good for the same, and the refusal or failure to obtain payment after was by reason of the failure of the bank occurring subsequent thereto, the loss has to be borne by the payee or holder of the check. That rule is, in cases where the parties all reside in the same place, that it must be presented for payment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent at the farthest by the last mail on the next day after it is received, and be presented by the party receiving it on the day following the reception by him. *Smith v. Janes*, 20 Wend., 192; *Story on Promissory Notes*, 493. If not thus regularly demanded, and the bank or bankers should fail after those times, the loss will be the loss of the holder, who is considered as having made the check his own by his laches. If the check is presented and not paid, notice of dishonor must be given the drawer in order to charge him. Now, in this case, it is plain that the plaintiffs did not observe these rules. They sent the check in time, and, if the presentation by letter was a good demand, it was presented on the 7th in the morning; then it should have been paid on the 7th, and if not, the drawer should have been notified of its non-payment. But, instead of being paid in money, it was paid by draft on Chicago, and it is claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check. This is not the law. The holder of a check cannot in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not, protested; and if the holder accepts the check or draft of the bank in payment in lieu of money, he must present and collect it the same day, or else he is chargeable with laches. He cannot, as in this case, keep it for three days, and then go back upon the drawer of the check if it is not paid, as by so doing he would extend the drawer's liability for two days beyond the time fixed by the law. *Alexander v. Burchfield*, 7 Man. & G., 1061.

This point is directly decided in *Smith v. Miller*, 43 N. Y., 171. In that case the check of the drawee was taken and presented at the bank on the following day, but before its presentation the drawers of the check had failed. The party accepting the payment thereupon protested the draft which they received it in payment of, and brought suit to recover the amount of the draft, claiming that as the check was presented on the next day after its date, it was duly presented, and, if not paid, the draft for which it was given was not paid. On the contrary it was claimed that, as the drawers of the check were paying all of the day on which it was given, and that if it had been presented on that day it would have been paid, and that, as it was taken in lieu of the money, it should have been presented on that day, that the party could not have the whole of the next day to present a check taken under such circumstances, which was sustained by the court, which said: "It was the duty of the plaintiffs to present the check at the bank at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested for non-payment, and not having done so, they were chargeable with negligence and the consequent loss." Here, even giving the plaintiffs the benefit of the time allowed when sent by mail, as in other cases, and they are

guilty of negligence; they received the banker's check on the 9th, but delayed presenting it for payment to the Union National Bank until the 10th. Certainly such negligence cannot be tolerated in treating with paper that they had taken in lieu of money, without the consent or knowledge of defendant. The plaintiffs cannot hold the defendant liable on his check during the time they were thus experimenting with the check they received from the bankers, in payment of his check to them. The bankers may have, and probably did, practice a fraud upon the plaintiffs when they sent this draft on the Union National Bank. But the defendant is not chargeable with that. He can say to the plaintiffs: "If you had sent the check to a party here to present in the usual way, it would have been paid, and I have a right to require you to pursue the ordinary course in such case; and if you depart therefrom, and are defrauded by your agent, which in this case was the banker, it is your loss, and you alone are liable, as you brought it unnecessarily upon yourself."

Under the evidence, the defendant must therefore have judgment.

SACRIDER v. BROWN.

(Circuit Court for Michigan: 8 McLean, 481-488. 1844.)

Opinion by the COURT.

STATEMENT OF FACTS.— This action is brought against the defendant as an indorser of a foreign bill of exchange; and the only question raised in the case is, whether the demand of payment and protest for non-payment were legally made. The demand and protest were made by the clerk of the notary, using the name of the notary, but without his knowledge or direction.

§ 751. *Right of notary's clerk to make demand and protest.*

In the case of *Leftly v. Mills*, 4 Term R., 175, Justice Buller said, "the next and the material part is the making of the demand; the party making the demand must have authority to receive the money," etc. It is material, too, to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a public officer." Mr. Chitty, in his treatise on Bills, 333, states the above and adds: "But the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible, and the constant practice is for the clerk to make the presentment." "In case there be not any public notary at the place where the bill is dishonored, it is expressly provided by 9 and 10 Will. 3, ch. 17, sec. 1, as to inland bills, that they may be protested for non-payment by any substantial person at that place, in the presence of two or more witnesses." The statement by Mr. Chitty that a demand of payment must be made by a notary and not by his clerk caused a correspondence between him and the association of notaries for Liverpool, which afterwards included the notaries of London. From this it appeared that it had long been the practice in London and Liverpool for the clerks of notaries to present bills for acceptance or payment. While Mr. Chitty admitted the practice, he still adhered to his original statement, and in page 465, when considering whether the clerk of a notary can, under the above statute, make the demand of payment, he says it is doubtful, though such is the practice. Again Mr. Chitty says, page 477, "the established custom of merchants requires that a formal demand of payment shall be made within the bus-

iness hours of the last day of grace, by a notary, being a known public officer of experience, and sworn to do his duty," etc.

In a case in New York it has lately been decided that a notary's clerk cannot present a bill for payment, but that the presentment must be made by the notary. 3 Hill, 53; 4 Hill, 129. Now, if it were admitted that a notary's clerk may make a demand of payment, yet it is very clear that the clerk cannot make the protest. This must be done by the officer who acts under oath, and to whose official acts duly certified the law gives verity. The use of the name of the notary without his consent or knowledge was a gross impropriety, and can add nothing to the protest. It was void when made, and time has not given it validity. We think the protest for non-payment is not established by the evidence.

Judgment for the defendants.

MAGRUDER v. UNION BANK OF GEORGETOWN.

(3 Peters, 87-92. 1880.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This action was brought by the Union Bank of Georgetown against George B. Magruder, as indorser of a promissory note made by George Magruder. The maker of the note died before it became payable, and letters of administration on his estate were taken out by the indorser. When the note became payable, suit was commenced against the indorser, without any demand of payment other than the suit itself, without any protest for non-payment, and without any notice that the note was not paid, and that the holder looked to him as indorser for payment. Upon these circumstances the counsel for the defendant moved the court to instruct the jury that, before the plaintiff can recover in this action, it is essential for him to prove demand, and notice to the indorser of the non-payment, which, not being done, the verdict should be for the defendant. But the court refused to give this instruction, and charged the jury that no demand or notice of non-payment was necessary. To this opinion the counsel for the defendant in the circuit court excepted, and has brought the cause to this court by writ of error.

§ 752. *Demand must be made to charge indorser.*

The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. The defendant in error does not controvert this rule, but insists that this case does not come within it, because demand of payment and notice of non-payment are totally useless, since the indorser has become the personal representative of the maker. He has not, however, cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle before it sanctions so essential a departure from established commercial usage.

§ 753. — *although the indorser be also the administrator of the maker. (a)*

This suit is not brought against George B. Magruder as administrator of George Magruder, the maker of the note, but against him as indorser. These two characters are as entirely distinct as if the persons had been different. A

(a) Reversing the ruling in 2 Cr. C. C., 687—Union Bank v. Magruder.*

recovery against George B. Magruder, as indorser, will not affect the assets in his hands as administrator. It is not a judgment against the maker, but against the indorser of the note. The fact that the indorser is the representative of the maker does not oppose any obstacle to proceeding in the regular course. The regular demand of payment may be made, and the note protested for non-payment, of which notice may be given to him as indorser with as much facility as if the indorser had not been the administrator. It is not alleged that any difficulty existed in proceeding regularly; the allegation is that it was totally useless. The note became payable on the 8th day of November, 1824. The writ was taken out against the indorser on the 26th day of April, 1825. If this unusual mode of proceeding can be sustained, it must be on the principle that, as the indorser must have known that he had not paid the note as the representative of the maker, notice to him was useless. Could this be admitted, does it dispense with the necessity of demanding payment? It is possible that assets which might have been applied in satisfaction of this debt, had payment been demanded, may have received a different direction. It is possible that the note may have been paid by the maker before it fell due. Be this as it may, no principle is better settled in commercial transactions than that the undertaking of the indorser is conditional. If due diligence be used to obtain payment from the maker, without success, and notice of non-payment be given to him in time, his undertaking becomes absolute, not otherwise. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. As no attempt to obtain payment from the maker was made in this case, and no notice of non-payment was given to the indorser, we think the circuit court ought to have given the instruction prayed for by the defendant in that court. The judgment is reversed, and the cause remanded, with directions to award a *venire facias de novo*.

RENNER v. BANK OF COLUMBIA.

(9 Wheaton, 581-598. 1824.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a writ of error to the circuit court of the District of Columbia; and by the record it appears that the action in the court below was prosecuted against Renner, the plaintiff in error, as indorser of a promissory note, drawn by James Foyles, and discounted at the Bank of Columbia. The note bears date on the 9th day of January, 1817, for \$4,600, and is payable sixty days after date. In the declaration it is averred that demand of payment of the maker was made on the 14th of March, which was on the fourth day after the expiration of the sixty days which the note had to run. Several questions arising out of the record have been presented for the consideration of the court. The principal one, however, is that which relates to the time of demand of payment of the maker of the note, and grows out of a bill of exceptions taken upon the trial. This has been pressed upon the court as a question of great importance, and the decision of which, in its application to the concerns of the bank, will have a very wide and extensive effect. We shall proceed to the consideration of this point in the first place, leaving the others, which are of minor importance, to be noticed hereafter.

The testimony given at the trial was for the purpose of showing that the Bank of Columbia had, from its first establishment in 1793, adopted the practice of demanding the payment of notes discounted by it, on the fourth day

after the time limited for the payment thereof, according to the express terms of the note. And that such was the universal custom of all the banks in Washington and Georgetown. That this custom was well known and understood by the defendant when he indorsed the note in question. After this testimony had been received, without objection, the counsel for the defendant below called upon the court to instruct the jury that upon the evidence so given by the plaintiffs, of a demand upon the maker of the note, on the fourth day after the time limited by the note for the payment, the defendant was not liable on his indorsement; which instruction the court refused to give, and a bill of exceptions was thereupon taken. This court must, therefore, assume as established facts (and, looking at the evidence before the jury, no doubt could be entertained on the subject), that the custom of the Bank of Columbia, and all the other banks in Washington and Georgetown, from their first institution, had been to demand payment of notes due them, on the fourth day after the time limited therein; and that this custom was known and well understood by the defendant Renner when he indorsed the note in question, and, it may be added, with full knowledge and expectation that this note was to be dealt with in the same way; for it was a renewal of a discount, continued for a considerable time before, on other notes similarly drawn and indorsed, some of which had been demanded in like manner, and protested, and afterwards paid and taken up by himself. Under such circumstances, it would seem that nothing short of some positive and unbending principle of law could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established by well settled rules of law. It seems to be assumed as the settled law of promissory notes, that, in order to charge an indorser, demand of the maker must be made on the third day after that limited in the note; and that this is so stubborn a rule that parties are not permitted to violate it, even by their mutual agreement.

§ 754. *Custom as to four days' grace is binding. Rule as to demand on third day will be noticed by the courts.*

We admit, in the most unqualified manner, that the usage of making the demand on the third day of grace has become so general that courts of justice will notice it *ex officio*; and in the absence of any proof to the contrary will presume that such was the understanding of all parties to a note when they put their names upon it. But that this rule has any attributes so inviolable as not to be touched by the parties to negotiable paper cannot be admitted. It has its origin in custom, and that custom, too, comparatively of recent date; and is not one of those to the contrary of which the memory of man runneth not, and which contributed to make up the common law code which is so justly venerated. So far from this, that the allowance of any days of grace is in derogation of the common law rule, applicable to other contracts. They are emphatically the mere creatures of usage, varying in different countries to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. The common law would require payment on the last day limited by the contract, and would also give to the maker the whole of that day. It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement to perform his engagement, and even until the last hour of the day. The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the day to a few hours of business. But this, and whatever other rules have been adopted by consent, and merely for the

convenience of commercial men, are departures from the common law doctrine. When, therefore, the allowance of only three days of grace is said to be the law of the contract by bills of exchange and promissory notes, nothing more can be intended than that custom has so long sanctioned this rule that all dealers in paper of this description are understood to govern themselves by it. The law of the contract, properly speaking, is to pay when due; and that time is to be ascertained either from the contract *per se*, or that taken in connection with some known custom, which the parties are presumed to have tacitly consented should be made a part of the contract. And it is in this view only that three days of grace are allowed, where that custom is recognized as the rule; for a note which upon its face has sixty days to run is in truth and in fact a contract for sixty-three days, and interest is taken for that time. And how is it ascertained that it is a note for sixty-three days, but by looking out of the contract and finding what was the understanding of the parties? Where the custom has existed for a long time, and has become general, courts of justice, as before observed, will notice it *ex officio*; and where it has not, it is matter of proof. If this is not the light in which these transactions are to be considered, all banks are chargeable with usury; for all take interest beyond what is allowed by law, if time is to be determined by the note itself. The general rule of law is that demand of payment must be made of the maker when the note falls due; and that time, as now settled, is on the last day of grace; and even this rule is of recent date, for in the king's bench in England, as late as the year 1791, about coeval with the institution of this bank, and the custom established by it, we find (*Leftley v. Mills*, 4 Term R., 170) Lord Kenyon and Mr. Justice Buller differing on this very point; the former holding that, by analogy to other contracts, the acceptor of a bill of exchange had the whole of the third day of grace to pay the bill, and that a demand on the fourth day was not too late. Mr. Justice Buller thought the demand ought to be made on the third day of grace: that the nature of the acceptor's undertaking was to pay the bill on demand on any part of the third day of grace; and he inferred this from its having been, as he said, the practice to make the demand on that day. If it was a doubtful question in England so late as the year 1791 whether the demand ought to be made on the third day of grace, or the day after, this bank is not chargeable with any culpable innovation upon long established rules of law or usage, by adopting the practice of making the demand on the fourth day.

It is said, however, that the effect of this testimony is to alter and vary, by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view; for there is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be and usually is proved as matter of fact. The rule is adopted for the purpose of carrying into effect the intention and understanding of the parties. That

the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the institution, and so understood by all parties, cannot admit of a doubt.

§ 755. *Application of the doctrine of usage.*

It would be a waste of time to go very much at large into an examination of the various usages and customs that are admitted in evidence and recognized in courts of justice both in England and in this country, in almost every branch of business, and especially in commercial transactions, for the purpose of ascertaining the meaning and interpretation of contracts. A few only will be noticed that are somewhat analogous to the present case. In the case of *Cutter v. Powell*, 6 Term R., 320, where was brought under consideration the legal effect of a promissory note, given to the mate of a ship for a certain sum of money, provided he proceeded on her voyage and continued to do duty to the port of destination. The legal construction to be given to this note was clear, and so considered by the court, that nothing was due unless the mate continued to do duty to the port of destination. He having died, however, on the voyage, the court directed an inquiry into the usage of merchants in such cases, declaring that if it sanctioned an allowance for the time the service was performed, the plaintiff should recover according to such usage. No intimation is here given that such proof would be repugnant to the contract, although it was against the legal import of the note, if construed without reference to the usage; and although the usage related to trade, it was very limited in its application. So in *Noble v. Kennoway*, 2 Doug., 510, usage of trade was admitted in evidence to explain the understanding of parties in a policy of insurance, although the usage had not existed three years. Lord Mansfield said the usage could only be known by proof and must be tried by a jury; that underwriters must be presumed to be acquainted with the practice of the trade they insure, whether recently established or not. If it were necessary, cases might be multiplied almost without end showing the same principle and same recognition of local and particular usages in almost every branch of business. We have also, in the state courts in our country, the decisions of very enlightened judges adopting the same principles and governing themselves by the same rules, and, in many cases, not unlike the one before us. In *Jones v. Fales*, 4 Mass., 252, the same doctrine as to usages of banks was fully sanctioned, and although that particular usage might have been found in practice inconvenient, and not to meet public approbation, yet the principle which governed the decision of the court is not thereby weakened, namely, that the usage with which the defendant was conversant was proper evidence to be submitted to a jury, to infer from it the agreement of the party. And although, as suggested at the bar, this custom was altered by the banks, we do not find the courts of justice in that state attempting to control it in its application to notes made in reference to the usage. The doctrine of this case was again fully recognized in *The Lincoln and Kennebeck Bank v. Page*, 9 Mass., 155, where it was held that bank usages, established respecting demands on makers of promissory notes and notices to indorsers, being known to dealers in the banks, they were bound by them, and that the usage was proper evidence to be submitted to a jury. These cases are not referred to for the purpose of approving the particular usages, but to show that evidence of such usage was never considered as contradicting the written contract.

Halsey v. Brown, 3 Day, 346, is a very strong case on this subject. The

question was as to the liability of ship-owners for the loss of money taken on freight by the captain. The defense set up was that the master, according to established custom, was permitted to take money on freight as a perquisite to himself, and the owners discharged from responsibility; and the question directly presented to the court was whether a particular custom or usage could be given in evidence to control the general law. And the court says it is a principle that the general common law may be, and in many instances is, controlled by special custom. So the general commercial law may, by the same reason, be controlled by a special local usage so far as that usage extends, which will operate upon all contracts of this nature made in view of, or with reference to, such usage. In *Smith v. Wright*, 1 Caines, 43, this general principle is laid down. The true test of a commercial usage is its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it. In the case of *The Bank of Utica v. Smith*, 18 Johns., 230, a note payable at the Mechanics' Bank in New York was presented and payment demanded fifteen minutes after bank hours, and this was held sufficient, it appearing that, although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentments, and of this course of business the defendant ought to have informed himself.

It is unnecessary to pursue this subject further by particular reference to decisions in the state courts. The same doctrine, as to the effect of particular usages in controlling the general law, will be found to accompany the administration of justice, wherever the subject is brought under consideration. Whether these usages are, in all instances, wise and beneficial, may, perhaps, be questionable; but where they do exist, they are considered as regulating and controlling contracts made under and in reference thereto. The same principle is recognized by this court in the case of *Yeaton v. Bank of Alexandria*, 5 Cranch, 49. The chief justice, in speaking of the effect of usage upon the legal obligation of parties, observes, if the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties. These cases are sufficient to show, in the most satisfactory manner, the light in which courts of justice consider contracts made in reference to any particular usage, and the effect that such usage is to have upon them. And no good reason is perceived why these principles should not be applied to the case before us. The custom, under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day, after the time limited for payment, is not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and Georgetown. The defendant indorsed the note in question, with full knowledge of the custom. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument growing out of a usage here, differing from that which is in practice in other places on this subject, are not of great public

concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered. Their private interest is a sure guaranty for this.

§ 756. *Courts bound by the contract as made.*

But, admitting the practice to be inconvenient, and that a uniformity, in this respect, with other parts of the country would be desirable, the remedy is not in the hands of courts of justice, whose business it is to judge of contracts as made by parties themselves, and not to prescribe the manner in which they shall be made. We are, accordingly, of opinion that the court below did not err in refusing to instruct the jury that the demand upon the maker of the note, on the fourth day after the time limited for payment thereof, discharged the defendant from liability on his indorsement.

§ 757. *Proof of custom as to days of grace; averment; error waived.*

One of the minor points which has been alleged as error, appearing on the face of the record, is, that the demand on the maker of the note should, at all events, have been laid on the third day after the time limited by the note for payment, and not on the fourth. This objection cannot be sustained at this time. Whether the declaration would not have been bad on demurrer, not, however, because the demand is laid on a wrong day, but because it does not aver the usage, is a question not necessary now to decide. But if, as we have determined, the demand was properly made on the fourth day, it would have been bad if laid at an earlier day, because the maker would have been under no obligation to pay, and, of course, not in default. If, therefore, the cause should be sent back to the court below, no amendment in this respect ought to be made. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question. The time of the demand, as laid in the declaration, is according to the legal effect of the note. If made at an earlier day, it would have given no cause of action against the indorser, for he was not bound to pay until the default of the maker, and he was not in default until the fourth day. It is a general rule, in declaring as to time, that it must be laid after the cause of action accrues. The case of *Rushton v. Aspinwall*, 2 Doug., 679, does not apply. The bill of exchange upon which that suit was founded was dated on the 27th of November, in the year 1778, payable three months after date. The declaration stated that the bill was presented for acceptance on the day of the date thereof, and duly accepted, and, afterwards, on the same day, the acceptor was requested to pay, etc., but neglected and refused, etc., and then goes on to state the liability of the defendant, as indorser, and that he, on the same day, assumed and promised to pay, etc. It appears, therefore, that the refusal of the acceptor, and the assumption of the indorser, are laid on the day of the date of the note, which was three months before it fell due. The plaintiff, therefore, by his own showing, had no cause of action when he commenced his suit. This was a defect which no verdict could cure. He had not set forth his cause of action defectively, but shown that he had no cause of action; and this was the ground on which it was placed by the court. A cause of action, defectively or inaccurately set forth, is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary in form or in substance, to make out his cause of action,

so imperfectly stated, must be proved at the trial; but when no cause of action is stated, none can be presumed to have been proved. This case is not to be considered as if before us on demurrer to the declaration. There being no averment of the special custom as to the demand on the fourth day, and the general rule being that the demand must be made on the third, if the declaration alleges it to have been made on the fourth, the joinder in demurrer admits the fact, and, of course, that the demand was too late. But had the declaration contained an averment of the special custom, it must allege a demand on the fourth day. That is according to the legal effect of the note; and a demand laid on any other day would have been bad. We must now consider the case as if the declaration had contained a special averment of the custom, the proof having been before the court and jury without objection, and now making a part of this record.

§ 758. *Secondary evidence of note admissible when note mislaid or lost; not necessary to show its destruction.*

The only remaining question arises out of a bill of exceptions taken upon the trial, to the decision of the court below, admitting secondary evidence of the contents of the note. And it has been contended: 1. That no such evidence was admissible, unless it appeared that the note was destroyed. The rule with respect to the admission of secondary evidence, we think, is not so restricted. If the original is lost, by accident, and no fault is imputable to the party, it is sufficient. In the present case, it appeared that the note was in court a few days before, and introduced in evidence on the trial against Foyles, the maker, but had been mislaid, and upon thorough search could not be found. Every case of this kind must depend, in a great measure, upon its own circumstances. This rule of evidence must be so applied as to promote the ends of justice, and guard against fraud or imposition. If the circumstances will justify a well grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description, that no doubt can arise as to the proof of its contents, there can be no danger in admitting the secondary evidence. In this case, the note having been in court a few days before, and proved, upon a trial against the maker, there could be no possible inducement to withhold it, and it was, no doubt, mislaid purely by accident.

§ 759. — *such secondary evidence may be other than a notarial copy of the note. Not necessary to allege such loss in the declaration to admit secondary evidence.*

It is objected, in the second place, that if secondary evidence is admissible, the contents of the note was not proved by that which was competent; that it should have been by a notarial copy. Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But, to have required a notarial copy, would have been demanding that of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protested.

It is objected, lastly, that secondary evidence was not admissible, without a special count in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, as far as our knowledge of it extends, and to require a special count upon a lost note, would be shutting the door against secondary evidence, in all cases where the note was lost after

declaration filed. We do not think any danger of fraud is to be apprehended from the admission of such evidence, under the usual count upon the note; and, the practice in the court below not requiring a special count in such cases, no error was committed in the admission of the evidence.

Judgment affirmed.

STORY, J., dissented. MARSHALL, C. J., and WASHINGTON and DUVAL, JJ., did not sit.

BANK OF WASHINGTON v. TRIPLETT.

(1 Peters, 25-36. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the United States circuit court of the District of Columbia for the county of Alexandria. On the 19th of June, 1817, William H. Briscoe, of Alexandria, drew a bill on Peter A. Carnes, of Washington, payable four months after date to the order of Triplett and Neale. The payees of the bill indorsed it in blank and delivered it to the cashier of the Mechanics' Bank of Alexandria, for the purpose of being transmitted through the said bank to a bank in Washington for collection. The cashier of the Mechanics' Bank of Alexandria indorsed the bill to the order of the cashier of the Bank of Washington, and transmitted it to him for collection in a letter of the 19th of July, 1817. Neither of the banks had any interest in the bill. The bill was protested for non-payment, and this suit was brought by Triplett and Neale against the Bank of Washington to recover its amount. The declaration charges that the bank did not use reasonable diligence to collect the money mentioned in the said bill nor take the necessary measures to charge the drawer, but neglected to present the bill either for acceptance or payment, and to have the same protested, whereby the plaintiffs have lost their recourse against the drawer. It was proved, on the part of the bank, that either on the day the bill was received or the succeeding day one of its officers called with the bill at the house of the said Peter A. Carnes for the purpose of presenting it for acceptance, and was told that he was in Baltimore. He called again three or four days afterwards for the same purpose, and was again told that he was in Baltimore. These answers were reported to the cashier. On the 9th of October, 1817, the cashier of the Mechanics' Bank of Alexandria addressed the following letter to the cashier of the Bank of Washington:

"DEAR SIR: The holder of the draft on Peter A. Carnes for \$625.34 desires me to inform you that if the draft is not paid to make the notary send a notice to P. A. Carnes, Baltimore, and likewise to W. H. Briscoe, Leesburg, provided it is not paid at his residence in Washington."

On the 13th of the same month the cashier of the Bank of Washington, in answer to this letter, stated that the bill had not been accepted because the drawee could not be found, and that the directions given in the letter of the 9th should be observed. On the 24th of October, the fourth day after that expressed on the face of the bill as the day of payment, it was protested for non-payment and returned under protest to the Mechanics' Bank of Alexandria. Notice was given to the drawer, who has refused to pay the same.

On the trial the counsel for the defendant moved the court to instruct the jury: 1. That upon this evidence, if believed, the plaintiffs are not entitled to recover. 2. That the plaintiffs are not entitled to recover for any loss of re-

course against Briscoe, the drawer of the said bill. 3. That the failure of the defendants (after having called at the residence of the drawee of that said bill to obtain his acceptance, and not finding him or any person there to accept it) to notify the drawer of the circumstance was not such negligence as discharged the said drawer from his liability on the said bill and entitles the plaintiffs to recover. 4. That if they believed, from the evidence, that the defendants conformed to their former usage in regard to such bills as the one in question in calling on the drawee for acceptance (the said drawee being from home) and not noting the same as dishonored and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored and to give notice accordingly of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs.

The court refused to give either of these instructions; to which refusal the counsel for the defendants excepted; and a verdict and judgment were rendered for the plaintiffs. The plaintiffs in error insist that the circuit court ought to have given the instructions first asked, because, 1st, no privity existed between the real holder of the bill and the Bank of Washington. That bank was not the agent of Triplett and Neale, but was the agent of the Mechanics' Bank of Alexandria. Some cases have been cited to show that if an agent employed to transact a particular business engages another person to do it, that other person is not responsible to the principal. On this point, it is sufficient to say that these cases, however correctly they may have been decided, are inapplicable to the case at bar. The bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington, to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics' Bank was the mere channel through which Triplett and Neale transmitted the bill to the Bank of Washington.

§ 760. *A bank which receives a bill for collection through another bank becomes the agent of the holder.*

The deposit of a bill in one bank, to be transmitted for collection to another, is a common usage of great public convenience, the effect of which is well understood. This transaction was, unquestionably, of that character; and there is no reason for suspecting that the Bank of Washington did not so understand it. The duty of that bank was precisely the same, whoever might be the owner of the bill; and, if it was unwilling to undertake the collection, without precise information on the subject, that duty ought to have been declined. The custom to indorse a bill put in bank, for collection, is universal; and the Bank of Washington had no more reason for supposing that Triplett and Neale had ceased to be the real holders, from their indorsement, than for supposing that the cashier of the Bank of Washington had become the real holder, by the indorsement to them. It is the customary proceeding for collection in such cases, and is for the advantage of the party interested. At any rate, the letter of the 9th of October disclosed the real party entitled to the money; and the answer to that letter assumes the agency, if it had not been previously assumed. The court is decidedly of opinion that the Bank of Washington, by receiving the bill for collection, and certainly by its letter of the 13th of October, became the agent of Triplett and Neale, and assumed the responsibility attached to that character. The first prayer of the defendants, in the circuit court, being to instruct the jury that, upon the whole evidence, the plaintiff ought

not to recover, if it might properly have been granted, in any case in which any testimony was offered, certainly ought not to have been granted if any possible construction of that testimony would support the action. The liability of the bank for the bill placed in its hands for collection undoubtedly depends on the question whether reasonable and due diligence has been used in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett and Neale have alleged the failure to give notice of the non-acceptance of the bill, and the failure to demand payment in proper time. The counsel for the bank have brought the first question more distinctly into view, by a more definite instruction respecting it, which was afterwards asked; and its consideration will be deferred until that prayer shall be discussed; but the first must be disposed of, under the general prayer.

§ 761. *Bank liable for negligence in making demand. Payment of bill should be demanded on last day of grace.*

Unquestionably, by failing to demand payment in time, the bank would make the bill its own, and would become liable to Triplett and Neale for its amount. The inquiry, therefore, is into the fact. The demand was made on the fourth day after that mentioned on the face of the bill as the day of payment. The defendants in error insist that, if the bill was never presented for acceptance, payment ought to have been demanded on the day mentioned on its face. If this be not so, then it ought to have been demanded on the third day afterwards, which is the last day of grace. The allowance of days of grace is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract that the bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment, previous to that day, will not authorize a protest, or charge the drawer of the bill. This is universally admitted, if the bill has been accepted.

§ 762. — *rule the same whether bill has been presented for acceptance or not.*

If it has been noted for non-acceptance, but has been held up, it would not be protested for non-payment until the last day of grace. Why, then, should a bill never presented be demandable at an earlier day than if it had been accepted, or if acceptance had been refused? Whatever might have been the original motive for the indulgence, it is now taken into consideration, both by the drawer and payee of the bill. The amount is, consequently, estimated on the calculation that it becomes really due on the last day of grace. Neither party can foresee, when the bill is drawn, whether it will be paid or not; nor, if it be payable after date, whether it will be presented or not. Their calculation, therefore, as to the day when it becomes really due and is to be paid, is independent of these considerations. No sufficient reason is perceived for the distinction.

§ 763. *Usage of bank as to time of payment of bill or note governs.*

It is, however, a law dependent on usage. The books which treat on the subject concur in saying that payment must be demanded when the bill falls due; and that it falls due on the last day of grace. The distinction between a bill which has and which has not been presented has never been taken; and it is apparent that a bill is never drawn with a view to this distinction. The fact that the question has never been made is a strong argument against it. The point has never, so far as we can find, been brought directly before a court; and we have seen only one case in which it has been even incidentally mentioned. In *Anderton v. Beck*, 16 East, 248, a bill was drawn, payable two

months after date, and was not presented for acceptance. It was protested for non-payment, and a suit was brought by the holder against the drawer. He resisted the demand, and the opinion of the court proceeds on the admission that the bill fell due on the last day of grace. This case consists, we believe, with the opinions and practice of commercial towns. But if a bill, payable after date, and not presented for acceptance, falls due on the same day as if it had been accepted, the defendants in error insist that payment ought to have been demanded on the last day of grace. It was proved at the trial that the settled usage of the Bank of Washington, at that time, and of all the other banks in Washington and Georgetown, was to demand payment on the day succeeding the last day of grace; and this usage, so far as respects notes negotiable in a particular bank, has been sanctioned by the decisions of this court. *Renner v. Bank of Columbia*, 9 Wheat., 582 (§§ 754-759, *supra*), was a suit brought in a circuit court of the District of Columbia, against the indorser of a promissory note, which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to have been in conformity with the custom of the bank; and the defendant moved the court to instruct the jury that the demand was not in time, and that the indorser was not liable for the note. This instruction was refused, and the defendant brought the judgment into this court by writ of error. The judgment, on great deliberation, was affirmed. In this case, the custom of the bank was known to the parties to the note. But the question arose afterwards in a case in which the custom was not known to the parties. *Mills v. Bank of United States*, 11 Wheat., 430 (§§ 958-963, *infra*), was a suit brought by the bank against the plaintiff in error and others, on a note indorsed by him and negotiated in the office of discount and deposit of the Bank of the United States, which was protested for non-payment on the day of [after] the last day of grace. It was proved at the trial that this was according to the usage of that bank. The counsel for the defendant moved the court to instruct the jury that this usage could not bind the indorser, unless he had personal knowledge of it at the time he indorsed the note. The court refused to give the instruction, and the jury found a verdict for the bank, on which judgment was rendered. That judgment was brought before this court and affirmed. The court said that, "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not." In the case of such a note the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

§ 764. *Application of the doctrine of usage.*

These cases decide that under consideration, unless there be a distinction between a bill and a note made negotiable in a particular bank. In the case of a note negotiable in a particular bank, the parties may very fairly be presumed to be acquainted with the usage of that bank. As the decisions which have been cited depend upon that presumption, it will become necessary to inquire how far the same presumption may be justified in the case of a bill drawn on a person residing in a place where this usage is established. If a promissory note were made in the city of Washington, payable to a person residing in the same place, though not purporting to be payable and negotiable in bank, it would very probably be placed in a bank for collection. It is a common prac-

tice, and the parties would contemplate such an event as probable when the note was executed. The same reason seems to exist for applying the usage of the bank to such a note as to one expressly made payable and negotiable in bank. Such notes are frequently discounted, and certainly the person who discounts them or places them in bank for collection stands in precisely the same relation to the bank, as respects its usage, as if the notes purported on their face to be negotiable in bank. The maker of a negotiable paper, in such a case, may fairly be presumed to be acquainted with the customary law which governs that paper at his place of residence. In the case at bar, however, the bill was drawn at Alexandria, on a person residing at Washington. Does this circumstance vary the law of the case?

§ 765. *Usage of place on which bill is drawn governs as to days of grace.*

The usage by which questions of this sort are governed is different in different places. It varies from three to thirty days; and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington. Could this be questioned, still the holder of the bill, who placed it, by his agent, in the Bank of Washington for collection, who has made that bank his agent, without special instructions, submits his bill to their established usage. The cases, then, which have been cited, are not different in principle from this; and payment having been demanded, according to the invariable usage of the bank, was demanded in time. If, then, the objections to the conduct of the bank were confined to the demand of payment and protest for non-payment, the first instruction asked by the defendants in the circuit court ought to have been given. But they are not confined to the demand of payment and to the protest for non-payment. They extend to the steps taken by the bank concerning the presentation of the bill. The second instruction asked for is in terms which are, in some degree, equivocal. It may imply either that the recourse against the drawer of the bill was not lost, or that, if lost, that circumstance would not entitle the plaintiff to recover against the bank; as its decision is not essential to the cause, it will be passed over. The third is more specific. The court is asked to say that the failure of the bank to give notice to the drawer that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharged the drawer from his liability, and entitles the plaintiff to recover.

§ 766. *Notice should be given of refusal by the drawee of a bill to accept it.*

The question suggested by this prayer is one on which no decision is found in the books. It depends on analogy, so far as it is to be decided by adjudged cases. Such a bill need not be presented; but if presented, and acceptance be refused, it is dishonored, and notice must be given. Had the bank taken no step whatever to obtain an acceptance, no violation of duty would, according to these decisions, have been committed. Can any unsuccessful attempt to do that which the law does not require, place the agent in the same situation that he would have stood in had the drawee been found, and had positively refused acceptance?

§ 767. *Where presentment for acceptance is unnecessary a bill should not be protested for non-acceptance because of the drawee's absence from home.*

Absence from home, with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home when the holder of a

bill or his agent offers it for acceptance is in no respect culpable. Had the drawee received advice of the bill, he could not have known that it would be presented for acceptance, because the law did not require it, and is consequently not blamable for his absence when the officers of the bank came to present it for acceptance. Had the bill, under such circumstances, been protested for non-acceptance, and returned, the drawer might not have been liable for it. The bill, then, on general principles, ought not to have been protested; and the absence of the drawee ought not to be considered as equivalent to his refusal to accept. It might have been a prudent precaution to have given information that the bill was not accepted, because the drawer had not been found; but we cannot say that the omission would subject the agent to loss, unless such was the special usage of this bank.

§ 768. *When a party may conform to his former usage as to presenting bills for acceptance.*

4. The fourth prayer is for an instruction to the jury, that, if they believe, from the evidence, that the defendants conformed to their former usage, in regard to such bills, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiff. The court has already indicated the opinion that this omission to treat the bill as dishonored, in consequence of not finding the drawee at home, if the usage of the bank was not to notice such a circumstance, did not discharge the drawer; consequently, this instruction ought to have been given, unless it should be supposed foreign to the case in which it was asked. In a suit brought by the holder against the bank, the court was not bound to declare the law as between the holder and the drawer, unless the liability of the bank was determined by the liability of the drawer. Although, in the general, the one question depends on the other, yet it may not be universally so. The bank was the agent of the holder, not of the drawer, and might consequently so act as to discharge the drawer without becoming liable to its principal. In this case, however, as the agent received no specific instructions, but was left to act according to the law merchant, a course of proceeding which did not discharge the drawer could not render the agent liable to the principal. This prayer was, therefore, essentially the same with that which preceded it, with this difference. The third prays an instruction, whatever might be the usage of the bank; the fourth prays essentially the same instruction, provided the conduct of the bank conformed to its usage. This instruction, therefore, ought to have been given as prayed. Upon a review of the whole case, the court is of opinion that, if the bank acted in conformity with its established usage, in not noting the bill, and giving notice thereof, when the ineffectual attempt was made to present it for acceptance, this action could not be supported. With respect to this usage, the testimony is contradictory, and ought to have been submitted to the jury in conformity with the last prayer made by the counsel for the bank. The court erred in not giving this instruction as prayed. The judgment, therefore, is to be reversed, and the case remanded for a new trial.

This cause came on, etc., on consideration whereof, this court is of opinion that the circuit court erred in refusing to instruct the jury, that if they believed that the defendants conformed to their former usage in regard to such bills as

the one in question, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs. It is therefore considered by the court that the said judgment be reversed and annulled, and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo* and to proceed therein according to law.

WISEMAN v. CHIAPELLA.

(23 Howard, 368-380. 1859.)

ERROR to U. S. Circuit Court, Eastern District of Louisiana.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.— The plaintiff in this action alleges that he is the holder and owner of a certain bill of exchange for \$2,045.45, dated at Vicksburg, in the state of Mississippi, May 13, 1855, and payable on the 23d November, 1855, which had been drawn by John A. Durden and A. Durden on William Langton & Co., of New Orleans, and accepted by them, payable to the order of Langton, Sears & Co., and by that firm indorsed in blank. He further declares that the bill when it became due was intrusted to the defendant, Achille Chiapella, a commissioned notary public for the city of New Orleans, to demand payment of it from the acceptors, and to protest the same for non-payment should the acceptors dishonor it; and that, from his carelessness in not making a legal demand of the acceptors, and from not having expressed it in the protest, that the indorsers of the bill had been discharged from their obligation to pay it by a judgment of the circuit court of the United States for the southern district of Mississippi. He further alleges that the acceptors, payees and indorsers were insolvent, and that, from the insufficiency of the demand for payment to bind the drawers of the bill, the defendant had become indebted to him for its amount, with interest at the rate of five per cent. from the day that it became due — the 23d November, 1855.

§ 769. *Presentment at the acceptor's place of business is sufficient.*

The defendant certifies in his notarial protest that the bill had been handed to him on the day it was due; that he went several times to the office of the acceptors of it, in Gravier street, in order to demand payment for the same, and he found the doors closed, and "no person there to answer my demand." It also appeared that one of the firm by which the bill had been accepted had a residence in New Orleans; that no demand for payment had been made individually upon him; and that no further inquiry had been made for the acceptors than the repeated calls which the notary states he had made at their office. We think, under the circumstances, that such repeated calls at the office of the acceptors was a sufficient demand; that further inquiry for them was not required by the custom of merchants; and that the protest, extended as it had been, is in conformity with what is now generally considered to be the established practice in such matters in England and the United States. We say, under the circumstances, for, as there is no fixed mode for making such a demand in all cases, each case as it occurs must be decided on its own facts. We have not been able to find a case, either in our own or in the English reports, in which it has been expressly ruled that a merchant, acceptor of a foreign bill of exchange, having a notorious place of business, has been per-

mitted to close it up during the business hours of the day, thus avoiding the obligation of his acceptance on the day of its maturity, and then that he was allowed to claim that the bill ought to have been presented to him for payment elsewhere than at his place of business. Though such conduct is not absconding, in the legal sense of that word, to avoid the payment of creditors, it must appear, when unexplained, to be an artifice inconsistent with the obligations of an acceptor, from which the law will presume that he does not intend to pay the bill on the day when it has become due.

§ 770. *Where the acceptor's house is closed on the day of the maturity of a bill, it is evidence of an intention to dishonor the bill.*

The plaintiff in this case does not deny that the office of the acceptors was closed, as the notary states it to have been. The only fact upon which he relies to charge the defendant with neglect is, that one of the firm of Langton, Sears & Co. resided in New Orleans, and that it was the duty of the notary to have made inquiry for him at his residence. No presumption, under such circumstances, can be made, that the acceptors had removed to another place of business, or that they were not intentionally absent from it on the day that they knew the bill was payable. This case, then, must be determined on the fact of the designed absence of the acceptors on that day; and that inference is strengthened by no one having been left there to represent them. All merchants register their acceptances in a bill book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally to avoid payment, and, on that account, that further inquiries need not be made for them before a protest can be made for non-payment. Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor has been deemed proper, and in which such inquiries not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of some peculiar facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment has been made in the business hours of the day; but in no case has the latter ever been presumed in favor of an acceptor, whose place of business has been so closed that a demand for payment could not be made there upon himself or upon some one left there to attend to his business.

Lord Ellenborough said, in the case of *Crosse v. Smith*, 1 Maule & S., 545: "The counting-house is a place where all appointments respecting business and all notices should be addressed; and it is the duty of the merchant to take care that proper persons shall be in attendance." It was also ruled in that case, that a verbal message, imparting the dishonor of a bill, sent to the counting-house of the drawer during the hours of business, on two successive days, the messenger knocking there, and making a noise sufficient to be heard within, and no one coming, was sufficient notice. In this case the facts were, that Fea & Co. had a counting-house at Hull, where they were merchants, and one lived within one mile and the other within ten miles of Hull. The Monday after Smith & Co. received the bill, their clerk went to give notice, and called at the counting-house of Fea & Co. about half after ten o'clock. He found the outer door open; the inner one locked. He knocked so that he must have been heard, had any one been there, waited two or three minutes, and went away;

and on his return from the counting-room he saw Fea & Co.'s attorney, and told him. The next Monday he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the parties. The court took time to consider, and then held, without any reference to the clerk having called at the counting-house two successive days, that going to the counting-house at a time it should have been open was sufficient, and that it was not necessary to leave a written notice, *or to send to the residence of either of the parties*. In *Bancroft v. Hall*, Holt, 476, the plaintiff received notice of the bill's dishonor at Manchester, 24th May. The same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice. The agent called at the defendant's counting-house about six or seven P. M., but the counting-house was shut up, and the defendant did not receive notice of the dishonor of the bill until the morning of the 27th—Monday. Two points were ruled: 1st. That sending by a private hand to an agent to give notice was sufficient. 2d. That it was sufficient for the agent to take the ordinary mode to give notice—the ordinary time of shutting up was eight or nine. Where the indorser of a note shut up his house in town soon after the note was made, and before it became due, and retired to his house in the country, intending, however, only a temporary residence in the country, it was held that a notice left at his house, by having been put into the key-hole, was sufficient to charge him. *Stewart v. Elen*, 2 Caines, 121.

This court held in *Williams v. Bank of United States*, 2 Pet., 96 (§§ 1003–10, *infra*), that sufficient diligence had been shown on the part of the holder of a note to charge the indorser, under the following circumstances: A notary public employed for the purpose called at the house of the indorser of a note, to give him notice of its dishonor; and finding the house shut and locked, ascertained from the nearest resident that the indorser and his family had left town on a visit. He made no further inquiry where the indorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business, but he left a notice of the dishonor of the note at an adjoining house, requesting the occupant to give it to the indorser upon his return.

§ 771. *It is no longer required, where an acceptor has removed from a town, to make effort to find out his new place of business or residence for the purpose of making demand.*

In making a demand for an *acceptance*, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business; but a demand for payment need not be personal, and it will be sufficient if it shall be made *at one or the other place in business hours*. Chitty, 274, 367. It was formerly the practice, if the house of the acceptor was shut up when the holder called there to present the bill for payment, and no person was there to represent him, and it appeared that he had removed, that the holder was bound to make efforts to find out to what place he had removed and there make a payment [demand]. Such, however, is no longer the practice either in England or in the United States, nor has it been in the United States for many years. It is now sufficient if the bill shall be taken to the residence of the acceptors, as that may be stated in the bill, for the purpose of demanding payment, and to show that the house was shut up, and that no one was there. *Hine v. Allely*, 4 Barn. & Ad., 624. It has been decided by the supreme court in Tennessee, that the protest of a foreign bill of exchange, drawn upon a firm

in New Orleans, with no place of payment designated, where it appeared that the deputy of a regularly commissioned notary had called several times at the office of the acceptors to make demand of payment, but found no one there of whom the demand could be made, was sufficient to excuse a demand, and to fix the liability of the indorsers to whom notice had been given. *Union Bank v. Fowlkes*, 2 Sneed, 555. The supreme court of Louisiana, in *Watson v. Templeton*, 11 Annual, 137, declares "that a demand made within the usual hours of business, at the commercial domicile of a partnership, for the payment of a note or bill due by the firm, is a sufficient presentment; that it was not necessary to make a further demand at the private residences of individual persons. The place of business is the domicile of *the firm*, and it is their duty to have suitable persons there to receive and answer all demands of business made at that place." Going with a promissory note, to demand payment, to the place of business of the notary, in business hours, and finding it shut, is using due diligence. *Shed v. Brett*, 1 Pick., 413. In the case of the *B. B. at Decatur v. Hodges*, the supreme court of Alabama say: "The court below excluded the protest for non-payment, because the presentment is stated thereon to have been made of the bookkeeper of the drawees in their counting-room, they being absent. This was erroneous. The bill was presented at the place of business of the firm, at their counting-room. If they had intended to pay the bill, it was their duty to have been present on the day of payment, or to have left means for making such payment in charge of some one authorized to make it. The notary finding them absent from their place of business, and their bookkeeper there, might well make protest of the dishonor of the bill for non-payment upon presentment to, and refusal by, him." When, upon presentment for acceptance, the drawee does not happen to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored and protested. *Story on Bills*, sec. 250; *Chitty on Bills* (9th ed.), 400.

§ 772. *It will be presumed that a presentment was made at a proper hour of the day.*

The supreme court of New York has ruled that where a notary's entry case states that presentment and demand were made at the maturity of a bill, at the office of C. & S., the acceptors, this language imports that the office was their place of business, and it will be presumed, in favor of the notary, that the time in the day was proper. *Burbank v. Beach*, 15 Barb., 326. The preceding citation is in conformity with what the supreme court of New York had ruled thirteen years before, in the case of the *Cayuga Bank v. Hart*, 2 Hill, 635. Its language is, that where a notarial certificate of a protest of a bill of exchange stated a presentment for payment at the office of an acceptor, on the proper day, and that the office was closed, but *was silent as to the hour of the day of doing the act, that it was sufficient, and the regularity in that particular should be presumed.*

We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does not require more to be done, in the present-

ment of a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting room or place of business; and if that be closed, so in fact that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be *prima facie* evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence. But whatever may have been the differences between cases upon this subject, both in England and the United States, there has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: that the protest was made in this case in conformity with the practice and law of Louisiana, where the bill was payable. *Rothschild v. Currie*, 1 Q. B., 43; 11 Smedes & M., 182. We are aware of the contrariety of opinion which prevailed for many years in regard to what should be considered due diligence in making a presentment of a bill of exchange for payment to an acceptor of it under such circumstances as are certified to by the notary in this case. We have carefully examined most of them, from the case of *Cotton v. Butler*, in Strange, 1086, to the year 1856, and we have adopted those of later years as our best guide, and as having a better foundation in reason for the practice and the commercial law of the present day, and because we think it has mostly prevailed in the United States for thirty years.

As the view which we have taken of this case disposes of it in favor of the defendant, we shall not notice another point made in the argument in his behalf, which was that the plaintiff's right of action, if he ever had one against the defendant, was excluded by the Louisiana law of prescription. We direct the affirmance of the judgment of the circuit court.

WALLACE v. AGRY.

(Circuit Court for Maine: 4 Mason, 336-348. 1827.)

STATEMENT OF FACTS.—The brig *Diana*, Heddean, master, arrived at Havana, Cuba, and procured a partial cargo of sugar, to be carried to Bremen. To make out a full cargo the master bought of the plaintiffs one hundred and fifty boxes of sugar on account of the owners of the brig, defendants in this action. To pay for this sugar the master drew a bill for £348, 6s., 11d., dated June 18, 1825, payable at sixty days' sight, on one Williams, the agent in London of the owners. Williams had funds of theirs in his possession, although this was not known to the master or the plaintiffs, who expected the bill would be paid out of the proceeds of the sugar, which were to be remitted to Williams after it had been sold in Bremen. Insurance was arranged to be effected on the sugar by one Whitney, agent at Boston of plaintiffs. These proceedings were all ratified by the owners of the brig. The brig proceeded on her voyage, and, after notifying Williams of the drawing of the bill and the intended remittance, the master sold the sugar at Bremen and remitted the full amount to Williams, who received it August 19th. The bill was sent to Whitney at Boston, who received it July 7, 1825, with permission to sell it in Boston or remit it to London. He attempted to sell it, but thinking the price of exchange too low he retained it until September 29th, when he sent it to London, directing Will-

iams to place it to his credit. The bill reached London October 31st, and was protested for non-acceptance. Protest and information of all the facts were sent Whitney, and reached him December 28th. He immediately informed defendants by mail of the protest for non-acceptance, but did not transmit the protest or a copy to them. Defendants at first made no objection to their liability to pay; then they expressed dissatisfaction at the long detainer of the bill in Boston, and finally expressed fears of their ability to pay. The action was *assumpsit* on the bill, and the declaration averred the presentment for acceptance, protest for non-acceptance, and due notice thereof to defendants; and also presentment for payment, and protest for non-payment, and due notice thereof. But no presentment for payment or protest for non-payment was proved in the case. Plea, general issue.

Charge by STORY, J.

Some of the questions of law, in this case, are of considerable importance, and require from the court an explicit opinion. The first objection to the plaintiff's right of recovery is, that no presentment for payment, or protest for non-payment, or due notice thereof to the defendants, is proved according to the allegations of the declaration. I agree that, under the circumstances of this case, the defendants stand in the same situation as if they were the drawers of the bill. They have adopted the acts of the master, and ratified the draft on Williams; and the plaintiff is therefore at liberty to consider them as subject to the same responsibility as if the bill were drawn by them, and no more. See *Van Reimsdyk v. Kane*, 1 Gall., 630; S. C., 9 Cranch, 155. But if they were drawers of the bill, there would be no necessity of proving the averments in the declaration of presentment for payment and protest, and notice for non-payment. The declaration contains a prior averment of a presentment and protest for non-acceptance, and due notice thereof to the defendants. The cause of action of the plaintiff was complete by such non-acceptance and notice, and it was wholly unnecessary afterwards to make any presentment for payment. The other averments, therefore, of presentment for payment, etc., are wholly immaterial, and may be rejected as surplusage. They constitute no part of the averments entitling the plaintiff to recover. The case is not like that of a material averment, more special than the law requires; there the whole must be proved as laid. But here the averments are distinct of matters foreign to the right of the recovery, and may be rejected without prejudicing the plaintiff's right. *Utile per inutile non vitiatur*. Such, upon principle, I take the law to be; and the authorities conform to it. *Chitty on Bills*, 300; 1 Starkie, 7; *Mason v. Franklin*, 3 Johns., 202.

§ 773. *Bill of exchange is prima facie an absolute payment.*

Then it is said that there can be no recovery upon the money counts in this case, because the taking of the bill of exchange was a satisfaction, and consequently an extinguishment of the original contract for advances to purchase the sugars. And in corroboration of this position it is argued that, by the law of Massachusetts and Maine, the taking of a negotiable security for a debt amounts to an absolute, and not merely to a conditional, payment. The rule is certainly so in these states, with this limitation, that the taking of such security is only *prima facie* evidence of being an absolute payment; but the fact is open to explanation, and is not conclusive where the other circumstances qualify or repel the presumption. *Thatcher v. Dinsmore*, 5 Mass., 299; *Manceley v. M'Gee*, 6 Mass., 143; *Goodenow v. Tyler*, 7 Mass., 36; *Johnson v. Johnson*, 11 Mass., 359; *Chapman v. Durant*, 10 Mass., 47; *Varner v. Nobleborough*, 2

Greenl., 121; Greenwood v. Curtis, 4 Mass., 93. Even with this limitation, however, the rule differs from that of the common law, which is adopted in many of the commercial states in the Union. By the common law a negotiable promissory note given by a debtor to his creditor for a subsisting debt is not a discharge of the debt. It is not, in a legal sense, a security of a higher nature. Rhoades v. Barnes, 1 Burr., 9. But if it be negotiated and outstanding in the hands of a third person at the time of a suit brought for the original debt, it may be pleaded in bar of the action. See Kearslake v. Morgan, 6 Term R., 513; The King v. Dawson, Wight., 32. A note or draft of a third person may, indeed, by express agreement of the parties, be taken as payment and thereby operate as a discharge of the debt; but unless there be such an agreement, or the creditor has been guilty of laches, if the note or draft be dishonored the creditor may resort to his original debt. Puckford v. Maxwell, 6 Term R., 52; Overton v. Morse, 7 Term R., 64. And this doctrine of the common law I take to be extensively adopted in our own commercial states. Tobey v. Barber, 5 Johns., 68; Schemerhorn v. Loines, 7 Johns., 311; Putnam v. Lewis, 8 Johns., 389; Johnson v. Weed, 9 Johns., 310; Pintard v. Tackington, 10 Johns., 104; Holmes v. D'Camp, 1 Johns., 34; Burdick v. Green, 15 Johns., 247; Sheehy v. Mandeville, 6 Cranch, 253 (§§ 1406-7, *infra*). But if the doctrine of the Massachusetts and Maine courts were admitted to govern in this case, the circumstances are such as would repel any presumption that the bill was received as absolute payment so as to discharge the owners from personal responsibility in case of its dishonor. On the contrary, the bill seems to have been relied on as collateral security and intended to discharge the debt only upon payment out of the funds which were to be remitted from Bremen. If those funds were not remitted by the master, or the bill were not paid at maturity, it can scarcely be believed that the plaintiff meant to rely exclusively on the credit of the drawer of the bill. The case, however, does not call for any decision on this point because it is not to be governed by the law of Massachusetts or Maine.

§ 774. *Transaction in Cuba governed by Spanish law.*

It is a transaction originating in and consummated at Cuba, and is to be governed by the law of Spain and not by the law of America applicable to this subject. What is the law of Spain I have no accurate means of knowing, and it is the duty of the party who sets up the defense to establish it in evidence by competent proofs. If he fails so to do the court can take no legal notice of the point. There is, however, much reason to believe that the civil law, which is the law of Spain, does not make a bill of exchange an extinguishment of a prior debt unless the parties expressly so stipulated. See Pothier on Obligations, part 3, ch. 2, art. 4; 1 Domat., B. 4, tit. 3, § 1, p. 491.

§ 775. *The protest of non-acceptance or copy thereof need not accompany the notice to the drawers.*

Another objection is that the protest of non-acceptance did not accompany the notice to the defendants, and it is strenuously contended that, by our law the notice, without such accompanying protest, or a copy, is a mere nullity. The case of Blakeley v. Grant, 6 Mass., 386, contains a remark which certainly countenances the suggestion, but it was wholly gratuitous in that case, not being called for by any argument urged at the bar or by any facts in controversy. It is, indeed, somewhat questionable whether the remark itself attracted the close observation of the court. I can only say that, as at present advised, I think that the *dictum* is not law, and I have no reason to suppose that it has been actually conformed to in practice. See Stanton v. Blossom, 14 Mass., 116. The

English rule as to foreign bills is directly the other way. It is the clear result of decisions in England purporting to be founded on the general law merchant, that the notice is sufficient though a copy of the protest is not sent. Chitty on Bills (5th ed.), 282; *Robins v. Gibson*, 3 Camp., 334; S. C., 1 Maule & S., 288; *Cromwell v. Hynson*, 2 Esp., 511; *Chaters v. Bell*, 4 Esp., 48. But this bill, being drawn in a foreign country, is, strictly speaking, to be governed on this point by the law of that country as to notice and protest. And in the absence of any other proof the court might well presume that the law of Spain does not differ from that acted upon in England. If it did, the learned counsel for the defendants would doubtless have established it by some competent evidence. See Pothier, *Traite de Change*, part 1, ch. 5, arts. 149, 150.

§ 776. *Delay in presenting sixty day sight draft.*

But the principal objection is, that there has been gross negligence in the remittance of the bill, and that this, at all events, would discharge the drawer, and by consequence the present defendants. There is a difference between the case of a bill of exchange, drawn payable at so many days after date, and one drawn payable at so many days after sight. In the former case the bill must be presented by the period of its maturity; in the latter it is sufficient if it be presented in a reasonable time. What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities. There is one other limitation, or rather illustration, of the principle, which is very material. It is this: that the holder is not at liberty to lock up the bill for any length of time in his own possession, but he may put it into circulation, and though it may remain a considerable time in circulation, if there be no unreasonable delay in any of the successive holders, the delay of presentment for acceptance is not fatal to the party in case of a dishonor. *Muilman v. D'Eguino*, 2 H. Black., 565; *Goupy v. Harden*, 7 Taunt., 159; *Fry v. Hill*, 7 Taunt., 397; *Field v. Nickerson*, 13 Mass., 131; *Kyd on Bills*, 117; *Bayley on Bills* (2d ed.), 60; *Chitty on Bills* (5th ed.), 208. In the present case the bill was not put into circulation, but was locked up in the hands of the agent of the plaintiff, at Boston, from the 6th of July to the 29th of September. It has been said that the plaintiff was bound to send it direct from Havana to England by some regular conveyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party who receives a negotiable bill, payable after sight, has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this as on other occasions. The holder of such a bill is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby in the presentment for acceptance, and thus to fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that, by the course of trade, many bills of exchange, drawn in the Havana on England, are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule

to hold that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to such extent. In my judgment, the remittance of the bill to Boston for sale was not a discharge of the defendants.

Then as to the delay. The jury must, independent of the asserted agreement, look to all the circumstances. If the bill had been presented before the 19th of August, when the funds reached Williams, it would have been protested for non-acceptance. That it was in the contemplation of all the parties that the bill should or might be retarded, so as not to reach the drawee before the fund, is most manifest from all the circumstances of the case. The whole arrangement proceeded upon this as an implied basis; for otherwise, in case the bill were sold, it would be returned by the holder, with heavy damages against the prior parties, since his right of action would be complete by the dishonor, and he would not be obliged to wait for the funds. Now the bill itself would not have been paid, if it had been presented later than the 21st of August, for it would not have arrived at maturity, if presented at a later period, before Williams' failure, which was on the 24th of October. In reality, then, there were but two days for the presentment of the bill, in which acceptance and payment would have followed each other. The loss, therefore, which has been sustained, cannot have arisen from any want of due presentment, unless there was an unreasonable delay in not remitting the bill before the 21st of August. The evidence establishes the usual average time of remitting bills from Havana to London, by common conveyances, to be about fifty days; and calculating this to be the earliest period for remittance, where there is no delay, the bill, if sent on its passage on the 20th of June, would not have reached London sooner than the 10th of August; and supposing the remittance to Boston justifiable, not until the 25th of August. In this view there can scarcely arise the least doubt that there was no delay in not remitting the bill until after the funds reached London. The plaintiff, having sent the bill to Boston for sale, had a right to some time to look out for a purchaser; and in the uncertainty of the time when the funds might be expected to reach London, he ought to be allowed, for the benefit of all concerned, a liberal indulgence as to his calculations of time. The only real difficulty is, whether the subsequent delay to the 29th of September was not an unreasonable time, not because it actually occasioned the loss, but because it was a giving credit to the drawee, and thereby putting the bill at the risk of the plaintiff, as to the solvency of the drawee. In coming to a conclusion upon this point, the jury will weigh the whole evidence, and take into consideration the course of trade, and the understanding of the parties in this particular case. If there has been any act of the defendants, or their agent, adopting the delay, or recognizing their responsibility with full knowledge of the delay, that would be decisive of itself. But in the absence of such evidence, it will still be for them to say whether the delay be, upon all circumstances, unreasonable.

Hitherto I have considered the case as if it were governed by the rules of the common law; but as I have before observed, the case arose in Cuba, and in this, as in other respects, it must be governed by the Spanish law. It has been treated, however, as a question not varied by any thing peculiar to the law of Spain, and therefore the court has given its opinion accordingly. It is most probable that the Spanish law is quite as indulgent, if not more so than ours, to the rights of the holder. See Pothier's *Traite du Contract de Change*, part 1, ch. 5, § 2, art. 143; Locré's *Esprit du Code de Commerce*, 2 tom., p. 242; *Code de Commerce*, lib. 1, tit. 8, § 11, art. 160, etc. If there was any special

agreement in the case, beyond what the other facts would naturally imply, it will, of course, be conclusive upon the point now under consideration. The testimony is in conflict, and it will be for the jury to decide upon the credit to which it is entitled.

ADAMS v. OTTERBACK.

(15 Howard, 539-546. 1858.)

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This was a writ of error to the circuit court of the United States for the District of Columbia. This action was brought on a promissory note dated the 11th March, 1848, given by George W. Yellett, Henry Haw and William B. Scott, in the name of Haw, Yellett & Co., in which they promised to pay to Phillip Otterback, Esquire, or order, sixty days after date, the sum of \$800 for value received; which note, before it became due, was assigned to the plaintiff. The general issue was pleaded, and the cause was tried by a jury.

The note was discounted by the Bank of Washington, the proceeds of which were drawn by the defendant.

The following facts appear in the bill of exceptions: The note was unpaid at maturity, and on Monday, the 15th of May, after three o'clock of that day, was delivered by the bank to George Sweeney, the notary employed by said bank, to demand payment thereof, and for protest if not paid. The notary stated that he demanded payment at the United States Hotel, and was answered "neither of the proprietors are within, and it cannot be paid." On the same day notice was left at the dwelling of the indorser. The witness further stated that he had been teller of the bank since the year 1836, and that after the decision of the case of *Cookendorfer v. Preston*, by the supreme court, in 1846, 4 How., 317, the said bank changed the usage and custom which had theretofore prevailed therein, in regard to the demand and protest of negotiable paper held and discounted by it; and in all cases of discount they thereafter held the paper until the fourth day of grace; and if the said fourth day fell on Sunday, it was under the said change the custom of the bank to retain it until Monday, and on that day to deliver the same to the notary to demand payment and give notice; and Sylvester B. Bowman, bookkeeper of the bank, states that since the decision of said case, the usage had been changed by the bank, as above stated. No notice of such change had been given, so far as the witness knew; and it was further stated, that four cases had occurred in which the notes becoming due on Sunday, the notice was given on Monday. On the evidence, this court instructed the jury that the plaintiff had not used due diligence in demanding payment and giving notice of non-payment to the indorser—to which the plaintiff excepted.

§ 777. *Usage as to making demand sanctioned.*

This court, by several decisions, have sanctioned the usages of banks in this District, in making demand and giving notice of non-payment, varying from the law merchant (*Rennér v. Bank of Columbia*, 9 Wheat., 587, 588; *Mills v. Bank of United States*, 11 Wheat., 431), and in some instances where, in this respect, notes left in a bank for collection, have been placed on a different footing from notes discounted. *Cookendorfer v. Preston*, 4 How., 324.

§ 778. *Usage must be of long standing and general notoriety.*

But these usages had been of long standing and of general notoriety. Rights had grown up under them which could not be disregarded without in-

jury to commercial transactions. In the case before us, the usage relied on, and under which notice to the indorser was given, had been adopted by the bank two years before the note in question was discounted, but it seems only four cases had occurred under it. No public notice was given at the time of its adoption, and no presumption can arise, from the facts stated, that the indorser could have had notice of the usage. It is said, if a bank may establish a usage, it may change it; and that there must be a beginning of acts under it. This may be admitted, but it does not follow that a usage is obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. It is unnecessary to consider whether a usage adopted might acquire force from public notices generally circulated. No such notice was given in this case.

§ 779. *Usage must be of a place, not of a bank.*

But to constitute a usage, it must apply to a place, rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot, consistently, be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement. In this country and in England, three days of grace are given by the general commercial law, and the day the note matures is not one of them. In Hamburg, the day the bill falls due makes one of the days of grace. Notice must be given to the drawer or indorser on the day the dishonor takes place, or on the next day. If notice be given through the post-office, it must be forwarded by the first mail after the demand of payment. If the note fall due on Sunday, under the general law, the demand of payment must be made on Saturday. The usage is not proved in this case. Four instances, in the course of two years, are insufficient to establish a usage. Such a rule would, in effect, abolish the commercial law, in regard to demand and notice on promissory notes and bills of exchange. There is ground to doubt whether any deviation from the general law has not been productive of inconvenience.

§ 780. *A demand made for payment at a hotel, without explanation, is insufficient.*

No explanation is given why the demand of payment on the note was made at the United States Hotel, in this city. Such a demand would seem to be insufficient.

We are, therefore, of the opinion that there was no error in the instructions of the court to the jury; the judgment of the circuit court is, therefore, affirmed.

MITCHELL v. DEGRAND.

(Circuit Court for Massachusetts: 1 Mason, 176-182. 1817.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This is an action on a bill of exchange brought by the payee against the drawer. The bill was payable five days after sight, and was presented at the counting room of the drawee for acceptance on the 30th of September. No acceptance was then made, the drawee being absent on military duty, and his clerk expressing only an opinion that it would be accepted by the drawee.

§ 781. *Where the holder of a bill elects to consider it dishonored for non-acceptance, and has it protested, he is bound to give the drawer notice.*

I do not say that, under these circumstances, the holder was bound to treat what passed between him and the clerk as a non-acceptance of the bill. On the contrary, he might properly have waited until the next day as a reasonable time to ascertain the intentions of the drawee, and such delay could not have been deemed laches on his part. But he elected to consider the bill as dishonored on the 30th of September, and protested it accordingly for non-acceptance. And the question now is whether, as to all the other parties to the bill, he is not bound by that act; and I am very clear that he is. When a bill is once dishonored, the holder is bound to give notice, by the next practicable mail, to the parties whom he means to charge for the default. *Lenox v. Roberts*, 2 Wheat., 377. By the legal construction of the contract they have a right to such notice, and the omission to give it with due and seasonable diligence discharges them from every legal liability upon the bill. No such notice was given in this case, and therefore the drawer was absolved from all liability.

§ 782. *No subsequent act between the holder and drawee can vary the drawer's right.*

But it is said that on the 1st of October, and before the mail for Boston was closed on that day, the drawee accepted the bill, and thereby notice became unnecessary. Assuming that the evidence in this case clearly shows an acceptance, still in my judgment it does not change the previous legal predicament of the parties. When once a bill is dishonored, the right of the other parties to notice immediately and absolutely attaches, and no subsequent acts between the holder and drawee can vary that right. Whatever is afterwards done by the holder is at his own peril, and cannot change the responsibility of others. A holder cannot elect to treat a bill as dishonored and afterwards as duly honored. The consequences of such a doctrine would be the most mischievous to the commercial world; and I have no difficulty in holding it not to be law.

§ 783. *Payment must be demanded upon the day when the instrument falls due. An acceptance takes effect from the time when done.*

But supposing this point were doubtful, there is another, which is decisive against the plaintiff. The acceptance, if any, was certainly not made before the 1st day of October; and upon that supposition, the bill being payable five days after sight, was payable on the 9th, and not on the 8th, day of October; payment was, therefore, demanded a day before the bill became due. To avoid this conclusion, it is argued that the acceptance may be considered as relating back to the 30th of September, when the bill was first presented. But neither of these grounds can be maintained. The doctrine of relation cannot apply to cases of this nature. The acceptance or non-acceptance of a bill is a single act, taking effect from the time when done, and having no retroactive operation. How can it be possible to say that this bill was accepted on the 30th of September, when the party has expressly protested it for non-acceptance on that day?

§ 784. *Where a bill is payable so many days after sight, the time begins to run from the presentment and acceptance.*

There is as little foundation for the other suggestion. A bill, payable in so many days after sight, means after so many days legal sight. Now, it is not merely the fact of having seen the bill or known of its existence that constitutes a presentment to the drawee in legal contemplation. It must be presented to him for acceptance, and the time of the bill begins to run, not from the

presentment, but from the presentment and acceptance. If the acceptance be general, it is in legal construction an agreement to pay in so many days after the acceptance, for that is the sight which the drawee admits and refers to. A different doctrine is supposed by Mr. Justice Bayley (Bayley on Bills, 67; but see *id.*, 53) to be asserted by Beawes (Beawes on Bills of Exchange, sec. 252, 1 vol., 455, edit., 8vo., 1795); and if it be so (which is not admitted), I should not incline to uphold his authority against that of Marius (Marius on Bills, 19), who holds the doctrine I have asserted, and which, I think, stands sustained upon principle as well as authority.

Plaintiff non-suited.

DOREMUS v. BURTON.

(Circuit Court for Wisconsin: 5 Bissell, 57-59. 1860.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—At the trial of this cause, which is a suit against the defendant as indorser of several promissory notes, it was objected that one of the notes became payable on Sunday, and that it was protested on Saturday previous for non-payment. These notes were negotiable, without days of grace. The court advised the jury to include this note in their calculation of the damages, and on a motion for a new trial the question could be considered, and if the assessment was found not to be legal, the plaintiff might remit the amount or a new trial would be ordered. On the motion for that purpose, I have examined the subject.

§ 785. *Note falling due on Sunday; demand to be made on Saturday.*

The law is universal in this country and in England that where the last day of grace falls on Sunday, demand and notice must be made on the Saturday previous. Such is the law of the supreme court of the United States. *Lindenberger v. Beall*, 6 Wheat., 104. In *Chitty on Bills*, 377, it is stated that, "In this country [England], at common law, if the day on which a bill would otherwise be due falls on Sunday, or a great holiday, as Christmas day, the bill falls due on the day before; and where a third day of grace falls on a Sunday, the bill must be presented on Saturday, the second day of grace; whereas, otherwise, a presentment on a second day of grace, being premature, would be a nullity." The reason of the rule as to notes in which days of grace are allowable is that as the allowance of days of grace is a mere indulgence to the maker, it shall be granted only in cases where it will not work any extra delay to the holder of the note, who is entitled to strict payment. If any other rule were adopted, he would be compelled to lose the use of his money for four days. But in practice, and in fact, according to the law of this state, a note for thirty days, where days of grace are not waived, as in this note, is a note for thirty-three days,—so understood when the note is given and received, such is the contract. Now the question is, does the waiver of the days of grace extend to the maker one additional day when the day of payment falls on Sunday? At the trial I was inclined to place the note in this respect as a non-negotiable contract, which it was understood would not be payable until the Monday following. In a note to section 220, *Story on Promissory Notes*, the above remark of *Chitty* is copied. This seems to confirm the principle that, at common law, this note would be payable on Saturday. In the case of *Banker v. Parker*, 6 Pick., 80, it is stated by the court that the note in suit fell due on Sunday, and, having been made in 1824, was not entitled to grace, the statute allowing grace on promissory notes not having been passed until 1825. The

note became due, therefore, on the 13th of November, 1825, and should have been demanded on the 12th, as the day of payment, according to the note, was Sunday. Reference is made to *Jones v. Fales*, 4 Mass., 245. Such seems to have been the common law of Massachusetts. In the case of *Avery v. Stewart*, 2 Conn., 69, the note sued on was for a certain sum in cotton yarn and was not negotiable. It fell due on Sunday, and a tender of the yarn was made on the Monday following. The court, six judges to three, decided that the tender on Monday was good and in time. The supreme court of New York, in the case of *Salter v. Burt*, 20 Wend., 205, decided that the check in suit having been protested, which was payable on the day of its date, which was Sunday, could not be demanded until the Monday following. It is apparent that it could not be presented at the bank for payment on Saturday, as it did not bear date on that day, but on the day following. It did not purport to have been written on Saturday. The reason given by the court favors the idea that this note was payable on Monday; but although the decision was correct, the reasoning may possibly be wrong. It is very certain that a presentment of the check on Saturday would be premature.

The note in suit being a negotiable note, with grace waived, is to be considered the same in regard to Sunday being the day of payment as if the waiver had not been made. When the note was made the maker may possibly have known that the day of payment would fall on a day on which it would be illegal to make demand. At all events, the instrument is to be considered against the maker, and upon such principles is not to be so construed as to allow an indorser to escape. The motion for a new trial will be overruled and judgment entered on the verdict.

MARTIN v. WINSLOW.

(Circuit Court for Rhode Island: 2 Mason, 241-243. 1821.)

STATEMENT OF FACTS.—This was an action of *assumpsit* on a promissory note,—indorsee against indorser. The note was made by Rousmaniere, and was payable on demand at the New England Commercial Bank, Newport. General issue. Plaintiff admitted on the trial that he never left the note at the bank, and never demanded payment of Rousmaniere. Rousmaniere died insolvent, and demand was at once made upon his administrators, and notice given to defendant and payment demanded. It appeared that defendant admitted the notice, but that he was insolvent and had no objection to the notes coming in with his other debts. Whether he had notice at the time that payment had never been demanded of the maker did not appear. The note was given in renewal of another note payable in nine months.

§ 786. *Time of presentation of demand note.*

Charge by STORY, J.

I have no hesitation in saying that a note payable on demand must be demanded within a reasonable time, otherwise the indorser is discharged. What shall constitute a reasonable time is not a matter of absolute certainty as to which a definite rule can be laid down. It must depend upon circumstances. But unless there be circumstances in the case which account for the delay, a neglect to demand payment of such a note for more than *seven* months is an unreasonable delay, and discharges the indorser. If the fact of such delay for such a length of time appear naked of all circumstances, it is a discharge of the indorser. And the *onus* to establish any justification or excuse for such

delay lies on the plaintiff. It makes no difference in the case that the indorsement was in lieu of a former security between the same parties, or was for the accommodation of the maker, unless the indorser assented to the delay. It will be for the jury to decide whether there are any circumstances in this case from which an assent to this delay can be inferred.

§ 787. *Indorsers are not bound by a new promise to pay, unless made with a full knowledge of all circumstances attending the delay.*

Then, as to the second point, a promise to pay with a full knowledge of all the facts is binding upon the indorser, although he might otherwise be discharged. But if he promise in ignorance of material facts affecting his rights, it is not a waiver of those rights. The question then is, whether the indorser in this case had such knowledge. It may be inferred from the connection between the parties, their near relationship and the deep interest which the defendant had in this particular case to ascertain, after the death of the maker, his own responsibility as indorser. It may also be inferred from the language used by him on this occasion. He did not object to the delay, though he knew the length of time which had elapsed since the note was given. As no objection of this sort was made, it leads to the presumption either that the indorser understood originally that the note was to lie unpaid for a period at least as long, or that under all the circumstances he did not deem it an unreasonable delay. He had no ground to presume that any demand of payment was made of the maker in his life-time, and the fact that the first known demand was on the administrators, and the first notice given to him after that demand, would strongly lead him to the conclusion that there had been no prior demand. And in fact no prior demand was made. But as these are mere presumptions of fact arising from circumstances, the jury will give them what weight they think them entitled to.

BRENT v. BANK OF METROPOLIS.

(1 Peters, 89-93. 1828.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was a suit brought in the circuit court of the United States for the District of Columbia on a note made by G. A. Carroll, and indorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis. The declaration set out the note, and averred a demand of the same “at the Bank of the Metropolis,” where the said note was negotiable. At the trial the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank about three years before the date of the note on which this suit was brought, and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation. For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there demanded, the bank proved by parol testimony that the said G. A. Carroll did not reside in the district after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes taken for the continuance of the accommodation were

expressed to be payable at the said bank; and that all the notes previous to that on which this suit was brought were there demanded, which demand was acquiesced in as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes but on this condition. The counsel for the defendants below objected to this testimony, but the court permitted it to go to the jury. The counsel for the defendants below then prayed the court to instruct the jury that, to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note. The court refused to give this instruction, but did instruct the jury that, if they should be satisfied from the evidence that it was agreed by all the parties whose names appear on the notes that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker was not necessary. An exception was taken to these opinions of the court, and their correctness is now to be examined.

§ 788. *Parol evidence admissible to show agreement as to place of demand.*

The plaintiffs in error contend that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply.

§ 789. *Personal demand on maker not necessary, when.*

No demand is necessary to sustain a suit against the maker. His undertaking is unconditional, but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only when they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action. If the testimony was admissible, there is no error in the instruction given by the court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary. This point is, we think, involved in the question respecting the admissibility of parol testimony to establish the agreement. Had the note purported on its face to be payable at the Bank of the Metropolis, that express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol (and, unless it can, the testimony was inadmissible), the effect of the parol contract is the same on this point as if it had been in writing. The only inquiry, therefore, is whether the testimony was sufficient to be submitted to the jury for the purpose of proving the agreement. We think it was.

§ 790. *Agreement to dispense with demand on the maker.*

The circumstances that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as the condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued after the removal of the maker out of the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis,—are facts from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

§ 791. *Demand on maker must be made or excused to charge indorser.*

A verdict having been rendered for the bank, the defendants in the court below filed errors in arrest of judgment. The error alleged is that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker. The plaintiffs in error contend that the agreement is not alleged in the declaration, and we admit that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment. After a verdict, it is, we think, sufficient to sustain the judgment. There is no error, and the judgment is affirmed, with costs.

COX v. NATIONAL BANK.

(10 Otto, 704-718. 1879.)

ERROR to U. S. Circuit Court, District of Kentucky.

§ 792. *Nature of bills of exchange; place of presentment.*

Opinion by MR. JUSTICE CLIFFORD.

Bills of exchange are written orders or requests from one party to another for the payment of money to a third person or his order, on account of the drawer, and, if payable at sight or at a date subsequent to the acceptance by the drawee, the instrument must be duly presented for payment, else the parties to the same conditionally liable for the payment of the amount will be discharged. Different rules prevail as to the place where the presentment for payment must be made, dependent upon the form of the instrument and the place where and the terms in which it was accepted.

§ 793. *Acceptance and protest.*

Such an instrument must first be accepted; and if, when presented for that purpose, the drawee refuses to accept the same, it must, if it is a foreign bill, be protested for non-acceptance, the rule being that the place of protest is the place where the same is required to be presented for acceptance, unless it is in

terms payable at some other place. Due presentment for payment must also be made, the general rule being that the place of payment is the place where the acceptor resides, or where on the face of the bill it is addressed to him, unless some other place is specifically designated in the instrument. Story, Bills, secs. 48, 282.

STATEMENT OF FACTS.—Sufficient appears to show that the subject matter of the present controversy is a bill of exchange drawn by the defendant first named, the address to the drawees being “Messrs. Cox & Cowan, New York, N. Y.,” for the sum of \$5,000, payable eighty days from date, value received, and the indorsement on the face of the bill is as follows: “Accepted. Cox & Cowan.” That the bill was duly presented for acceptance, and that it was accepted by the drawees in the manner described, is admitted; nor is it denied that it was duly indorsed by the payee, nor that the plaintiff bank became the *bona fide* holder of the bill by virtue of the second indorsement exhibited in the record. Payment of the bill at maturity being refused, the plaintiff bank, as the lawful holder of the same, caused it to be protested, and instituted the present action against the drawer, the acceptors and the payee as the first indorser, to recover the amount. Process was served, and the drawer and indorser appeared and filed separate answers. Though the answers are separate, yet the material defenses in each are the same, and may be considered together. They are as follows: 1. That the bill was not duly presented to the acceptors for payment. 2. That it was not duly protested for non-payment. 3. That due notice was never given to the drawer of the dishonor of the bill or of the failure of the acceptors to pay the same at maturity. Amended answers having subsequently been filed by the same parties, they went to trial, and the verdict and judgment were in favor of the plaintiff bank against the drawer, acceptors and indorser for the amount specified in the transcript. Exceptions were filed by the defendants, and they sued out the present writ of error.

Since the cause was entered here, the defendants have assigned for error the following causes: 1. That the circuit court erred in instructing the jury that the bill, being addressed to the drawees, “New York, N. Y.,” is in law payable in New York city. 2. That the circuit court erred in refusing to instruct the jury that the acceptance of the bill, as shown in the transcript, was a general acceptance, which made the bill payable at no particular place. 3. That the circuit court erred in refusing to instruct the jury that, in order to charge the defendants, the officers of the plaintiff bank, if they knew at the maturity of the bill where the residence and place of business of the acceptors were, as stated in the answers, must show that the bill was presented and that payment was demanded at their residence or place of business. 4. That the circuit court erred in instructing the jury that if the notary made reasonable and diligent inquiry for the acceptors and their place of business in the city of New York, and could not find either their residence or place of business, and that he then demanded payment during business hours at the place or places frequented by them when in said city, that such a demand was a sufficient presentment to maintain the action. Evidence was introduced by the defendants tending to show that throughout the transaction they were all residents of the state of Kentucky, and that the bill in question was drawn and indorsed in the state; that it was sent by one Thompson to the firm of Wright & Co., who delivered the same to the plaintiff bank or their officers, who were informed where the bill was executed by the drawer and indorser. They also introduced testimony showing that the officers of the bank, when they took the bill, knew where the

drawer resided when it was forwarded, and afterwards when it was accepted by the drawees. Explanatory evidence was also given by the plaintiff bank showing that no sort of agency existed between the person by whom the bill was forwarded and the firm by whom it was delivered and the plaintiff bank, and that the former never had any communication with the bank, and never informed either the bank or the said firm of the postoffice address of any one of the defendants.

§ 794. *Rule as to presentment, protest and notice.*

Commercial rules everywhere require that to fix the liability of the drawer of a bill of exchange or the indorser of a bill or note, there must be a legal presentment of the instrument to the acceptor or maker, or payment must be demanded of such a party on the day the instrument becomes payable. That payment must be demanded from the maker of a note and notice of its non-payment forwarded to the indorser in due time, in order to render him liable, is so firmly settled, says Marshall, C. J., that no authority need be cited to support the proposition. *Magruder v. Bank*, 3 Pet., 87, 90 (§§ 752, 753, *supra*); *Juniata Bank v. Hale*, 16 Serg. & R. (Pa.), 157. Nobody doubts the correctness of that rule; and it is equally well settled that when a note or bill is expressed to be payable at a particular place, a demand there is always sufficient to charge the indorser. Story, *Bills* (4th ed.), sec. 357; Chitty, *Bills* (13th Am. ed.), 407; *Rowe v. Young*, 2 Brod. & B., 165; *Picquet v. Curtis*, 1 Sumn., 478. Text-writers of undoubted authority state that an acceptance is an engagement to pay the bill according to the tenor of the acceptance, and that a general acceptance is an engagement to pay according to the tenor of the bill. Bayley, *Bills* (5th ed.), 154; Chitty, *Bills* (13th Am. ed.), 342. Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are that in such a case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but the same decisions hold otherwise as to the maker of a note and the acceptor of a bill, the rule being that, unless the restrictive words "only and not elsewhere" are added, no presentment there at maturity or afterwards is necessary to charge such a party. *Foden v. Sharp*, 4 Johns. (N. Y.), 183; *Wolcott v. Van Santvoord*, 17 id., 248.

§ 795. *As to place of presentment.*

Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business. Circumstances, however, may control the usual inference arising from the want of any such expression in the instrument which may warrant a very different conclusion. Thus, if a bill were drawn upon a merchant when abroad, and should be addressed to him at Paris or at London, the place of payment would be the place where the drawer accepted the instrument, whether Paris or London, and not the place of his residence when the bill was drawn or at its maturity. 1 Daniel, *Negotiable Securities* (2d ed.), sec. 90. Provided no place is designated or agreed or indicated in the form of the address or the terms of the acceptance, the rule then is that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at their usual place of business during business hours. *Id.*, sec. 635. Parol testimony to show such an agreement is admissible, it being settled law that the introduction of such testimony is not inconsistent with the

rule that a written instrument cannot be varied by parol evidence. *Brent v. Bank of Metropolis*, 1 Pet., 89, 92 (§§ 788-791, *supra*).

§ 796. *Liability of makers and acceptors.*

Unlike the indorser, the maker of a promissory note is liable without any demand of payment. His undertaking is unconditional; but the indorser only undertakes to pay if the maker does not, which makes it necessary for the holder to take proper steps to obtain payment from the maker, from which it follows that his contract is that due diligence shall be used to that end; and when the parties agree what shall constitute due diligence in the particular case, says Marshall, C. J., they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes as such when they are silent. Acceptors of a bill of exchange stand in the same relation to the drawee of the bill as the maker of a note does to the payee, the acceptor being the principal debtor in a bill precisely as the maker is of a promissory note, the rule being that the liability of the acceptor is governed by the terms of his acceptance, just as the liability of the maker of a note is defined and governed by the terms of a note; nor can the place of payment be of any more importance in the one case than in the other.

§ 797. *Bills payable at a particular place.*

When a note or bill is made payable at a particular bank, as is frequently the case, it is well known that, according to the usual course of business, the note or bill is usually lodged in the bank for collection; and if the maker or acceptor calls to take it up when it falls due, and it is delivered to him, and he pays the amount, the business is closed; but if he does not find the note or bill at the bank, he can deposit the money to meet the same when it shall be presented, and the proof of such tender and deposit, in case of a subsequent suit, will exonerate him from all costs and damages. Or should the note or bill be made payable at some other place than a bank, and no deposit should be made, or he should choose to retain the money in his own possession, an offer to pay at the time and place would protect him against interest and costs on bringing the money into court. Rules of a different character have sometimes prevailed in other jurisdictions, but the principles to be applied in such a case are settled in this court; nor is it necessary, where the note or bill is payable at a specified time and place, to aver in the declaration or prove at the trial that a demand was made at that place, in order to maintain the action, the established rule being that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it is matter of defense to be pleaded and proved. *Wallace v. McConnell*, 13 Pet., 136, 150; 1 *Daniel*, *Negotiable Securities* (2d ed.), sec. 643; *Edwards*, *Bills* (2d ed.), 150; *Rowe v. Young*, 2 Bl., 391, 395. Beyond doubt, these principles are applicable, as determined by this court, where the suit is against the maker of the note or the acceptor of the bill; but when recourse is had to the indorser of the note or the drawer of the bill, very different considerations arise, as they are not the principal debtors to the holder of the instrument. Their undertaking is not absolute, like that of the maker of the note or the acceptor of the bill, but conditional, that if the maker in the one case, or the acceptor in the other, refuses to make good the undertaking, they will pay the amount. Hence, the holder is bound to use due diligence to obtain payment from the maker or acceptor, as a condition precedent to his right to recover of the parties only conditionally liable. Consequently, when a place of payment is designated in the body of

the note or bill, the drawer or indorser has a right to presume that the maker or acceptor has provided funds at such place to pay the note or bill, and to require the holder to apply for payment at such place, unless when the place designated is a bank, and the bank is the holder of the instrument, when the rule does not apply. In all other cases the obligation is absolute, that the holder must aver and prove a presentment at the designated place, unless the necessity is obviated by agreement, or something appearing in the instrument to indicate a different intention. *Bank of United States v. Smith*, 11 Wheat., 171, 175. Suppose that is so, then there never need be any difficulty in determining the rights of the parties in such a case where the place of payment is specifically designated in the bill, or where the terms of the instrument contain no such designation whatever, as the rule of procedure in each case, though different, is equally plain and unmistakable. Nor do the parties here differ in respect to those rules; but the plaintiff bank contends that the bill in question brings the case within the category of the first case, but the defendants insist that it falls within the second, where no place of payment is designated.

§ 798. *The place indicated in the address of a bill of exchange is fixed as the place of payment by that address.*

Looking at the terms of the bill, independent of the address to the drawees and the acceptance written across the face of the bill, it would seem that the theory of the defendants is correct; but the bill is addressed to "Messrs. Cox & Cowan, New York, N. Y.," as drawees, and is by them accepted without explanation or condition, from which it follows as a reasonable inference that they accepted the bill as if they were at the time in the city of New York; and having so accepted it without explanation or condition, the legal construction of the instrument is that it became payable when it fell due at the place designated by the address as the place where the acceptance took place. *Halstead v. Skelton*, 5 Q. B., 86; 1 & 2 Geo. IV., c. 78; 38 British Stats., 291. Bills of exchange, like other written instruments, are subject to legal construction in order to ascertain the intent and meaning of the parties, unless the language employed to express such intent and meaning is clear and unambiguous. Enough has already been remarked to show that when a bill or note is expressed to be payable at a particular place on demand, it is always sufficient to prove that it was presented there to charge the acceptor or the indorser. *Evans v. St. John*, 9 Port. (Ala.), 186, 193; *McClane v. Fitch*, 4 B. Mon. (Ky.), 599. Where a bill is drawn on a firm, as W. M. & Co., at a particular number and street, as at 263 Washington street, New York, the presentment should be made at their place of business, as presumable from such address, or at the residence of either of the firm. *Otsego County Bank v. Warren*, 18 Barb. (N. Y.), 291, 293. If the instrument is payable in a particular town, and the residence of the maker or acceptor is elsewhere, the holder is not bound to make demand anywhere except in that town. *Smith v. Little*, 10 N. H., 526, 530; 1 Am. Lead. Cas. (5th ed.), 454.

Views equally explicit are expressed by Judge Story, who says that if the bill is drawn upon the drawee domiciled in one place and is payable in another place, and is accepted by him, *meaning without qualification*, the presentment should be made at the latter place. Thus, if a bill is drawn on the drawees at Liverpool, payable in London, and is accepted, without explanation, the presentment for payment must be in London, if any particular place is there pointed out where demand may be made, and if none, and no one can be found to pay the bill, it may be protested there for non-payment for that very cause. Story, *Bills* (4th ed.), sec. 353; *Boot v. Franklin*, 3 Johns. (N. Y.), 208; 2 & 3 Wm.

IV., 50 British Stats., c. 98, p. 587; Chitty, Bills (13th Am. ed.), 390. So where a bill is directed to the drawee at a particular house, and is by him accepted without condition, the going to that house with the bill on the day of payment and finding it closed is a sufficient presentment. Bayley, Bills (5th ed.), 200; *Hine v. Allely*, 1 Nev. & M., 433; Chitty, Bills (13th Am. ed.), 330. American authorities almost universally hold that in such a case no presentment is necessary to charge the acceptor of the bill or the maker of the note,—the only effect of the neglect as to such a party being that it relieves him from cost and damages if he was ready at the time and place named to pay the amount and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact and payment of the money into court will be a bar to the recovery of interest and cost. *Hills v. Place*, 48 N. Y., 520; *Caldwell v. Cassidy*, 8 Cow. (N. Y.), 271.

§ 799. *Due diligence required to find proper place to present bill.*

Want of due diligence cannot be successfully set up in this case, as the protest was given in evidence, and shows to a demonstration that everything the law requires was done to find the acceptors or their place of business, without success, and that the protest was finally made at the only place in the city of New York where they were accustomed to transact any business. Diligence is doubtless required of the holder to ascertain the proper place to present the bill for payment; but it is not necessary to give that issue much consideration in this case, as it is not controverted that every needful effort in that regard was made, if the true theory of the bill is that it was payable in the city of New York, which is asserted by the plaintiff bank and denied by the defendants. Nothing need be added to what has already been remarked to explain the views of the court upon that subject, which are, that the bill having been addressed to the drawees at the city of New York, and they having accepted the same without qualification, explanation or condition, the bill became payable in that city, even though no mention was made of any dwelling, store or place of business where the bill should be presented. *Freese v. Brownell*, 35 N. J. L., 285; 1 Bell, Com. (5th ed.), 412.

§ 800. *Demand of acceptor not required.*

Nor is it necessary to repeat the views heretofore expressed, that the acceptor of the bill, like the maker of a note, is the promissory debtor in such a case, and that in respect to such a party to a bill no presentment or demand of payment need be made at the specified place in order to render him liable to an action on the instrument. Story, Notes (7th ed.), sec. 228; 1 Parsons, Bills and Notes, 425-429; Thompson, Bills (2d ed.), 294. Our decisions are decisive to that effect; and it is equally clear in this case that every step necessary to bind the drawer and the indorser was also taken by the holder of the bill described in the declaration. Story, Notes (7th ed.), 236; *Carter v. Smith*, 9 Cush. (Mass.), 321. Presentment at the specified place as against the acceptor of a bill is not necessary, the rule being that, if he was ready at the time and place to pay, he may prove that as a defense; but the rule is otherwise as against the drawer and indorsers. 3 Kent Com. (12th ed.), 100, 104.

Five other assignments of error are set forth in the brief of the defendants; but it is unnecessary to pursue the discussion, as the remarks already made are sufficient to show that there is no error in the record, and that the judgment should be affirmed. Exactly the same questions are also involved in the second of the above entitled cases. Both were argued and submitted at the same time, and must be decided in the same way. In each case judgment affirmed.

M'GRUDER v. BANK OF WASHINGTON.

(9 Wheaton, 598-602. 1824.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This case comes up from the circuit court of the District of Columbia, in which a suit was instituted against the plaintiff here, as indorser of one Patrick M'Gruder. The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action, and the defendant brings this writ of error to have that judgment reversed, and a judgment entered in his favor. The leading facts in the cause are so much identified with those in the case of *Renner v. The Bank of Columbia*, 9 Wheat., 581 (§§ 754-759, *supra*), decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this. But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was, whether the facts stated will excuse it.

§ 801. *Removal from jurisdiction excuses demand.*

At the time of drawing the note, and until within ten days of its falling due, the maker was a housekeeper in the District of Columbia. But he then removed to the state of Maryland, to a place within about nine miles of the District. The case admits that neither the holder of the note, nor the notary, knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of the admission to this point are, that he "went to the house where the said Patrick had last resided, and from which he had removed as aforesaid, in order there to present the said note, and demand payment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest." The alternative in which the judgment of the court is to be rendered is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is, whether the holder had done all that he was bound to do, to excuse a personal demand upon the maker. On this subject the law is clear; a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly personal, in the language of the submission, is not required; it is enough if it is at his place of abode or generally at the place where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the indorsee to show due diligence. Now, that the notary should not have found the maker at his late residence was the necessary consequence of his removal, and is entirely consistent with the supposition of his not having made any one of those inquiries which would have led to a development of the cause why he did not find him there. *Non constat*, but he may have removed to the next door, and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might with equal correctness have returned "that he had not found him," and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

§ 802. *Mere distance does not excuse demand of payment.*

The party must then be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties. Mere distance is, in itself, no excuse from demand; but, in general, the indorser takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the postoffice allowed him, as in the case of notice to the indorser. But the question on the recent removal into another jurisdiction is a new one, and one of some nicety. In case of original residence in a state different from that of the indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another state, the holder shall be required to pursue the maker, is a question not without its difficulties. We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point there is no other rule that can be laid down which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed in this respect by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the states, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier states, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same state with the maker, that could result from crossing the British channel. With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

RAY v. SMITH.

(17 Wallace, 411-417. 1873.)

ERROR to U. S. District Court, Middle District of Alabama.

STATEMENT OF FACTS.—Smith, of New York, sued Ray, of Alabama, as indorser of notes which fell due in 1862. They were not protested, on account of the state of war then in existence, but were presented to the maker and dishonored in 1866. There was evidence that the indorser had been provided with funds to pay the notes, and would have paid them if they had been protested sooner. There was judgment for the plaintiff.

Opinion by MR. JUSTICE STRONG.

Whether timely presentment of the notes was made to the maker, and whether due notice of their dishonor was given to the defendant who had indorsed them, are questions which were not submitted to the jury. The court below appears to have been of opinion that, in view of the facts given in evidence, neither demand of payment nor notice to the indorser was necessary to justify a recovery against him. The jury was instructed, in substance, that even if there was no legal demand and notice, the want of them was sufficiently excused; and that the plaintiff was entitled to a verdict for the amount of the notes with interest from the dates when, according to their terms, they fell due. It is necessary, therefore, to inquire whether the evidence, as exhibited in the bill of exceptions, warranted such instructions.

§ 803. *Demand excused by state of war, but must be made after it ceases.*

It is undoubtedly the law, that though the plaintiff was relieved by the war from obligation to make demand upon the maker of the notes when they came to maturity, it was necessary for him, in order to charge the indorser, to make such demand within a reasonable time after it became possible; that is, after the close of the war; unless he was excused by the fact that the indorser had sufficient funds of the maker in hand, which he had received in the course of a current business, and which he had authority to apply to the payment of the notes at their maturity. And whether that alone constituted a sufficient excuse, is the real question now.

§ 804. *Indorser supplied with funds to pay note becomes liable as maker.*

An indorser of a promissory note is only secondarily liable. His responsibility is, in its nature, a contingent one, and ordinarily, performance of the condition to make demand of the maker and give notice of his default in due time is an essential part of the title of one who asserts an indorser's liability. It has often been regretted that courts have dispensed with the performance of that condition for any cause. Still, the principal reason for the requirement of demand and notice is, that the indorser, if looked to for payment, may have the earliest opportunity to take steps for his own protection. Hence, it has been said, in some cases, that when by no possibility a failure to make demand and give notice could have injured him, or rather, when they could by no possibility have enabled him to protect himself, proof of demand and notice are not necessary. It must be admitted there has been much inconsistency in the decisions respecting the application of this rule. In some it has been held that if an indorser has taken an indemnity from the maker, he is not entitled to notice of default. But this is not sustained by sound reason, and the best-considered cases assert the contrary doctrine. The indemnity may prove insufficient. At all events, it is not inconsistent with the existence of a remedy over against the maker, and the correct rule, as stated by Bailey, J., in *Brown v. Maffey*, 15 East, 222, is that every indorser ought to have notice whenever he has a remedy over. All the cases agree, however, that when, by arrangement between the maker and the indorser, the latter has become the principal debtor, and primarily liable, he may not insist upon notice. Presentment to the maker, followed by notice to himself, can be of no service to him, for he has no remedy over. And he becomes the principal debtor when, either before or at the maturity of the note, he is supplied by the maker with sufficient funds for the purpose of paying it. Receiving the funds for such an avowed purpose, he assumes an obligation to take up the note; and, as has been said, he may be regarded as an agent who has undertaken to pay, and who, therefore, cannot be disappointed if his principal, trusting to his obligation, takes no further steps for the payment.

§ 805. *Whether funds placed in indorser's hands by maker are intended to pay note is a question of fact.*

In the present case, the evidence does not necessarily establish that the funds which the indorser held were placed in his hands for the purpose of paying the notes. They were derived from the profits of the business, in conducting which he was a partner of the maker; and he was merely authorized to apply them to the payment of the notes, at their maturity. Whether this proved the existence of an obligation assumed by him to take them up, or, in other words, whether, as between him and the maker, he thus became the primary debtor, is a question which the court could not correctly answer in the affirmative as a

conclusion of law. If it did establish such an obligation, absence of demand and notice were immaterial, and the plaintiff was entitled to a verdict. But if it did not, if the indorser, as between himself and the maker, had not become the principal debtor, if the authority to pay the notes out of the fund in his hands was only an arrangement for his indemnity, we think he was at liberty to pay them to the maker at any time after the maturity of the notes, and before he had any notice that they remained unpaid. In such a case, his liability to the holder remained contingent, and consequently, unless there was a legal demand and notice, he cannot be charged. It follows that the judge of the court below erred in directing a verdict for the plaintiff. The most that could properly be claimed by the holder of the notes was that the evidence should be submitted to the jury to find whether it proved that the defendant had become the principal debtor by arrangement between him and the maker, with instructions that if it did, the plaintiff was entitled to recover; and that if it did not, the indorser could not be held liable without proof of reasonable demand upon the maker, and notice.

§ 806. *A deposition read without objection at the trial cannot be objected to in an appellate court.*

Nothing more need be said respecting the charge given to the jury. But as the case goes back for another trial it is proper to notice an exception taken to the refusal of the court to suppress the deposition of the plaintiff. The deposition had been taken *de bene esse*, and before the trial the defendant moved to suppress it. But when it was offered at the trial, it was read without objection, and without exception. It may be that had it been objected to then, it should not have been received. But after having permitted it to be read at the trial without opposition, we think it cannot be objected now that the court received it.

Judgment reversed, and a new trial ordered.

IN RE BROWN.

(Circuit Court for Massachusetts: 2 Story, 502-525. 1848.)

STATEMENT OF FACTS.—Petition by assignee in bankruptcy to expunge from the list of proved debts against the estate the claim of payees of checks of the bankrupt, upon the grounds stated in the opinion of the court. There was a counter petition by the claimants. The drawer had a balance to his credit at the bank when the checks were made of \$30.89; on the 18th, 19th, 20th and 21st days of May of \$6.11, and on 10th, 11th, 12th and 13th of June, of \$20.72.

Opinion by STORY, J.

I cannot say that I entertain any doubt upon either of the questions which have been argued in this case, although they are presented under somewhat novel circumstances. The argument for the assignee resolves itself into these points: 1. That these instruments, although in the form of checks, are, in fact, inland bills of exchange, and governed by all the rules thereof as to presentment and notice. 2. That here no due notice was given to the drawer of the presentment and dishonor of these checks; and that the circumstances relied on as a waiver do not justify the conclusion. 3. That the facts relied on in the petition of Messrs. Courtis do not change the legal posture of the case or entitle them to any relief in equity.

§ 807. *Checks payable at a future time are not inland bills of exchange.*

In respect to the first point, the argument pressed is that checks are always, and properly, payable on demand, and that when payable at a future time they

become, to all intents and purposes, inland bills of exchange. But I am not by any means prepared to admit the validity or force of this distinction, and no case has been cited which, in my judgment, satisfactorily establishes it. A check is not less a check because it is post-dated and thereby becomes, in effect, payable at a future and different time from that on which it is drawn or issued. This is sufficiently apparent from the case of *Allen v. Keeves*, 1 East, 435. That it may be declared upon as a bill of exchange is no proof that it may not also be declared upon as a check. In many cases they are identical in their legal results, but by no means in all. Mr. Chitty very properly says that a check *nearly* resembles a bill of exchange; but, he adds, it is uniformly made payable to bearer, and should be drawn upon a banker or a person acting as such. Chitty on Bills, 8th ed., ch. 11, p. 545. I agree that it nearly resembles a bill of exchange, but *nullum simile est idem*. It is commonly, although not always, made payable to the bearer; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually, also, made payable on demand, although I am not aware that this is an essential requisite. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for mere acceptance, but only for payment. Mr. Chancellor Kent, in his learned Commentaries (3 Kent's Comm., 75, 4th ed.), says: "A check upon a bank partakes more of the character of a bill of exchange than of a promissory note. It is transferable like a bill of exchange. It is not a direct promise by the drawer to pay, but it is an undertaking on his part that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay." But he has more fully explained his real meaning in a note to the index of the fourth edition of his Commentaries (4 Kent's Comm., p. 549, note, 4th edition), which I adopt with entire confidence as expressive of my own opinion. "A check," says he, "differs from a bill of exchange in this: that it has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain until called for; and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may, under circumstances, be deemed to have made the check his own, to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser, who has a right to require diligence on the part of the holder to relieve him from responsibility. It is true, however, that there is so much analogy between checks and bills of exchange and negotiable notes that they are frequently spoken of without discrimination." S. P., 3 Kent. Comm., s. 44, p. 104, note, 5th ed.; *Little v. Phoenix Bank*, 2 Hill (N. Y.), 425; *Kemble v. Mills*, 1 Mann. & G., 757.

The case of *Cruger v. Armstrong*, 3 Johns. Cas., 5, does not inculcate any different doctrine when correctly considered. And the case of *Conroy v. Warren*, 3 Johns. Cas., 259, expressly distinguishes between checks and bills of

exchange, and puts the doctrine of the necessity of presentment for payment upon its true and reasonable ground, whether any damages have been sustained by the drawer by the delay or not; and I conceive that the point as to notice of the dishonor of a check would mainly turn upon similar considerations.

We all know, from the history of inland bills of exchange, that, originally, they were not entitled to days of grace; and that days of grace were first established, as applicable to them, by the statutes 9th and 10th Will. 3, ch. 17, and 3d and 4th of Ann, stat. 2, ch. 9. 2 Black. Comm., 467. In Massachusetts days of grace were not formerly allowed upon promissory notes payable at a future time (*Putnam v. Sullivan*, 4 Mass., 45; *Jones v. Fales*, 4 Mass., 245); and the like rule was supposed to apply to inland bills of exchange, or, at least, the contrary was not established. This rule in Massachusetts was altered by the stat. of 1824, ch. 130, and by the Revised Laws of 1835, stat. 12, ch. 33, §§ 5, 6, which allow days of grace upon all bills of exchange payable at sight or at a future day certain, and on all promissory negotiable notes, orders or drafts payable at a future day certain. But no mention whatsoever is made in either statute of checks; but they are silently left to the known rules, practice and usages of banks, which I believe to be invariable, never to accept them prior to payment, and always to pay them on presentment on or after the day stated for payment by the date or upon the face of the check. Thus, if a check be dated on the 1st of December, and be payable on the 10th of December, it is presentable on the latter day, and on presentment on that day it will be paid by the bank. It is never presented for acceptance, and no days of grace are ever allowed upon it. In short, it is always treated as payable on the very day designated as the day of payment. If it be asked, What is the reason of all this? the true answer is that it is the usage of banks and the understanding of the parties to the check, and being the constant habit of business, it becomes, like all the other usages of merchants, the *lex et norma* by which to expound the contract. The parties have, in the present case, used the common form of a bank check, and by so using it they impliedly authorize the bank to treat it as a check, and pay it as a check, payable on the very day on which it is dated, or on which it purports to be payable, without any grace. The words of both these instruments are precisely alike, except as to sums and times of payment. The first one is: "Granite Bank, Boston, April 18, 1841. Pay to W. Courtis & Co., 18 May, or bearer, seven hundred and three dollars and 50-100. Ephraim Brown, by J. W. Green. To the Cashier." The second is dated on 18th of April, and is to "Pay to W. Courtis & Co., 10 June, or bearer, seven hundred and seventy-six dollars 52-100." Signed in the same manner and addressed in the same way "To the Cashier" of the Granite Bank. No one can doubt that it is entirely competent for the parties to agree that an instrument shall be treated to all intents and purposes as a check, and to have all the attributes and incidents thereof, and to declare that it shall not be deemed a bill of exchange. In fact, by the forms here adopted the parties do so declare; and, as I understand it, the banks uniformly act upon this understanding, and always pay such checks upon the day fixed for payment, without any allowance of grace, if they have funds; and this is done without any suspicion that it is a misuser or misapplication of the funds of the drawer.

I am aware of the case of *Brown v. Lusk*, 4 Yerg., 210, in which it was held that a check drawn in Nashville on the Branch Bank of the United States at Nashville, on the 13th of December, 1827, payable to A. B., or bearer, on the 14th of January following, was held to be an inland bill of exchange, and en-

titled to the days of grace. This case was decided in the absence of Mr. Chief Justice Catron, and not only was no authority cited for the position, but the very citation from Chitty on Bills which was relied on to support it distinctly shows that there is a marked distinction between checks and bills of exchange. Mr. Chitty there says (Chitty on Bills, p. 322, 7th Amer. ed.; S. P., Chitty on Bills, ch. 11, p. 546, 8th London ed., 1833): "They (checks) are not due before payment is demanded, in which they differ from bills of exchange and promissory notes payable on a particular day." Now, the most that this position proves is, that checks are not governed in all cases by the same rules as bills of exchange and promissory notes. They are not payable until presentment. But how does this show when they are presentable, or that they may not be made payable on any other day certain than the day of the date? Or that days of grace are to be allowed upon them if payable on a day certain? The learned judge who delivered the opinion of the court in *Brown v. Lusk*, added: "They (checks) are appropriations of money in the hands of a banker and are payable on presentment." In this remark he but followed out what was intimated by Lord Kenyon in *Boehm v. Sterling*, 7 Term R., 423, 429, and has been since often recognized as sound law. *Cruger v. Armstrong*, 3 Johns. Cas., s. 7, 9; *Conroy v. Warren*, 3 Johns. Cas., 259. But we all know that at law neither a bill of exchange, until acceptance, nor a promissory note, is any appropriation of the money of the drawer or maker in the hands of any one. In truth, a check is an instrument *sui generis*, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of a bank or banker, and it appropriates the amount to the holder of the check. And I agree with Lord Kenyon in holding that the drawer cannot honestly alter the state of his accounts with the bank or banker, so as not to leave in his hands sufficient to pay the check on the very day on which it is presentable and payable; for that would be a fraudulent misapplication of the appropriated funds.

The like distinction between checks and bills of exchange was stated by Mr. Justice Sutherland in *Murray v. Judah*, 6 Cow., 490. He there said: "As a general rule, therefore, a check is not due from the drawer until payment has been demanded of the drawee, and refused by him. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker, or drawer, a demand at any time before suit brought is sufficient, unless it appear that the drawee has failed, or the drawer has in some manner sustained injury by the delay." The same doctrine has been fully recognized in other cases. *Mohawk Bank v. Broderick*, 10 Wend., 304, 306; S. C., 13 Wend., 133; *Cruger v. Armstrong*, 3 Johns. Cas., 5; *Conroy v. Warren*, 3 Johns. Cas., 259. It is a natural, even if it be not a necessary, consequence of the fact that a check is an appropriation of the funds of the drawer in the hands of the bank or banker to the amount of the check; and, consequently, the drawer has no right to withdraw the same. And if the drawee, upon the presentment, refuses to pay the check, because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained and can sustain no loss, there is every reason to hold him liable therefor. Every check is *prima facie* presumed to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the

holder of the check? Or that he shall not be deemed to hold the money, as money had and received for the use of the holder, either because he had no funds in the bank, or because he still retains those funds, appropriated to the use of another, for his own use? I am aware that Mr. Justice Cowen, in his elaborate opinion in *Harker v. Anderson*, 21 Wend., 372, has endeavored to support the opinion that a check is to be deemed, to all essential purposes, to be a bill of exchange, and, therefore, that all the rules applicable to the latter are of equal force in relation to the former. Notwithstanding the array of authorities, so fully and learnedly brought forth by him in support of that opinion, my own judgment is that they wholly fail of the purpose. It appears to me to be a struggle on the part of the learned judge to subject all the doctrines, applicable to all negotiable instruments, to some common and uniform standard. I hope and trust that such an effort will never prevail. In my judgment, it is far better that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience, and to mould themselves into the common habits of social life, than to assume any artificial forms, or to regulate, by any inflexible standard, the whole operations of trade and commerce. As new instruments arise in the course of business, they should be construed so as to meet and accomplish the very purposes for which they were designed by the parties, and not to defeat them. Checks are as well known now as bills of exchange, as a class of distinct instruments in commercial negotiations; and he who seeks to make them identical in all respects with bills of exchange may unintentionally be introducing an anomaly, instead of suppressing one. Upon the whole, my judgment is precisely in coincidence with that of Mr. Chancellor Kent, already cited on this subject. I hold that the instruments in the present case are strictly checks, and subject to all the incidents thereof; that they were payable on the very day on which payment was upon their face demandable, without any days of grace; and that both parties intended throughout that they should be treated as checks, and that they should be paid by the bank on the very day designated, or at any reasonable time thereafter.

§ 808. *Right of drawer of check to complain of want of presentment or notice.*

But assuming, for the purposes of the argument, that this is not entirely correct (which I maintain, however, to be entirely correct), still, in this case, in my judgment, the checks are a good debt against the bankrupt. And this for two reasons, either of which would be conclusive. In the first place, it is manifest that these checks were drawn without the drawer having any right to draw. He had no funds in the bank at the time when the checks were due and payable, or indeed for aught that appears, at any time since, to discharge them or either of them. Now, in the case of a check, I take it to be clear that the drawer impliedly engages that at the time when the check is due and payable, he has and will have then, and at all times thereafter, sufficient funds in the bank to pay the same upon presentment; and by the draft he appropriates those funds absolutely for the use of the holder. Now the bank is not bound to pay, unless it is in full funds; and it is not obliged to pay or to accept to pay, if it has partial funds only, for it is entitled to the possession of the check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with unless he receives full payment, nor the bank exact, unless under the like circumstances. The holder is not bound to accept

part payment, even if the bank is willing to pay in part, for he has a claim to the entirety. Now the circumstance that the drawer had no right to draw these checks, and had no funds there at any time to pay the same, seems to me decisive that he has no right to complain of the want of due presentment, or of the want of due notice. Not of the want of due presentment, for the checks were demandable not merely on the days on which they were respectively due, but as against him at any reasonable time afterwards, and he ought to have had funds at all times in the bank to pay the checks after they were due. Not of the want of notice, for as he never had any funds in the bank to pay the checks, he had no right to believe they would be paid, and strictly speaking, his conduct was an actual or constructive fraud upon the holders. In both views, the case of *Conroy v. Warren*, 3 Johns. Cas., 259, is a direct authority to the purpose. And it may be further added, that it was held in that case, in which I entirely concur, that if the drawer sustains no damage by want of due presentment or due notice, and the non-payment of the checks arise from his own default, or from his want of funds, he is liable to the holder to the full amount of the checks. If the bank had funds, and had failed in the intermediate time, that might have furnished a different ground for defense. It would then be like the case of a note or acceptance, payable at a bank, where the bank had at the time funds to pay, and had failed after it became due, and there had not been a due presentment for payment. It appears to me equally clear, upon principle and authority, that the drawer is liable in all cases for the dishonor of checks, whether they have been duly presented or not, or whether he has had due notice of the dishonor or not, in all cases where he has sustained no damage on account of the omission.

§ 809. *The fact that a drawer has in bank a part of the funds necessary to pay his check does not entitle him to presentment and notice.*

But it is said that, in cases of bills, due presentment and due notice are necessary whenever the drawer has any funds in the hands of the drawee; and the same reasoning applies to cases of checks. Now, I deny both the premises and the conclusion. In the first place, as I understand it, the true doctrine is this: that if the drawer has a right to draw, in the belief that he has funds, or in the expectation that he shall have funds at the time of the presentment for acceptance, by reason of arrangements with the drawee, or putting his funds *in transitu*, then and in such cases he is entitled to due notice. But according to the doctrine now contended for, if the drawer knows that he has but \$1 in the hands of the drawee, and he has no expectation of any more being added, and has no right to believe that a bill for more will be honored, he may, nevertheless, draw a bill on the drawee for \$10,000; and if it is dishonored (as he knows it will be) he is still entitled to strict notice; whereas, if he had not the \$1 in the drawee's hands, he would not be entitled to any notice at all. Now, I do not understand the law to involve any such strange anomaly, not to call it an absurdity. In each case the same reason applies; the draft is a fraud upon the holder; and in each case a meditated fraud shall not be sheltered behind a rule intended to protect the innocent and trustworthy. *Bickerdike v. Bollman*, 1 Term, 405. The two cases relied on at the bar to establish the opposite doctrine turn upon the very considerations which I have already suggested. In *Hammond v. Dufrene*, 3 Camp., 145, the bill was drawn by the party having no funds at the time; but the drawees accepted the bill, and afterwards, and before the bill became due, the drawer paid a larger sum on

account of the acceptors; and Lord Ellenborough held that the drawer was entitled to strict notice of the dishonor when the bill became due. Why? Because the drawer had a reasonable expectation that the bill would be accepted (and it was accepted), and that it would be paid at maturity by the acceptors, as he was then in advance for them to a larger amount. In *Thackeray v. Blackett*, 3 Camp., 163, the two bills drawn were accepted, and were dishonored at their maturity by the acceptors; but due notice thereof was not given to the drawer. The bills were, in fact, drawn for the accommodation of the drawer; but, before they became due, he had contracted engagements on account of the acceptors to the amount of about 1,000*l.*, the bills amounting to upwards of 3,600*l.* Lord Ellenborough held the drawer entitled to strict notice; but it was upon the ground that there was an open account between the parties, and, therefore, the drawer could not necessarily have been aware beforehand that either of the bills would be dishonored; so that the case was put upon the clear ground that the drawer had a right to draw, and had a right to believe that his drafts would be honored. Indeed, in cases of a fluctuating balance between the parties, this may well constitute a ground upon which, without knowing the exact state of the balance, the drawer may reasonably draw. And this is the very ground upon which the doctrine was put in the case of *Orr v. Maginnis*, 7 East, 358, where the court thought that, in cases of a shifting balance, notice was necessary, because the drawer could not, or might not know, that he was drawing without any right to draw. See, also, *Chitty on Bills*, ch. 8, p. 358, 8th ed., 1833. The same doctrine was upheld in *Legge v. Thorpe*, 12 East, 171, and was there expounded upon the principles which I have stated.

§ 810. *Waiver by agent of right to presentment and notice of non-payment.*

In the next place, independently of the ground already suggested, there is another one, which, in my judgment, would be decisive of the whole merits of the case. It is, that there was an express waiver, on the part of Brown, of due presentment and of due notice of the dishonor of the checks, and, indeed, a request that they should not be presented when due and payable, as there would be no funds in the bank to meet them. It is true that this waiver and request were not made by Brown personally; but they were made through the instrumentality of his general agent, Green. I say his general agent, for such, upon the evidence, he clearly appears to have been; and he was duly authorized by Brown to draw checks on the Granite Bank in his name, and this would incidentally clothe him with full authority to make any arrangements with reference to the presentment of the checks, for the benefit of his principal. But it is not necessary to put the case upon this narrow ground. It seems clear that Green was not only the general agent of Brown in this business, which would confer on him this incidental authority, but in point of fact, that he transacted "almost all the business that was done for him."

§ 811. *An accommodation maker of a note may prove his claim against the estate of the person accommodated.*

Passing from these grounds, either of which would alone dispose of the case, let us now proceed to the consideration of the facts presented upon the petition. It there appears that these checks were, in fact, given to the Messrs. Courtis as collateral security for a promissory note, made by them, payable to Brown or order, for the sum of \$1,450, in four months, at his request, and for his accommodation. That note was discounted for the benefit of Brown at the Grand

Bank in Marblehead, and not being paid by Brown at its maturity, it was paid by the Messrs. Courtis to the bank. Here, then, is a clear case of money paid at the request and for the use of Brown; and it is recoverable from Brown's estate as a debt, unless some legal discharge thereof has occurred. Now, the only pretense to allege a discharge is that the checks above stated have not been duly presented, or due notice given thereof, and therefore that the drawer is discharged therefrom. Assuming this to be true, and that no action would lie by the holders on these checks against the drawer, what answer is that to the claim for the money paid for the drawer on the promissory note discounted at the Grand Bank? That is an independent debt, not growing out of the check, but collateral to it. Besides, I understand the true doctrine to be, in all cases where the notes or bills of third persons are taken as collateral security for a debt or indemnity, that the party receiving them is a mere bailee to collect the amount, and like other bailees, where the bailment is for the mutual benefit of the creditor and the debtor, that the bailee is bound only to ordinary diligence for the collection; and therefore, unless some loss has accrued to the bailor, by reason of the want of ordinary diligence in the collection, the bailee is not liable; and his rights as a creditor remain unchanged. This rule is frequently applied in cases of notes and bills of exchange of third persons, taken from the debtor without his indorsement thereon, and also in cases of guaranty. The debtor must show that he has sustained some loss or damage by the omission to collect the notes or bills, or by the want of due presentment, or due notice of the dishonor of them. Story on Bills of Exchange, s. 372; Chitty on Bills, s. 372; Chitty on Bills, ch. 10, p. 474, 8th ed., 1833; id., p. 529; Bayley on Bills, ch. 7, s. 2, pp. 286 to 290, 5th ed., 1830; Oxford Bank v. Haynes, 8 Pick., 423, 428. The rule would seem equally to apply to all cases, where, although the debtor should indorse such notes or bills, yet at the time of the indorsement he knew, or had reason to believe, that they would not and ought not to be paid; for then the indorsement and delivery of the notes or bills would be a mere fraud or imposition upon the creditor. Farmers' Bank v. Vanmeter, 4 Rand., 553. If this would be true in the case of the notes or bills of third persons, it must, *a fortiori*, be true in relation to a check, drawn by the very debtor himself, on a bank where he has no funds, or none but nominal funds, utterly inadequate to pay the debt, and which he knows, therefore, must be dishonored. Any other doctrine would allow the drawer to take advantage of his own gross laches, or gross fraud. In the present case the drawer would thereby retain in his own hands the amount of the checks, for which he had received a full consideration; and he would escape the repayment of the very money paid for him in good faith by the Messrs. Courtis, without his having sustained any loss or damage by the non-presentment of the checks or the want of due notice of the dishonor. A more equitable defense against a just debt can scarcely be imagined. It is precisely what a court of equity would feel itself bound to redress by the fullest exercise of its powers, by granting full relief to the petitioners for the amount of the debt paid by them for Brown.

Upon the whole, my judgment, upon all the questions in the case, is in favor of the petitioners; and I shall accordingly direct it to be certified to the district court: (1) Upon the first question, that the proof of the debt of the Messrs. Courtis ought not to be expunged, but ought to stand as good and valid. (2) That the petitioners (the Messrs. Courtis) are entitled to be relieved in equity to the full amount of the debt proved by them, for which the checks in the case were given by the bankrupt.

§ 812. **Against indorser.**—Demand and notice necessary to charge indorser. *United States Bank v. Smith*, 11 Wheat., 171; *Bank of Alexandria v. Young*,* 2 Cr. C. C., 52; *Dean v. Marsteller*,* 2 Cr. C. C., 121. An indorser is not liable unless demand is made upon the maker. *Bank of Alexandria v. Deneale*,* 2 Cr. C. C., 488.

§ 813. Where a maker when he made the note resided out of the jurisdiction where the note was made payable, this fact does not excuse demand. *Tayloe v. Davidson*,* 2 Cr. C. C., 484.

§ 814. **Agent's delay to demand.**—An agent to present a bill for acceptance or payment has no right to neglect to do so for any reason seeming sufficient to him. *Olshausen v. Lewis*,* 1 Biss., 419.

§ 815. **Note payable in money or cotton; time fixed; no demand necessary.**—An action was brought on a note reading thus: "On or before the 1st of June, 1827, I promise to pay B. C., or order, \$200, which may be discharged in cotton at the market price in the fall of 1826." *Held*, that this note gave the maker an election to pay in property or money; that no demand need be made, the time of payment being fixed; that the note could not be discharged by payment of property after the day of payment passed; that the place of paying the property would be the residence of the maker, unless a different place were named, and that upon a failure to discharge the note by delivering or tendering the cotton, the amount to be paid was to be ascertained by the note itself, and that evidence of the value of the cotton was not admissible. *Campbell v. Clark*,* *Hemp.*, 67.

§ 816. A check must be presented for payment like a bill, before the drawer can be sued. *Clark v. Nat. Metropolitan Bank*,* 2 MacArth., 249. See §§ 47, 48, 200, 335, 358, 493.

§ 817. **Demand as against drawer.**—Demand and notice of dishonor are essential to charge the drawer of a bill. *Craig v. Brown*,* 3 Wash., 501.

§ 818. **Against maker.**—Demand is not necessary as against the maker, where the note is payable at a fixed place. *Silver v. Henderson*,* 3 McL., 165; *Kendall v. Badger*, 1 McAl., 523; *United States Bank v. Smith*, 11 Wheat., 171; *Brown v. Piatt*, 2 Cr. C. C., 253; *State Bank of Ohio v. Fox*, 3 Blatch., 431; *The Bank v. Bussard*,* 3 Cr. C. C., 173; *Warner v. Rising Fawn Iron Co.* 3 Woods, 514.

§ 819. **Special demand of maker not necessary on a note payable "two years after date on demand."** *State Bank of Ohio v. Fox*, 3 Blatch., 431.

§ 820. **No demand of a note payable at a particular bank is necessary to charge the maker.** *Brabston v. Gibson*, 9 How., 263 (§§ 433-440).

§ 821. In an action against the maker of a note, payable at a particular time and place, a demand need not be averred or proved; if the maker was ready, and offered at the time and place to pay, it is a matter of defense, to be pleaded and proved by him. *Wallace v. McConnell*, 13 Pet., 136 (§§ 1539-43).

§ 822. **Note payable at a bank.**—Where a note is made *negotiable* at a bank, it is not necessary to demand payment at the bank in order to hold the indorser. *Beeding v. Thornton*,* 2 Cr. C. C., 693.

§ 823. It is sufficient evidence of demand on a note made payable at a particular bank that the note was at the bank, was its property, and was not paid at maturity. *Fullerton v. Bank of United States*, 1 Pet., 604 (§§ 1200-1204).

§ 824. An agreement was made that a note was to be sent to a certain bank for collection. *Held*, that it was complied with by presenting the note and demanding its payment at maturity by the holders at such bank within banking hours. The note need not be placed under the management of the bank itself. *Camden v. Doremus*, 3 How., 515 (§§ 585-588).

§ 825. A note was made payable at the Commercial Bank of Columbus, Mississippi. By an agreement between the parties it was stipulated that it should be sent to that bank for collection. *Held*, that if any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus and not that of other banks not mentioned in the contract. *Ibid.*

§ 826. If a note is payable at a particular bank and is held by it at maturity, all it need do is to examine the maker's account for funds to pay it. This is a sufficient demand. *U. S. Bank v. Smith*, 11 Wheat., 171.

§ 827. The presence of a bill in a bank, if unknown to the cashier, is not a sufficient presentment and demand. *Chicopee Bank v. Philadelphia Bank*, 8 Wall., 641 (§§ 1048-52).

§ 828. A bank was the holder of a note payable at its office. After banking hours the note was delivered to a notary by the officers of the bank, who informed him that they had no funds to pay it. *Held*, a sufficient demand, no formal demand being necessary. *Bank of United States v. Carneal*, 2 Pet., 543 (§§ 964-971).

§ 829. A note payable at a bank was deposited in it for collection. The teller of the bank was clerk of the notary, and when the note became due he inquired of the book-keeper whether any funds had been deposited to pay the note, who replied, after examining the books,

that no such deposit had been made. The teller at the time held the note in his hands, presenting it to the book-keeper. *Held*, a sufficient demand. *Browning v. Andrews*, * 3 McL., 576. Citing *Bank of Utica v. Smith*, 19 Johns., 231.

§ 830. By notary's clerk.—The demand may be made by the clerk of the notary with the consent of the plaintiff. *Bank of Alexandria v. Wilson*, * 2 Cr. C. C., 5. See § 717.

§ 831. Upon one joint maker.—Demand upon one joint maker is enough to charge the indorser, especially if they constitute a firm. *Greatrake v. Brown*, 2 Cr. C. C., 541.

§ 832. Where there are two makers of a note not partners, demand should be made of each in order to hold an indorser. *Taylor v. Davidson*, * 2 Cr. C. C., 434.

§ 833. Of bar keeper; not good.—A demand of a bar keeper at a tavern to which the livery stable was attached in which the payee frequently left his horse is not a good demand. *Goldsborough v. Jones*, * 2 Cr. C. C., 805.

§ 834. Demand on widow.—The maker of a note died before it matured. Demand was made on his widow at his last dwelling place. The notary did not know whether there were executors or administrators. *Held*, that the demand was sufficient, presumptively, to charge the indorser. But if there is an executor or administrator, there must be a demand on him. *Bank of Washington v. Reynolds*, 2 Cr. C. C., 289.

§ 835. Verbal.—Where a note was due on the 17th, and the notary on the 18th gave verbal notice that it would be protested if not paid on that day, and that he had demanded payment of the maker on the 17th, *held* insufficient. *The Bank v. Barry*, * 2 Cr. C. C., 307.

§ 836. Both note and coupons need not be presented.—Where the interest on notes was to be paid upon the presentation of coupons, it is not necessary for the notary to present both notes and coupons at the time of demanding payment. *Codman v. Vermont & C. R. Co.*, 17 Blatch., 1.

§ 837. Certificates of deposit; bankruptcy; dishonor.—After bankruptcy a bank's certificates of deposit occupy the position of dishonored paper. They stand upon the same footing as a claim proved for an open account. *In re Sims*, 3 Saw., 305; 12 N. B. R., 315. See §§ 37, 214.

§ 838. Dishonor; effect.—By dishonor a promissory note does not lose its character as such, nor cease to be negotiable. The only effect of dishonor upon negotiability is to let in the defenses of the maker as against the payee. *Varner v. West*, 1 Woods, 493.

§ 839. Check; time or demand.—No negligence can be imputed to the holder of a check who demands it on the day after he received it. *Clark v. National Metropolitan Bank*, * 2 MacArth., 249. See §§ 47, 48, 200, 353, 358, 483, 816.

§ 840. Time; sufficiency, a question of law.—Where the facts are undisputed the sufficiency of the time when a bill of exchange shall be presented to the drawee is a matter of law. *Olshausen v. Lewis*, * 1 Biss., 420.

§ 841. Days of grace.—A nine months' note dated March 16th matures December 19th following next. *Hill v. Norvell*, * 3 McL., 583. See §§ 719-725.

§ 842. A note given for insurance premium is entitled to grace, and the tender of interest upon it on the last day of grace saves a forfeiture of the policy. *Jarmin v. St. Louis L. I. Co.*, 1 Flip., 548.

§ 843. Evidence of the particular custom of banks and merchants in Washington to make demand, protest and notice on the day after the last day of grace is admissible, though not averred in declaration. *Coyle v. Gozzler*, 2 Cr. C. C., 625; *Bank of Alexandria v. Wilson*, 2 Cr. C. C., 5; *Brent v. Coyle*, 2 Cr. C. C., 287.

§ 844. General commercial usage allows three days of grace. *Hill v. Norvell*, * 3 McL., 583.

§ 845. Demand of payment of a note must be made on the last day of grace. *Beeding v. Pic*, * 2 Cr. C. C., 153; *Auld v. Peyton*, * 2 Cr. C. C., 182; *Lenox v. Roberts*, * 2 Wheat., 373.

§ 846. Notes negotiated by banks in Washington are, by local usage, entitled to four days' grace. *Hill v. Norvell*, * 3 McL., 583; *Bank of Alexandria v. Wilson*, 2 Cr. C. C., 5; *Brent v. Coyle*, *id.*, 287.

§ 847. If a person who indorses a note which is discounted at a bank had knowledge of the custom of the bank as to the time for demand, notice and protest at the time of making the indorsement, he is bound thereby. *Bank of Columbia v. McKenney*, 3 Cr. C. C., 331.

§ 848. Where it is the custom of banks to demand payment of notes discounted by them on the day after the third day of grace, and the indorser has been an indorser of notes discounted at the same bank previously, the jury may infer that he had knowledge of such usage at the time he indorsed the note. *Bank of Washington v. Reynolds*, 2 Cr. C. C., 289.

§ 849. Notice of a usage to allow four days' grace is presumed from the fact of making a note payable at a bank where such a usage prevails. *Mills v. Bank of United States*, 11 Wheat., 481 (§§ 958-963).

§ 850. Demand and notice on the day after the expiration of the days of grace is sufficient. *Bank of Alexandria v. Wilson*, * 2 Cr. C. C., 5.

§ 851. Where a note is due the 23d and 26th, demand and notice on the 27th is sufficient — too late after the 23th. *Lenox v. Wright*,* 2 Cr. C. C., 45.

§ 852. Where a note is due on the 1st and 4th, demand of payment on the 5th is too late; insolvency of the maker not an excuse. *Neale v. Peyton*,* 2 Cr. C. C., 813.

§ 853. Where the last day of grace is Sunday, demand must be made on Saturday, and notice may be given on Monday. *Irwin v. Brown*,* 2 Cr. C. C., 314; *McElroy v. English*,* 2 Cr. C. C., 528.

§ 854. The last day of grace falling on Sunday, demand and notice were properly made on Saturday; and protest being made after bank hours, a suit brought the same day was not premature. *Mandeville v. Rumney*,* 3 Cr. C. C., 424. See, also, *Bussard v. Levering*,* 6 Wheat, 102.

§ 855. Where the last day of grace falls on Saturday, a demand on Monday is too late. *Thornton v. Stoddert*,* 1 Cr. C. C., 534.

§ 856. A note was received by a bank to be collected, "according to the known and established mode of transacting business in the bank." The third day of grace fell on Sunday. It was the custom of the bank in such cases not to demand payment till Monday. *Held*, that the bank was not liable for damages for failure to make demand on Saturday. *Patriotic Bank of Washington v. Farmers' Bank of Alexandria*, 2 Cr. C. C., 560.

§ 857. Demand on third day of grace after banking hours, good. *The Bank v. Walker*,* 2 Cr. C. C., 294.

§ 858. Unreasonable delay.—A note was payable "on demand after date, with interest." Demand made more than five years after date, *held*, not in a reasonable time. *In re Grant*,* 6 Law Rep., 158.

§ 859. A lapse of three months in time of war, before presenting an American bill in London, is not an unreasonable delay. Nor is a delay of five months, under the same circumstances, before giving notice of non-payment, unreasonable delay; and whether it is reasonable or not, is a question of law. *United States v. Barker*, 2 Paine, 340 (§ 1011).

§ 860. Demand note; when due; limitation.—A note or bill payable on demand is due immediately, whether with or without interest. Suit may be brought upon it as soon as made, without previous demand, and the statute of limitations begins to run from its date. *Bartlett v. Rogers*, 3 Saw., 62.

§ 861. Check; assignment; delay in demanding.—A check is always supposed to be drawn on a private deposit of funds, and amounts to an absolute appropriation of so much thereof to the holder of the check, to remain on deposit so appropriated until called for, and a delay of five months in the presentation of the check will not release the indorser, if he has sustained no loss in consequence of the delay. *Deener v. Brown*,* 1 MacArth., 350. See §§ 47, 48, 200, 335, 358, 483, 816, 839.

§ 862. Saturday check presented Monday.—To present a bank check, drawn on Saturday, for payment the following Monday, is not a want of due diligence on the part of the holder, although he live but a few feet from the bank, which failed before he presented the check. *O'Brien v. Smith*,* 1 Black, 99. See §§ 816, 839, 861.

§ 863. Note payable "at either bank."—On a note payable at "either of the banks in Boston" it is not necessary to present the note for payment at either of such banks. Such a note is to be treated as if the place of payment was general. *Brown v. Noyes*, 2 Woodb. & M., 75.

§ 864. Oral agreement as to place.—An oral agreement entered into, at the time of the making of the note, between the maker and a party who afterwards became an indorsee, fixing the place at which the note should be payable, is a nullity, and does not affect the rights of the indorser as to demand and notice. *Specht v. Howard*, 16 Wall., 564.

§ 865. General rule; place of business; dwelling house.—The holder of a note is only bound to call during business hours at the usual place of business of the maker and demand payment. If he find it locked and no person there to receive notice, he need not go to the maker's dwelling house, although it be not far distant. *Bowie v. Blacklock*,* 2 Cr. C. C., 265.

§ 866. A note was not made payable at any particular place. The holders lived in Cincinnati and the notary made a formal demand at their counting house, being unable to find the makers. *Held*, an insufficient demand. *Burrows v. Hannegan*, 1 McL., 309 (§§ 1029-33).

§ 867. Inquiry for maker.—A promissory note was made payable at the house of Y., the first indorser. The notary, on the day after the last day of grace, demanded payment of Y. there, but did not inquire after the maker or his funds. *Held*, not a good demand. *Mechanics' Bank v. Lynn*,* 2 Cr. C. C., 217.

§ 868. Failure to find maker; dishonor.—The maker of a note not being found on the last day of grace, at either his office or his residence, the note was deemed dishonored. *Great-rake v. Brown*, 2 Cr. C. C., 541.

§ 869. **Averment of place.**—The declaration, in an action against the indorser of a note, made payable at a certain bank, must aver that payment was demanded at that bank. *Bank of United States v. Smith*, 2 Cr. C. C., 319.

§ 870. **What not evidence of demand at a bank.**—In an action against an indorser of a note payable at a bank, it was shown that the note was discounted by the same bank; that a notary, at the request of the bank officers, presented it at the maker's store, and not finding him, demanded it of his clerk; and that on the day the note became due, the maker had no funds to his credit in the bank. *Held*, that the jury could not infer from these facts that demand was made at the bank; nor that plaintiffs were present at the bank on the day of payment, with the note, and ready to give it up on receipt of the money; nor that the bank officers, on the day of maturity, turned to their books to ascertain whether the maker had funds to his credit to pay the note. *Ibid*.

§ 871. **Securing indorser.**—In case the maker of a note transfers property to an indorser for the express purpose of paying the debt, then subsequent notice to indorsers of non-payment by the maker is dispensed with, if the amount of property thus assigned be sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned. An assignment by the maker to an indorser, in trust for general creditors, and only sufficient in amount for the payment of no more than fifteen cents on the dollar, although it included all he had, is not enough in law to excuse want of notice to the indorser, or to show due diligence in the holder. *Woodbury v. Crum*, *1 Biss., 284.

§ 872. **Want of funds; acknowledgment of debt.**—The want of funds in the hands of the drawer, the drawer's payment of part of the draft and his subsequent acknowledgment of the debt, and promise to send funds to the drawee to pay it, are either of them sufficient to dispense with protest and notice. *Read v. Wilkinson*, 2 Wash., 514.

§ 873. **Waiver — Question for jury.**—It is a matter of fact for the jury to determine whether certain declarations made by an indorser of a note amount to a waiver of the want of demand and notice. *Union Bank v. Magruder*, 7 Pet., 287.

§ 874. **Promise to pay.**—An agent to collect a note called upon an indorser and asked him whether he should have the note protested against the estate of the maker, who had died. The indorser told him he need not do so and that the note should be paid at maturity. After the note became due, the agent called upon the indorser and informed him that he had neglected to put the note in the bank for collection, and asked him what he was going to do; he said he would see the agent in a few days, and arrange it. *Held*, a waiver of demand and protest, and that the want of them could not be set up in defense to the note. *Sigerson v. Mathews*, *20 How., 496. See, also, *Pierson v. Hooker*, 3 Johns., 68; *Hopkins v. Liswell*, 12 Mass., 52; *Walker v. Laverty*, 6 Munf., 487; *Thornton v. Wynn*, 12 Wheat., 183; *Bank of Georgetown v. Magruder*, 7 Pet., 287.

§ 875. **Drawer declared his intention to a third person, not the agent of the holder, of paying a certain bill of exchange if he ever became able to do so.** He did not know that the bill had not been presented. *Held*, that this declaration did not amount to a waiver of demand and notice. *Craig v. Brown*, *3 Wash., 503.

§ 876. **Knowledge of non-payment.**—The fact that the indorser of a note drawn by himself, in the name and for the benefit of the firm of which he was a member, knew that the note was unpaid and that the firm was insolvent, does not dispense with the necessity of demand and notice, in order to bind him as indorser. *In re Grant*, *6 Law Rep., 158.

§ 877. **Absence from business.**—If the maker of a promissory note dated at Washington resides two miles out of the city, but within the county of Washington, and is employed in one of the departments at Washington from three to ten o'clock daily, in a room with other clerks, his absence temporarily from such room when the notary called to demand payment is no excuse for not making a personal demand, or a demand at his residence. *Goldsborough v. Jones*, *2 Cr. C. C., 305.

§ 878. **Time draft; demand and protest not necessary.**—A draft made payable three months after date need not be presented for acceptance; but if the holder undertake to present for acceptance, he must proceed, in respect to protest and notice, as if the obligation existed, unless excused by want of funds in the hands of the drawee, or by want of reasonable expectation of acceptance or payment. If protest and legal notice of non-acceptance of a draft be not given, presentation and demand of payment must be made at maturity. And a failure on the part of the holder of the draft to protest for non-payment and give legal notice is a breach of duty, unless excused by want of funds in the drawee's hands or by want of reasonable expectation of payment. *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. R., 238; 8 C., 7 Fed. R., 169.

§ 879. **Lex loci.**—The question of the timely presentation of a bill of exchange drawn in the United States on a bank in Norway is governed by the laws of Norway. *Pierce v. Indseth*, *16 Otto, 546.

VII. PROTEST AND NOTICE.

SUMMARY— *What bills must be protested*, §§ 880, 882, 886. — *Interstate bills, suits on*, § 881. — *Inland bills*, §§ 881-883. — *Protest as evidence*, §§ 883, 884. — *Statute authorizing protest of domestic bills*, § 885. — *Who entitled to notice*, §§ 887, 896-899, 919-922. — *Requisites of notice*, §§ 888-890. — *Time of making protest*, § 891. — *Due diligence*, § 892. — *Who may make protest*, §§ 893, 894. — *Who may serve notice*, § 895. — *How notice must be given*, §§ 900, 901, 908, 911. — *Notice by mail*, §§ 902, 903, 912, 913. — *Whether notice is in time*, §§ 904, 905, 917, 918. — *Diligence in finding indorser*, §§ 906, 907, 909. — *Want of notice*, §§ 910, 923, 924. — *Actual notice not necessary*, § 914. — *Notice sent to wrong address*, § 915. — *Rule that each party has one day*, § 916. — *Duty of collection agent*, §§ 918, 933-937. — *Excused by a state of war*, § 923. — *Waiver*, §§ 925-928. — *Promise to pay after dishonor*, § 929. — *Note taken as conditional payment*, §§ 930, 931. — *Loss of bill by agent*, § 932.

§ 880. Foreign bills and notes must be protested, and protest of them is evidence of demand and notice. *Union Bank v. Hyde*, §§ 938, 939.

§ 881. Interstate bills of exchange are foreign bills within the meaning of the eleventh section of the judiciary act of 1789, and may be sued upon in the federal courts. *Buckner v. Finley*, § 941.

§ 882. An inland bill of exchange or promissory note need not be protested. *Union Bank v. Hyde*, §§ 938, 939.

§ 883. A protest of an inland bill or note is not evidence of demand and notice, which must, therefore, be proved *aliunde*. *Ibid*.

§ 884. A protest is not rendered inadmissible as evidence by a mistake in writing the Christian name of the agent of the acceptor in a copy of the bill contained in the protest — the instrument being in all material respects well described in the protest. *Dennistoun v. Stewart*, § 940.

§ 885. A statute authorizing the protest of domestic bills and allowing damages in case of their non-payment does not make such a protest essential to sustain a recovery upon them. It only confers a cumulative remedy which the holder may waive. *Bailey v. Dozier*, §§ 942-946. Followed in *Wanzer v. Tupper*,* 8 How., 234.

§ 886. Promissory notes need not be protested. *Burke v. McKay*, §§ 947-949.

§ 887. A drawer who has no reasonable ground to suppose that his drafts will be accepted or paid is not entitled to notice of non-acceptance or of non-payment. *Dickins v. Beal*, §§ 950-957.

§ 888. A notice need not name holder, nor place of demand; nor will an error in giving date of a note render it insufficient, the paper being otherwise accurately described. *Mills v. Bank of United States*, §§ 958-963. See § 1145.

§ 889. A notice of protest need not expressly aver that the holder looks to the indorser for payment. *Bank of United States v. Carneal*, §§ 964-971.

§ 890. Where only one note had been indorsed by defendant for the maker, a notice to the indorser of its non-payment is sufficient, although it misstate the amount of the note, the description being in other respects correct. *Bank of Alexandria v. Swann*, §§ 972, 973.

§ 891. If a bill has been duly presented for acceptance or payment, and dishonored, and a minute made at the time of the steps taken, the protest may be drawn up in form afterwards, at the convenience of the notary. And it may be corrected subsequently from these minutes. *Bailey v. Dozier*, §§ 942-946.

§ 892. The facts being ascertained, due diligence is a question of law. *Rhett v. Poe*, §§ 974-979.

§ 893. Protest need not necessarily be made by a notary public. A justice of the peace or other functionary, or even a merchant, may act as a notary in protesting bills. *Burke v. McKay*, §§ 947-949.

§ 894. A justice of the peace may protest a note or bill in Mississippi, and his authority so to do is not restricted to occasions where a notary is absent or cannot be found. *Bailey v. Dozier*, §§ 942-946.

§ 895. A notary in possession of a note, or any agent of the holder, is competent to notify an indorser of its non-payment. The holder need not give the notice himself. *Harris v. Robinson*, §§ 980-982.

§ 896. An accommodation indorser of a promissory note is not liable without notice of demand and dishonor. *French v. Bank of Columbia*, §§ 983-985.

§ 897. One who guaranties the payment of a bill at maturity is not entitled to notice of its dishonor with the same strictness that would be required to bind a surety, where the

drawer, acceptor and an indorser all became insolvent before the bill matured. The contract of guaranty is in the nature of an insurance of prompt payment. *Rhett v. Poe*, §§ 974-979.

§ 898. An indorser who has discharged a maker from liability by a release is not entitled to notice of dishonor. *Burke v. McKay*, §§ 947-949.

§ 899. A guarantor of future advances is entitled to notice of the acceptance of the guaranty, and of consent to act under the guaranty and to make the advances. But it is generally not necessary to give another and future distinct notice to the guarantor of the amount of the advances actually made and the terms upon which they have been made, when the transaction is completed, although this rule may be otherwise in particular cases having peculiar circumstances. No such second notice is necessary where all the parties are originally privy to the whole transaction. Nor will the guarantor be released by a failure to give him notice of the default or insolvency of the person guarantied, unless he has been prejudiced by the omission to give such notice, and then the omission is a defense only to the extent to which it has damaged the guarantor. *Wildes v. Savage*, §§ 986-990.

§ 900. If an indorser lives in the town in which a note is made payable, notice to him must be personal, unless he agrees to receive it otherwise, or unless by the usage of the bank where the note is payable, the notice should be sent him by mail. *Bowling v. Harrison*, §§ 991-994.

§ 901. Where for several years prior to the maturity of a note it had been the usage of the bank at which it was payable to have notice personally served on indorsers resident in the same city with itself, unless there was a memorandum on the note designating a place where notice was to be served, in which case the notice was left at such place, *held*, that the following memorandum on the note, "Third indorser, J. P. H., lives at Vicksburg," did not amount to an agreement to take notice through the postoffice. *Ibid*.

§ 902. An indorser resided two or three miles from Georgetown, where the note was payable, and habitually received his letters at the postoffice of that place. *Held*, that notice directed to him and mailed at the Georgetown postoffice was sufficient, although he frequently resorted for the transaction of business to a house in Washington. *Bank of Columbia v. Lawrence*, §§ 995-997.

§ 903. A notice addressed "To Thomas D. Carneal, Campbell county, Kentucky," was mailed at Cincinnati. C. received his letters at either of three postoffices — Cincinnati, Newport, and Covington — near to each of which places he lived and did business. *Held*, a sufficient notice, notwithstanding the general direction. *Bank of the United States v. Carneal*, §§ 964-971.

§ 904. Demand was made before three o'clock P. M., and notice of dishonor might have been mailed so as to have been carried by the post that night and delivered next day, but notice was in fact not mailed until the next day. *Held*, sufficient, as ordinary diligence only was required. *Bank of Alexandria v. Swann*, §§ 972, 973.

§ 905. Demand and protest on the last day of grace, and a notice on the following day, shows due diligence, even though the protest be dated on the day of notice. *Cookendorfer v. Preston*, §§ 998-1000.

§ 906. Where an indorser is not engaged in business, but is a physician practicing in a particular neighborhood, an inquiry of one residing in and familiar with that neighborhood as to the indorser's residence is sufficient diligence to ascertain his address. *Lambert v. Ghiselin*, §§ 1001-1004.

§ 907. A notary was handed a note by the cashier of a bank to make demand and give notice of non-payment. He inquired of the cashier, and, of another person, resident in the same county with the indorser, in order to ascertain the indorser's postoffice address. He did not inquire of the holder of the note because he did not know him, although it appeared that the holder could have informed him of the address had he been asked. *Held*, that the failure to make inquiry of the holder as to the indorser's postoffice did not render the notice insufficient, if the notary used due diligence in all other respects. *Harris v. Robinson*, §§ 980-982.

§ 908. Notice of protest to an indorser, left at the place of business of his son, is not sufficient, even though the indorser reside in the same house, over said son's place of business, but has a place of business elsewhere. But it would be sufficient notice if it was actually received by the indorser, though the proof must be clear and certain. The jury cannot infer the actual receipt of notice from loose and indeterminate facts. *Bank of United States v. Corcoran*, §§ 1005-1007.

§ 909. Where the parties reside in the same city, and the notary calls at the residence of the indorser, and finds it closed and locked, and inquires of the nearest neighbor, who informs him that the indorser and family have left town, for an unknown time, *held*, sufficient diligence to excuse further notice by mail. *Williams v. Bank of United States*, §§ 1008-1010.

§ 910. Timely notice of protest must be given, or its omission excused by showing due diligence, in order to charge the indorser. *Ibid.*

§ 911. If the parties reside in the same city or town the indorser must be personally notified of the dishonor of the bill or note, either verbally or in writing; or a written notice must be left at his dwelling house or place of business. *Ibid.*

§ 912. Evidence of the postmaster and his deputy as to the course of the mails and usages of the postoffice is admissible to show diligence in giving notice. *Dickins v. Beal*, §§ 950-957.

§ 913. A copy of the notice sent by mail need not be produced, nor need proof of its contents be made in order to show due notice. It is sufficient if the notice itself be produced on the trial, and the oath of the notary made that notice was given. Or notice may be proved by entries on the notary's books, proved by his handwriting after death, or his belief arising from the fact of his having made such entry, connected with his uniform usage. *Ibid.*

§ 914. The liability of a drawer or indorser of a dishonored bill of exchange does not depend upon his receiving actual notice, but is fixed by due diligence to give or send him notice. *Ibid.*

§ 915. If after due diligence a notice is sent to a wrong address, it is not incumbent upon the holder, after discovering the mistake, to send a notice to the right address. *Lambert v. Ghiselin*, §§ 1001-1004.

§ 916. The rule that each party has an entire day after that on which he has been informed of the dishonor of the bill to give notice to the party to whom he looks for payment applies only where the holder of the bill is a party to it. A mere agent to notify of the bill's dishonor has no such time. *United States v. Barker*, § 1011.

§ 917. Where the holder employed an agent to give notice of the dishonor and protest of a bill, and such agent received the notice the morning of Saturday, and might have given it on that day to the drawer, but neglected to do so until the Monday following, the notice is insufficient and the drawer is released. *Ibid.*

§ 918. A promissory note was made by A. to B. and payable in Boston, where B. resided. B. indorsed it to the branch of the United States Bank at Portsmouth, which sent it to the Boston Branch for collection. A. failed to pay it, and the Boston Branch notified the Portsmouth Branch, which in turn gave notice to B. *Held*, that this circuitry of notice and the delay consequent thereupon were no defense to an action on the note against B. as indorser. An agent to collect a note is bound to give notice of its non-payment only to his principal; if there be, back of the principal, prior indorsers, they may be notified by the principal or their immediate indorsees. *United States Bank v. Goddard*, §§ 1012-1017.

§ 919. The general rule requires notice of demand, non-payment and protest to be given to makers, drawers or indorsers, in order to bind them to pay their bills. This rule, however, does not apply in favor of the maker or drawer of a bill where he has no funds or effects in the hands of the drawee, and no good reason to expect that the bill will be honored upon presentation. Where the drawees resided in England and were engaged in selling and settling the English estate of the drawer, who was also shipping to them from Virginia tobacco to be sold on his account, it was held that these transactions warranted the drawer in drawing his draft, with the expectation of its being paid; that he was entitled to notice of its non-payment, and, none having been given him or his representatives until the institution of suit upon the bill, about forty years after its protest, he was held released from liability upon it. *Hopkirk v. Page*, §§ 1018-1023. See § 1068.

§ 920. But when the drawer's English estate had been substantially settled, and he had received from it all excepting a very small balance that he had reason to expect, and had ceased to ship tobacco to his English representatives, who had intimated to him their unwillingness to honor further drafts for money, notwithstanding which he drew a second bill upon them, which was not paid, *held*, that he was not released from liability upon it by the failure of the holders to notify him of the non-payment of the draft. *Ibid.*

§ 921. If the insolvency of the drawer and acceptor were known to each other, and the bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and the payment of the bill was subject to a private arrangement between the drawer and acceptor, the holder will be excused from giving notice of non-payment to the drawer. *Rhett v. Poe*, §§ 974-979.

§ 922. Where a drawer of a bill had funds in the hands of the acceptor at the time of acceptance, but withdrew them afterwards, with an understanding to supply other funds to meet the bill, and failed to supply the same, he was not entitled to notice of dishonor of the bill. *Ibid.*

§ 923. Notice of non-payment and protest is excused by a state of war. *Hopkirk v. Page*, §§ 1018-1026.

§ 924. Abandonment of residence and removal from the state to an unknown place excuses the giving of notice. *Rhett v. Poe*, §§ 974-979.

§ 925. While notice of demand and non-payment is usually necessary to charge an indorser, yet he may waive such notice, as by writing the holder on the last day of grace of a note of which he is indorser, that it will not be paid, but that he (the indorser) holds himself "responsible for the payment of this note, and shall see that it is done at an early day." Notice to the indorser after such a letter would be of no service to him, as he already knows of the non-payment and demand. *Yeager v. Farwell*, §§ 1027, 1028. See § 1062.

§ 926. An indorser's letter: "I do request that hereafter any notes that may fall due in the Union Bank, on which I am or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested," waives demand and notice. *Union Bank v. Hyde*, §§ 938, 939.

§ 927. An indorser's assurances to the holder, made before or after maturity, that the drawers should or would pay the note, but not accompanied by any promise on his part to pay it, do not amount to a waiver of notice by the indorser. *Burrows v. Hannegan*, §§ 1029-1033.

§ 928. The taking from the maker by an indorser of a partial indemnity in the shape of a mortgage, given to secure the indorser from loss in case he shall be compelled to pay the note, does not amount to a waiver of notice by the indorser. *Ibid.*

§ 929. If an indorser promise to pay a promissory note after it is due, with full knowledge that demand of payment has not been made of the maker, he may be held liable to pay it, but not if the proof fail to show that when he promised he was aware of his discharge from liability by reason of the holder's laches. *Thornton v. Wynn*, §§ 1034-1037.

§ 930. Where negotiable paper is given as conditional payment, the proceeds to be collected by the holder and applied in payment of the debt, it is incumbent on the holder to use due diligence in collecting the money by making a demand when it becomes due, and in giving notice of non-payment to those whose names are on the paper. If in this respect the holder is guilty of laches, so as to release the parties on the bill, he makes the paper his own and must sustain the loss. *Foote v. Brown*, §§ 1038-1040.

§ 931. Creditor A. received from debtor B. a draft, indorsed by B. and drawn by C. upon D., upon the understanding that the draft was not to be taken by A. in payment of B.'s debt, but that the proceeds of it when paid should be applied upon the debt. Upon maturity the draft was not paid. A. gave B. no notice of its non-payment, but sued him for the debt upon the open account. *Held*, that, although the bill was not received by A. in payment, he could not be considered as a mere agent to collect it; that he was the holder of the bill, neither the drawer nor indorser (debtor) having any right to withdraw it or to do anything with it prejudicial to his interests; that having failed to notify the indorser of its non-payment he released him from liability both as debtor upon the open account and as indorser. *Allen v. King*, §§ 1041-1047. See § 1155.

§ 932. Where a bank loses a bill remitted to it for collection, negligence is presumed, and the burden of rebutting this presumption rests upon the bank. *Chicopee Bank v. Philadelphia Bank*, §§ 1048-1053.

§ 933. It is the duty of agents to collect a check to present and demand payment of it within the time prescribed by law, and if it be not paid, to notify the owners of its dishonor. If loss occurs on account of the acts or omissions of the collecting agent, he is liable. *Essex Co. Nat. Bank v. Bank of Montreal*, §§ 1053-1058.

§ 934. The law presumes damages from the negligence or unauthorized act of a collecting agent of commercial paper, whereby any party to it is released or not charged. *Ibid.*

§ 935. If an agent to collect a check accept a certification of it instead of a cash payment, this discharges the drawer and makes the agent and the drawee liable to the holder for the amount of it. *Ibid.*

§ 936. A bank or other agent to collect a note, which, upon receiving notice of its non-payment and protest, fails to notify prior indorsers thereof, is liable if the amount of the note is lost by its negligence in this respect. *Bird v. Louisiana State Bank*, §§ 1059-1061.

§ 937. Parent bank liable for the negligence of its branches in failing to give notice of non-payment and protest. *Ibid.* As to collection agents, see AGENCY, VII; BANKS, VIII.

[NOTES.— See §§ 1082-1162.]

UNION BANK v. HYDE.

(6 Wheaton, 572-576. 1821.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.— This cause turns upon the construction of a written instrument in these words:

"I do request that hereafter any notes that may fall due in the Union Bank, on which I am or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested.

(Signed)

"THOMAS HYDE."

Two constructions have been contended for: the one, literal, formal, vernacular; the other, resting on the spirit and meaning, as a mercantile and bank transaction. The former has been sustained in the court below, and the correctness of that opinion is now to be examined.

§ 938. *Inland bills need not be protested.*

The defendant, it appears, became indorser to one Foyles, and the note was discounted in the Union Bank; on its falling due, it is admitted that no demand was made on the drawer, or notice given to the indorser. The case presents the right of the plaintiffs under two aspects: 1. Upon the just construction of the written instrument. 2. The practical exposition of it by the defendant himself; and it might also have presented a third: the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now become very generally prevalent; and since the inundations of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a solemnity, cogency and legal effect have been given to such protests in public opinion, which certainly has no foundation in the law merchant. The nullity of a protest on the legal obligations of the parties to an inland bill is tested by the consideration that, independently of statutory provision (if any exists anywhere) or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser into an absolute assumption. The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making a drawer of a bill, or indorser of a note, liable. On foreign bills it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicated of a protest, that it has a legal or binding effect.

§ 939. *Waiver of protest construed a waiver of demand and notice on inland bills.*

But the writing under consideration has reference exclusively to inland bills, and as to them the protest has no legal or binding effect. The indorser becomes liable only on demand and notice, and of these facts the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or in effect convert his conditional into an absolute undertaking? Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what are we to understand him to intend, when he says: "I will consider my-

self bound in the same manner as if said notes had been or should be legally protested?" Except as to foreign bills, a protest has no legal binding effect, and as to them it is evidence of demand, and incident to legal notice. It either then had this meaning or it had none. This reasoning, it may be said, goes no further than to a waiver of the demand; but what effect is to be given to the word bound? It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is entitled to a reasonable notice in addition to the technical notice communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may, therefore, be well supposed to have been in contemplation of the parties, when entering into this contract. It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff, for which it tenders a consideration. It requests to be exempted from an expense, exposure, or mortification, on the one hand; and on the other, what is tendered in return? The intended object and conceived effect of the protest on the one hand is to convert his undertaking into an unconditional assumption, and the natural return is to make his undertaking at once absolute, as the effectual means of obtaining the benefit solicited. If this course of reasoning should not be held conclusive, it would at least be sufficient to prove the language of the undertaking equivocal; and that the sense in which the parties used the words in which they express themselves may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions. On this point the evidence proves that, by the understanding of both parties, this writing did dispense with demand and refusal; that the company, on the one hand, discontinued their practice of putting the notes indorsed by defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued up to the last moment to acquiesce in this practice, by renewing his indorsements without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by, and lull the company into a state of security, of which he might at any moment avail himself, after making the most of the credit thus acquired. Judgment reversed, and *venire facias de novo* awarded.

DENNISTOUN v. STEWART.

(17 Howard, 606-609. 1854.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The plaintiffs declared against the defendant, as drawer of a bill of exchange, by the name and style of James Reid & Co., of which the following is a copy:

"No. —. £4,417,14s. 11d. st'g.

MOBILE, September 9, 1850.

"Sixty days after sight of this of first exchange (second and third unpaid), pay to the order of ourselves, in London, forty-four hundred and seventeen pounds, 14s. 11d. st'g, value received, and charge the same to account of 1,058 bales cotton per 'Windsor Castle.'

"Your obedient servants,

"Pr. pro JAMES REID AND CO.,

"WM. MOULT, Jr.

"To Hy. Gore Booth, Esq., Liverpool."

Acceptance across the face of the bill.

"*Seventh October, 1850.* Accepted for two thousand five hundred and seventy-one pounds, eighteen shillings and seven pence, being balance unaccepted for acct, 1,058 bf. colton pr. Windsor Castle, payable at Glyn and Co.

"Pr. pro HENRY GORE BOOTH,

"AND. E. BYRNE.

"Due 9 Decem."

Indorsed: "Pay Messrs. A. Dennistoun and Co., or order,

"Pr. pro JAMES REID AND Co.,

"WM. MOULT, Jr."

After reading this bill, with its indorsement, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne." The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

§ 940. *Error in name of acceptor's agent will not render protest inadmissible as evidence.*

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested." A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. 1 Pardess., 444; Chitty on Bills, 45§.

However stringent the law concerning mercantile paper, with regard to protest, demand and notice may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and, consequently, may be amended according to the truth, if any mistake has been made. The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested when the notary has been furnished with a sufficient description as to date, amount, parties, etc., to identify it. In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor," or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of notice is to inform the party to

whom it is sent that payment has been refused by the maker, and that he is held liable. Hence, such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in *Mills v. Bank of United States*, 11 Wheat., 431 (§§ 958-963, *infra*), with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility." In the case before us, the protest had an accurate copy of every material fact which could identify the bill — the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, everything necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the Christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court. This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the circuit court is reversed, and a *venire de novo* awarded.

BUCKNER v. FINLEY.

(2 Peters, 586-594. 1829.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This is an action of *assumpsit*, founded on a bill of exchange drawn at Baltimore, in the state of Maryland, upon Stephen Dever, at New Orleans, in favor of R. L. Colt, a citizen of Maryland, who indorsed the same to the plaintiff, a citizen of New York. The action was brought in the circuit court of the United States for the district of Maryland; and upon a case agreed, stating the above facts, the judges of that court were divided in opinion whether they could entertain jurisdiction of the cause upon the ground insisted upon by the defendants' counsel, that the bill was to be considered as inland. The difficulty which occasioned the adjournment of the cause to this court is produced by the eleventh section of the judiciary act of 1789, which declares that no district or circuit court shall have "cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

§ 941. *What are foreign bills. Interstate bills are foreign.*

The only question is, whether the bill on which the suit is founded is to be considered a foreign bill of exchange. It is to be regretted that so little aid in determining this question is to be obtained from decided cases, either in Eng-

land or in the United States. Sir William Blackstone, in his commentaries (vol. 2, 467), distinguishes foreign from inland bills, by defining the former as bills drawn by a merchant residing abroad, upon his correspondent in England, or *vice versa*; and the latter as those drawn by one person on another when both drawer and drawee reside within the same kingdom. Chitty, p. 16, and the other writers (Bayley, Kyd) on bills of exchange, are to the same effect; and all of them agree that, until the statutes of 8 and 9 W. III., c. 17, and 3 and 4 Anne, c. 9, which placed these two kinds of bills upon the same footing, and subjected inland bills to the same law and custom of merchants which governed foreign bills, the latter were much more regarded in the eye of the law than the former as being thought of more public concern in the advancement of trade and commerce. Applying this definition to the political character of the several states of this Union in relation to each other, we are all clearly of opinion that bills drawn in one of these states upon persons living in any other of them partake of the character of foreign bills, and ought so to be treated; for all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed with great force by the president of the court of appeals of Virginia in the case of *Warder v. Arell*, 2 Wash., 298, where he states that, in cases of contracts, the laws of a foreign country where the contract was made must govern, and then adds as follows: "The same principle applies, though with no greater force, to the different states of America; for, though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign."

This character of the laws of one state in relation to the others is strongly exemplified in the particular subject under consideration, which is governed, as to the necessity of protest and rate of damages, by different rules in the different states. In none of these laws, however, so far as we can discover from Griffith's Law Register, to which we were referred by the counsel, except those of Virginia, are bills drawn in one state upon another designated as inland, although the damages allowed upon protested bills of that description are generally, and with great propriety, lower than upon bills drawn upon a country foreign to the United States, since the disappointment and injury to the holder must always be greater in the latter than in the former case. It is for the same reason, no doubt, that, by the laws of most of the states, bills drawn in and upon the same state, and protested, are either exempt from damages altogether, or the rate is lower upon them than upon bills drawn on some other of the states. The only case which was cited at the bar, or which has come to our knowledge, to show that a bill drawn in one state upon a person in any other of the states is an inland bill, is that of *Miller v. Hackley*, 5 Johns., 375. Alluding to this case in the third volume of his Commentaries, p. 63, in a note, Chancellor Kent remarks very truly that the opinion was not given on the point on which the decision rested; and he adds that it was rather the opinion of Mr. Justice Van Ness than that of the court. It is not unlikely, besides, that that opinion was, in no small degree, influenced by what is said by Judge Tucker, in a note to 2 Black. Com., 467, which was much relied upon by one of the counsel in the argument, where the author would appear to define an inland

bill as being one drawn by a person residing in one state on another within the United States. He is so understood by Chancellor Kent in the passage which has been referred to; but this is undoubtedly a mistake, as the note manifestly refers to the laws of Virginia; and by an act of that state passed on the 28th of December, 1795, it is expressly declared that all bills of exchange drawn by any person residing in that state on a person in the United States shall be considered in all cases as inland bills. The case of *Miller v. Hackley*, therefore, can hardly be considered as an authority for the position which it was intended to maintain. We think it cannot be so considered by the courts of New York, since the principle supposed to be decided in that case would seem to be directly at variance with the uniform decisions of the same courts upon the subject of judgments rendered in the tribunals of the sister states. In the case of *Hitchcock v. Aicken*, 1 Caines, 460, all the judges seem to have treated those judgments as foreign in the courts of New York; and the only point of difference between them grew out of the construction of the first section of the fourth article of the constitution of the United States and the act of congress of the 26th of May, 1790 (Stats. at Large, 122), respecting the effect of those judgments and the credit to be given to them in the courts of the sister states.

It would seem from a note to the case of *Bartlett v. Knight*, 1 Mass., 401, where a collection of state decisions on the same subject is given, that these judgments had generally, if not universally, been considered as foreign by the courts of many of the states. If this be so, it is difficult to understand upon what principle bills of exchange, drawn in one state upon another state, can be considered as inland, unless in a state where they are declared to be such by a statute of that state.

It has not been our good fortune to see the case of *Duncan v. Course*, 1 S. Carolina Const. R., 100; but the note above referred to in 3 Kent's Com. informs us that it decides that bills of this description are to be considered in the light of foreign bills; and the learned commentator concludes, upon the whole, and principally upon the ground of the decision just quoted, that the weight of American authority is on that side. That it is so, in respect to the necessity of protesting bills of that description, was not very strenuously controverted by the counsel for the defendant. But he insists that, under a just construction of the eleventh section of the judiciary act, concerning the jurisdiction of the federal courts, these bills ought to be considered and treated as inland. The argument is, that the mischief intended to be remedied by the provisions in the latter part of that section, by the assignment of promissory notes and other *choses in action*, is the same in relation to bills of exchange of the character under consideration. We are of a different opinion. The policy which probably dictated this provision in the above section was to prevent frauds upon the jurisdiction of those courts by pretended assignments of bonds, notes, and bills of exchange strictly inland; and as these evidences of debt generally concern the internal negotiations of the inhabitants of the same state, and would seldom find their way fairly into the hands of persons residing in another state, the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different states with each other. It is quite otherwise as to bills drawn in one state upon another. They answer all the purposes of remittances, and of commercial facilities, equally with bills drawn upon other countries, or *vice versa*; and if a choice of jurisdiction be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so to that of the former. Nor does the reason for restraining the transfer of other *choses in*

action apply to bills of exchange of this description, which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different states of the Union. We conclude, upon the whole, that in no point of view ought they to be considered otherwise than as foreign bills.

BAILEY v. DOZIER.

(6 Howard, 28-30. 1847.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.— This is a writ of error to the circuit court of the United States held by the district judge in and for the southern district of Mississippi. The suit was brought on an inland bill of exchange by the indorsee against the drawers, and resulted, in the court below, in a verdict for the defendant on an objection taken to the validity of the protest. The statute of Mississippi provides for protesting inland bills in case of non-acceptance, or of non-payment by the drawee, after due presentment, in like manner as in case of foreign bills of exchange; and allows five per cent. damages on the amount for which the bill is drawn. Howard & Hutchinson, Statutes of Miss., 372, § 8; 375, § 17; and 376, § 20. On the trial, the notary was called as a witness by the plaintiff, and proved the presentment of the bill at maturity, demand of payment, and refusal, and notice to the drawers. And further, that he drew up the protest in form at the time and delivered it to the holders, but that on account of some alleged defect, which is not stated in the bill of exceptions, it was returned to him, and a second one made out and delivered, which was also subsequently returned, and a third drawn up, which was the protest offered in evidence. It was made out nearly a year after the presentment. The court below decided that the protest was invalid, and instructed the jury that the plaintiff could not recover, unless the bill had been duly protested according to the requirement of the statute. Whereupon a verdict was rendered for the defendant.

§ 942. *Justice of the peace may present and protest a note.*

The bill was presented and the protest made out by a justice of the peace, as a notary *ex officio*; and on the argument the ruling of the court was sought to be sustained, on the ground that the power of this officer to protest bills extended only to cases where the notary was absent or could not be procured. But, on looking into the laws of Mississippi, it was found that a subsequent statute had given the power to this officer in all cases without any qualification, and the point was given up. How. & Hutch., 430. § 24. The ground of objection, therefore, is narrowed down to the time when, and the circumstances under which, the notarial protest was drawn up in form.

§ 943. *Time of drawing up formal protest may be at notary's convenience.*

And on looking into the cases and books of authority on the subject, it will be found that if the bill has been duly presented for acceptance, or payment, and dishonored, and a minute made at the time of the steps taken, which is called noting the bill, the protest may be drawn up in form afterwards, at the convenience of the notary. And it has been held, if drawn up at any time before the trial, it will be sufficient. Chitty on Bills, 334, 436, and cases. Ed. 1842. The minute contains a brief record of the facts which transpired on presenting the bill; and the protest, as subsequently made out, is but an extension of them in the customary form. The time of the extension, therefore, would seem to be of no great importance. For the same reason, if a mistake

should occur, no great danger need be apprehended if the notary is permitted to correct it, provided the regular steps have been taken, and noted, to charge the parties. The amendment would not be made from memory or recollection, but from a written memorandum of the facts.

§ 944. *Statute authorizing protest of domestic bills does not make protest essential to recovery thereupon.*

But without pursuing this view of the case further, a decisive ground against the ruling of the court below is, that a protest of the bill was not essential to enable the plaintiff to recover. The statute of Mississippi is taken substantially from the 9 and 10 Wm. III., c. 17, amended by the 3 and 4 Anne, c. 9, under which it has always been held by the courts in England that the action at common law was not thereby taken away; but that an additional remedy was given, by which the holder could recover interest and damages on an inland bill in cases where he was not entitled to them at common law. And that if he chose to waive the benefit of the statute, he might still recover the amount due on the bill, by giving the customary proof of default and notice. 2 Ld. Raym., 992; S. C., 1 Salk., 131; S. C., 6 Mod., 80; 2 Barn. & Ald., 696; Chitty on Bills, 466. The act of Mississippi is not more explicit and positive in its terms, in respect to the duty of protesting, than that of the 9 and 10 Wm. III., as will be seen on a comparison of the two acts, and should receive a similar interpretation. It follows, therefore, from this view, as the plaintiff did not claim the five per cent. damages given by the act, he should have been allowed to recover the amount of the bill, principal and interest, on the testimony of the notary alone, independently of the written protest.

§ 945. *A plea of non-assumpsit is a waiver of a plea to the jurisdiction.*

It appears from the record that the defendant put in two pleas to the jurisdiction in the court below, for the want of proper parties, and also the plea of *non-assumpsit*. To the latter, the *similiter* was added, upon which issue the cause went down to trial. No notice was taken of the pleas to the jurisdiction. It is suggested that this affords ground of error on the record. The plea of *non-assumpsit* in bar of the action operated as a waiver of the pleas to the jurisdiction, which doubtless furnishes the reason why no notice was afterwards taken of these pleas by either party. 3 Johns., 105; 6 Bac. Abr., tit. Pl. & Pl., let. a, 186, 187; Gould, Pl., c. 5, § 13. They were virtually abandoned by the defendant.

§ 946. *Right to sue on note in federal court.*

It was also suggested that it appeared from the declaration that Fatheree, the payee of the bill, was a citizen of Mississippi, and that the plaintiff, deriving title from him, though a citizen of Virginia, could not maintain the action, for want of jurisdiction, within the eleventh section of the judiciary act. The answer to the suggestion is that the fact upon which it is founded is not sustained by the record. The suit was brought originally against Dozier and Fatheree, the drawer and payee, indorser, jointly, who are described in the commencement of the declaration as citizens of the state of Mississippi. But in a subsequent part of the declaration it is averred that Fatheree, at the time the bill was drawn, and also at the time of its transfer to the plaintiff, was an alien, and resident of Texas. The suit was discontinued as to Fatheree before the trial, which left it between the plaintiff and the defendant alone. The plaintiff being a citizen of Virginia, and deriving title through a person competent to maintain a suit in the circuit court against the defendant, that court

properly took jurisdiction of the case. In every view taken of the case, we think the court below erred, and that the judgment should be reversed.

Judgment reversed, with *venire de novo* by the court below.

BURKE v. MCKAY.

(2 Howard, 66-72. 1844.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Mississippi. The plaintiff in error brought an action of *assumpsit* in that court against the defendant in error, as indorsee upon a promissory note dated at Clinton, Mississippi, January 20, 1837, whereby R. E. Stratton, Samuel W. Dickson and B. Garland, or either of them, on the 1st day of January, 1840, promised to pay Robert Mathews, or order, \$2,800 for value received. The note was indorsed by Mathews as follows: "I assign the within note to Robert McKay, and hold myself responsible for the same, waiving notice of demand and protest if not paid at maturity." The note was afterward indorsed by McKay (the defendant), as it should seem, in blank, and the plaintiff in error, in his declaration, made title as immediate indorsee to McKay. At the trial of the cause, upon the general issue, the plaintiff read the note and the indorsement, and also proved that, at the maturity of the note, due demand of payment was made of the makers by S. W. Humphreys, a justice of the peace of Hinds county, Mississippi, styling himself "acting notary public," who, upon the non-payment, made due protest thereof (the protest being by consent admitted as evidence of the facts), and gave due notice thereof to the payee of the note and to all the indorsers. The defendant (McKay) also admitted that, in a settlement with the makers of the note, in some other transactions, the present note was included, and the defendant released the makers from all liability thereon, but he denied that he had ever received of the makers full payment of the said note, and that, upon a compromise of all claims and controversies between them, he released the makers from all liability to the defendant; and he agreed that the same statement should be read and received at the trial of the case by the court and the jury. The district judge (who alone sat in the cause) instructed the jury that, in order to charge the indorser of a promissory note, the plaintiff must prove that it was protested on the day of its maturity by a notary public, and demand made, and notice of non-payment given by him; that the statement of Humphreys, admitted as evidence, not proving that fact, they must find for the defendant. Whereupon the jury returned a verdict for the defendant, and judgment passed accordingly. A bill of exceptions was taken by the plaintiff to the instruction of the court at the trial; and the cause now comes before us upon the writ of error to examine the correctness of that instruction.

§ 947. *Promissory notes need not be protested.*

And we are all of opinion that the instruction was incorrect, and not maintainable in point of law. In the first place, by the general law merchant, no protest is required to be made upon the dishonor of any promissory note, but it is exclusively confined to foreign bills of exchange. This is so well known that nothing more need be said upon the subject than to cite the case of *Young v. Bryan*, 6 Wheat., 146, where the very point was decided. It is true that it is a very common practice for a notary public to be employed to make demand

of payment of promissory notes from the makers, and also to give notice of the dishonor to the indorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law as binding upon the holder. Unless, therefore, there be some statute in Mississippi requiring the intervention of a notary in such cases (as we understand there is not), or some general usage equally binding, it is clear that the instruction proceeded upon a mistaken ground. In the next place, it is no necessary part of the official duty of a notary (subject to the like exceptions) to give notice to the indorsers of the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transaction of such affairs in commercial cities.

§ 948. *Who may act as a notary.*

In the next place, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries, and even by merchants. But where, as in Mississippi, a justice of the peace is authorized by positive law to perform the functions and duties of a notary, there is no ground to say that his act of protest is not equally valid with that of a notary. *Quoad hoc* he acts as a notary. See Howard and Hutchinson's Statutes of Mississippi, c. 37, § 24, p. 430.

§ 949. *Indorser who releases maker is not entitled to notice of dishonor.*

In the next place, in the present case, under the circumstances, the indorser (McKay) was not entitled to any notice whatsoever of the dishonor. He had actually discharged the makers from all liability for the payment of the note by his release and settlement with them. Of course, the notice could be of no use or value to him; for he would in no event be entitled to any recourse over against them; and, therefore, no notice to him would have been necessary, although it fully appears that he had received due notice of the dishonor.

For these reasons, we are of opinion that the judgment ought to be reversed and *venire facias de novo* awarded.

DICKINS v. BEAL.

(10 Peters, 572-582. 1836.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—Samuel Dickins, the defendant, and Jesse Taylor were partners, transacting business at Hazelwood, Madison county, Tennessee, which was the residence of Dickins. On the 6th of December, 1832, Taylor drew a bill of exchange for \$1,448, on Wilcox and Feron, New Orleans, in favor of Dickins, payable on the 1st of May, 1834, which Dickins indorsed to the plaintiff. On the same day, Dickins and Taylor drew two other bills, on the former house, in favor of the plaintiff; one for \$2,302, payable the 1st of May; the other for \$1,590, payable the 1st of April, 1834. The three bills were dated at Hazelwood, Madison county, Tennessee; presented to the drawers on the 3d of June, 1833, for acceptance; which being refused, they were protested, for non-acceptance, by a notary public, who, on the same day, gave notice thereof to the drawer and indorser of the first, and the drawers of the other two, by letters put into the postoffice, addressed to them at Hazelwood, aforesaid. It was testified by the notary that, not knowing of any other resi-

dence of the parties than that designated by the caption of the bill, he forwarded the notices accordingly, after inquiring of persons likely to know.

It appeared that all the bills were drawn without funds, or authority to draw; nor was any evidence offered to show that either Dickins or Taylor had any reason to think that their bills on Wilcox and Feron would be honored, except two letters from Wilcox and Feron, dated the 1st of December, 1831, addressed to the cashier of the Branch Bank of the United States, at Nashville. In one they say: "Messrs. Dickins and Taylor are authorized, in making negotiations, to value on our house in New Orleans, for say \$10,000, in such form and at such time as they may think proper, and same will be duly honored." In the other: "Our friend, Colonel Samuel Dickins, is authorized, in negotiating with your institution, to value on our house in New Orleans, at any time, for such sums as he may think proper, and same will be duly honored by W. and F." These letters were in the handwriting of Wilcox and Feron, and in the possession of Dickins; they were offered to show that he was entitled to regular notice of the protest of the bills drawn by Dickins and Taylor; but were rejected by the court as incompetent. The plaintiff resided at New Orleans. Jackson is the county town of Madison county, Tennessee, about fourteen miles from Hazelwood, the defendant's residence, which is on Spring Creek, about half or three-fourths of a mile from a postoffice called Spring Creek postoffice, of which the defendant was postmaster, and did his business there in June, 1833. This was known to plaintiff, who about and before the 3d of June, 1833, directed a letter to defendant at "Hazelwood, Spring Creek, Madison county, Tennessee," and one to "Colonel Samuel Dickins, postmaster, Spring Creek, Madison county, Tennessee." At the trial, the plaintiff offered to prove, by the postmaster at Nashville, and his deputy, that that place was the distributing office for letters from New Orleans, intended for West Tennessee, including the county of Madison; that in June, 1833, they knew defendant was postmaster at Spring Creek; that if, in distributing the mail, they had seen a letter addressed to defendant at Hazelwood, they would have sent it to Spring Creek postoffice. Also to prove by the postoffice books at Nashville, that, on the 13th of June, 1833, the New Orleans mail arrived at Nashville; and, on the 14th, a package was sent to Spring Creek postoffice, which had come to Nashville for distribution, and was rated at fifty cents postage. To this evidence it was objected, by the defendant, that, inasmuch as the putting a letter into the postoffice containing notice of a protest, properly directed, forms a conclusive legal presumption that such notice was duly given and received, it was also a legal presumption that the notice went to the place directed and no other; and that the plaintiff was concluded from showing, either that the destination of the letter was changed on its passage, or was in point of fact sent to any other place. The court overruled the objection, and the evidence was received.

It was also testified that letters from Orleans, for the western district of Tennessee, come to Nashville for distribution, unless there was a river mail, in which case they would be delivered at Memphis and be distributed thence; other evidence was also given in relation to the course of the mail, and the usage of the postoffice at Nashville, which is needless to recite. In their charge to the jury, the court instructed them that the usage of a distributing office in conformity to law, and the authorized regulations of the department, and in the discharge of the official duties of the officers employed, might properly be taken into their consideration of the question submitted to them; which

was whether, from the usual course of the mail, and the usage as proved, the notice of the protest would necessarily reach Spring Creek postoffice, or would fail to reach it, or be carried to some other office; in the first case, the court instructed them that the notice was served on the defendant; but in the other, the drawer was discharged unless actual notice was served.

Several instructions were prayed by the defendant, which the view taken by the court renders it unnecessary to consider, as they relate to matters not material to the cause; and, if given either way, they could not affect the right of either party. One, however, deserves particular notice, which was, "That the evidence of the notary was not sufficient proof that a legal notice was sent; but that he ought to have set out a copy of the notice, or stated its contents, in order that the court might judge whether it was sufficient." The court refused to give this instruction; but stated that it might reasonably be inferred from the nature of the notice, and from the fact that notice was given, as stated in the deposition. Exceptions were taken to the decision of the court on the questions of evidence, and the various matters given in charge to the jury.

§ 950. *Admissibility of written authority to draw to prove right to notice of non-acceptance.*

The first question which arises is on overruling the admission in evidence of the two letters from Wilcox and Feron to the cashier of the branch bank at Nashville. It was in full proof that Taylor and Dickins never had a dollar in the hands of Wilcox and Feron to pay any draft drawn on the latter, nor any money or other property in their hands to meet the bills at the time they became due, or any funds in their hands when presented and protested for non-acceptance. No proof was offered that Dickins and Taylor, or either of them, had made any consignments to Wilcox and Feron, as an expected or anticipated fund on which to draw. It was also proved that Jesse Taylor had neither funds or property in the hands of the drawees, when his bill in favor of Dickins was presented for acceptance, or when it became due; and that they had received no advice of such bill; and that the two bills of Dickins and Taylor, drawn in favor of the plaintiff, one for \$2,802, and the other for \$1,598, balanced their account on his books. It is clear, therefore, that this transaction was not a negotiation within the meaning or intention of these letters; they evidently referred to negotiations at the bank, or within the sphere of its operations in the commercial transactions of the firm; the one referring to Dickins alone was expressly limited to negotiations with that bank. The remittance of these bills to New Orleans in payment of an antecedent debt to the plaintiff was in no sense of the term a negotiation of them, and was so utterly inconsistent with the evident object of the letters, that the most remote expectation could not have been entertained that they would have been accepted. A mercantile house conducting operations at Memphis and New Orleans would, in the course of their business, lend their credit in anticipation of consignments, while they would refuse it to pay the debts due to other persons; these considerations could not escape the consideration of Dickins and Taylor, when they sought to make Wilcox and Feron their creditor, instead of Beall, by such a fraudulent abuse of the letters of credit. Had these bills come to the hands of an innocent holder in the course of trade, with a knowledge of these letters, the case would have been different; or if the bank had negotiated them, there would have been a reasonable expectation that they would have been honored; but Dickins and Taylor could have entertained no such

expectation. The letters were, therefore, properly excluded, and the case must be considered as if they had not existed.

§ 951. *Right of drawer to notice of dishonor.*

An established exception to the general rule that notice of the dishonor of a bill must be given to the drawer is, where he has no funds in the hands of the drawee; but of this exception there are some modifications. 4 Cranch, 154; 1 Durn. & E., 405; 2 Durn. & E., 712; 12 E., 175; 20 J. R., 149, 150. If the drawer has made, or is making, a consignment to the drawee, and draws before the consignment comes to hand. 12 East, 175.

If the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee or the goods were lost. 16 E., 43. If the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the course of their transactions (15 E., 221); or a reasonable expectation that the bill would be paid. 4 M. & S., 229, 230. Or if the drawee has been in the habit of accepting the bills of the drawer without regard to the state of their accounts, this would be deemed equivalent to effects. 12 E., 175. Or if there was a running account between them. 15 E., 221. In all such cases, the drawer is considered as justified in drawing, as so far having a right to draw, that "the transaction cannot be denominated a fraud; for in such a case it is a fair commercial transaction, in which the drawer has reasonable expectation that his bill will be honored, and he is entitled to the same notice as a drawer with funds, or authority to draw without funds." 15 E., 220; 16 E., 44. But, unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law; and as he can in nowise suffer by the want of notice of the dishonor of his drafts, that it is deemed a useless form. "Notice, therefore, can amount to nothing, for his situation cannot be changed." In a case where he has no fair pretense for drawing, there is no person on whom he can have a legal or equitable demand, in consequence of the non-payment or non-acceptance of the bill. This is the rule, as laid down by this court, in *French v. Bank of Columbia*, 4 Cranch, 153, 164 (§§ 983, 984, *infra*), on a very able and elaborate review of the then adjudged cases, which is fully supported by those since decided in England, and in the supreme court of New York. The case of the defendant falls clearly within the rule applicable to bills drawn without funds, or any *bona fide*, reasonable or just expectation of their being honored; and notice of their dishonor was not necessary. The case requires no opinion whether notice of the dishonor of Taylor's bill in favor of Dickins was necessary, and we forbear to express any.

§ 952. *Evidence of postal officials admissible to show due diligence in giving notice.*

The next question which arises is on the admission of the evidence of the postmaster at Nashville, and his deputy, in relation to the course of the mail, the usage of the office, and the facts to which they testify. We are at a loss to perceive any plausible objection to the evidence which was received by the court, on the assumption that notice of the dishonor of the bills must be made out by the plaintiff, which could be done in two ways: 1. That the bills had been duly protested for non-acceptance; and due and legal diligence used in giving notice thereof to the parties on the bills, in which case the legal presumption of its receipt in time would attach. 2. By proof that the notice actually came to hand in proper time, though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route. The

fact of notice, and its reception in due time, are the only matters material to the drawer or indorser of a dishonored bill; the manner or place in which he receives such notice is immaterial; for all the objects to be answered by its reception, it is equally available to them. To the holder it is immaterial whether the evidence of notice consists in the legal presumption arising from due diligence, which supplies the place of specific evidence, and is binding on a jury as proof of the fact of its reception, or it is established by direct evidence, or such circumstances as will, in law, justify them in drawing the inference. 2 Pet., 132.

§ 953. *Interstate bills are foreign; use of mails in giving notice.*

Since the case of *Buckner v. Findley*, 2 Pet., 589, 591 (§ 941, *supra*), decided on great consideration, it has been the established doctrine of this court that a bill of exchange drawn in one of the states of this Union on a person in another is a foreign bill, and to be treated as such; and that in this respect they are to be considered as states foreign to each other, though they are otherwise as to all the purposes of their federal constitution. Among these purposes are the establishment of postoffices and post-roads, the regulation of which has been delegated to the federal government, and is exercised by their laws and the regulations of the postoffice department conformably thereto. On these depend all the communications between the states by mail, the time of departure from different places, its route, place, and course of its arrival, and distribution. The usage of the officers employed in the various details of the operations of the department, when acting within the line of their duty, as prescribed by law and regulations, become all-important to a court and jury in deciding on what is legal diligence in giving notice, or what is evidence of its reception. It is legal diligence in the holder of a bill, if he avails himself in time of the means of communicating notice, which are thus afforded; but he is not answerable for any defects in the outline or details of the regulation of the mails for the route in which the letter is carried, the time which elapses from its deposit in the office and delivery, or the mode of carrying or distributing the mails; but it is proper that he should give evidence of all these matters, as well to repel the imputation of laches if the letter does not come to hand or not in due time, as to prove its regular delivery, if there should be any doubt as to the use of diligence, in the direction or deposit of the letter. Such evidence is uniformly received in cases arising on the notice of dishonored bills.

§ 954. *Copy of notice of dishonor mailed need not be produced to show notice.*

The next question arises on the prayer of the defendant to instruct the jury that proof that the bills were protested and notice thereof put into the postoffice was not sufficient, without producing a copy of the notice, or proving its contents. In *Lindenberger v. Beall*, the notary testified that notice of non-payment was inclosed in a letter addressed to the defendant at H., and put into the postoffice at G.; he had no recollection of these facts, and only knew them from his notarial book and the protest made out at the time; from which, and his invariable practice, he presumed he had done so. This was held sufficient proof of such notice, and that it was unnecessary to give notice to defendant to produce it. 6 Wheat., 104, 106. In *Nicholls v. Webb*, the notary was dead; but on a memorandum on the margin of the protest it was stated in his handwriting, "Indorsee duly notified in writing 19th July, 1819, the last day of grace being Sunday, the 18th," which was held competent proof of notice. 8 Wheat., 326, 330. In this case the protests were produced at the trial, and the oath of the notary positive as to the fact of notice; this is entirely equivalent

to an entry on his books, proved only by his handwriting after his death, or his belief arising from the fact of having made such entry, connected with his uniform usage. It must therefore be taken as settled law, that such is sufficient proof that the notice required by law was given. It remains to consider whether the letter containing the notice was so directed and deposited in the postoffice at Orleans as to comply with the law.

§ 955. *A party is only required to use due diligence in giving notice.*

In cases of this description the true question is, whether due diligence has been used by the holder of the bill; not whether he has given, or the defendant has received, notice; both are immaterial, if reasonable diligence has been used. This consists in giving notice, if, after the usual and proper inquiries are made, it is practicable to give it; but if, when this is done, the holder or notary cannot give the notice personally, where the parties reside in the same place, or does not know where to direct it by mail, the inquiry is diligence, without giving notice. After inquiring from other parties to the bill, and examining the directory, if the party's residence cannot be found (3 Camp., 263); if on calling at his residence, or place where he transacts his business, he is not to be found or any other person who can receive notice, it may be left there; or, if his house of business or residence is locked up, and on audible knocking no one answers, or the party has changed his former residence, or removed to the country, no notice is necessary. 9 Wheat., 599; 2 Pet., 102, 105, 129; 6 D. & R., 505; 20 J. R., 172, and cases cited. Where the parties do not reside in the same place, diligence consists in sending notice by the first mail, of the day of protest. 2 Wheat., 273; 9 Pet., 45. This is all that is necessary, if the letter containing the notice is properly directed. 4 Wheat., 438. If the residence of the party appears on the bill, the notice of protest, etc., must be directed there (12 East, 433); if it does not so appear, then reasonable diligence must be used in making inquiry for his residence, and a reasonable time will be allowed to give notice after ascertaining it; this has been held in case of notice to an indorsee in April, of a protest in October preceding. Wightwick's Ex., 76, 77.

§ 956. *Diligence a question of law, when.*

When all the facts are ascertained, diligence is a question of law. Wightwick, 76; 1 Pet., 583. If the evidence is doubtful or contradictory, it is for the jury to decide (7 Pet., 290); but in either case, it turns on what is the usage of the place (9 Wheat., 587), the habits of men of business, the kind and mode of inquiry usually made in similar cases. 2 Burr., 669; 2 H. B. L., 565; 3 B. & P., 601; 20 J. R., 174. Thus a bill drawn by persons residing in Petersburg, Virginia, on a house in New York, and dated there, being protested, a clerk of the notary made inquiry at the banks and elsewhere, and on being informed that the drawers resided at Norfolk, directed one notice to them there, and put another into the postoffice in New York, directed to them there, it was held sufficient. 1 J. R., 294, 296; Chapman v. Lippincott, cited, 13 Johns., 433; 16 J. R., 220; 20 J. R., 174.

If a bill is drawn dated "Manchester" (or "London"), without any one direction, notice of protest, directed to the drawer at Manchester, was held good, on the presumption that it would reach him if so directed. 1 R. & M., 249, 250. Notice directed to the residence or house of business of the party is sufficient; the holder is not bound to show that notice is brought home, but only to employ the usual mode of conveyance; and the rules of diligence to which he is held ought not to be such as will tend to clog the circulation of commercial or negotiable paper by impairing the liability of those who have put it into

circulation. 1 Pet., 583; 2 Pet., 102, 129. If an indorsee lives within a reasonable distance of a postoffice, notice to him, directed to him, at his residence, is good; as where a note was protested at Cincinnati, the notice was directed to T. D. O., Campbell county, Kentucky, though defendant lived on the south side of the Ohio, two miles from Cincinnati and Covington, and three miles from Newport, the county town, in all of which there were postoffices, and his residence was well known to the holder and postmaster. The putting the notice into the postoffice at Cincinnati was held sufficient. 2 Pet., 519.

§ 957. *Liability of drawer or indorser depends not upon actual notice but upon due diligence to give notice.*

The clear and conclusive result of these cases is, that as between the holder and the drawer or indorser of a dishonored bill, the question of their liability depends not on actual notice, but on seasonable diligence, which is in all cases tantamount to actual notice, whether given or not. Hence, it becomes useless to examine into the instructions prayed for by the defendant at the trial, and refused by the court, in relation to the course of the mail after leaving New Orleans, or the points submitted to the jury, for they could in no event avail the defendant, if the jury believed the evidence of the notary. As these were foreign bills, the protests produced at the trial were in themselves evidence of the demand and protest. 8 Wheat., 330. The oath of the notary, that he put the notice into the postoffice, on the day of protest, is competent and sufficient in law to prove the fact; the only question for the jury was his credibility. The notices were properly directed: 1. Because Hazelwood was the residence of the defendant, within a short distance of a postoffice. 2. The bills were dated at that place, and the direction of the notices was to the same place.

As a matter of law, then, we are clearly of opinion that due diligence was used by the plaintiff, when the notices of protest were put into the postoffice at New Orleans. His right of action was then consummated, and it can in nowise be affected by the course of the mail, or the arrangements concerning its route or distribution. We forbear any notice of the other questions presented at the trial, lest, by doing so, we should, by implication, be deemed to think they could in any event affect the right of the plaintiff, when no laches could be imputed to him or the notary. The judgment of the circuit court is affirmed, with costs and interest.

MILLS v. BANK OF UNITED STATES.

(11 Wheaton, 431-441. 1826.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a suit originally brought in the circuit court of Ohio by the Bank of the United States against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for \$3,600, money lent and advanced. During the pendency of the suit Reed and Adair died. Mills filed a separate plea of *non-assumpsit*, upon which issue was joined; and, upon the trial, the jury returned a verdict for the Bank of the United States, for \$4,641, upon which judgment was rendered in their favor. At the trial a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this court. By the bill of exceptions it appears that the evidence offered by the plaintiffs in support of the action “was by consent of counsel permitted to go to the jury,

saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note, signed Wood and Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair and Horace Reed, as successive indorsers; which note, with the indorsements thereon, is as follows, to wit: "Chilicothe, 20th July, 1819. \$3,600. Sixty days after date, I promise to pay to Peter Mills or order, at the office of discount and deposit of the Bank of the United States, at Chilicothe, \$3,600, for value received. Wood and Ebert." Indorsed, "Pay to A. Adair or order, Peter Mills." "Pay to Horace Reed or order, A. Adair." "Pay to the president, directors and company of the Bank of the United States or order, Horace Reed." On the upper right-hand corner of the note is also indorsed: "3185. Wood and Ebert, \$3,600, Sept. 18-21." It was proven that this note had been sent to the office at Chilicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proven, by the deposition of Levin Belt, Esq., mayor of the town of Chilicothe, that on the 22d day of September, 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the postoffice, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chilicothe, 22d of September, 1819. Sir: You will hereby take notice that a note drawn by Wood and Ebert, dated 20th day of September, 1819, for \$3,600, payable to you or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectfully, Levin Belt, mayor of Chilicothe." (Peter Mills, Esq.) It was further proven by the plaintiffs, that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange on the day after the last day of grace (that is, on the sixty-fourth day), that the Branch Bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the indorsers. The court charged the jury: 1. That the notice, being sufficient to put the defendant on inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due. 2. That if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood and Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note, made by the notary in the notice given to that defendant, does not impair the liability of the said defendant, and the plaintiffs have a right to recover. 3. That, should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment and to protest and give notice on the sixty-fourth day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury, "that before the common principles of the law relating to the demand and notice necessary to charge the indorser can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and, also, that before the plaintiffs can recover as the holder and indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsements on the note," which instructions were refused by the court. Upon this posture of the case no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's (Mills') counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

§ 958. *Notice need not name holder.*

The first point is, whether the notice sent to the defendant at Chilicothe was sufficient to charge him as indorser. The court was of opinion that it was sufficient, if there was no other note payable in the office at Chilicothe, drawn by Wood and Ebert, and indorsed by the defendant. It is contended that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice whosoever he may be; and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

§ 959. *Notice misdescribing note as to date is sufficient.*

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case the misdescription was merely in the date. The sum, the parties, the time and place of payment and the indorsement were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that, on the 22d of September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office of Chilicothe, drawn by Wood and Ebert and indorsed by the defendant. If there was no other note how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood and Ebert, how could the notice fail to be full and unexceptionable in fact?

§ 960. *Notice need not aver place of demand.*

The last objection to the notice is that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal practice, is not to state in the notice the mode or place of demand, but the mere naked non-payment. Upon the point, then, of notice, we think there is no error in the opinion of the circuit court.

§ 961. *Notice of usage as to four days' grace presumed from making note payable at bank where such usage prevails.*

Another question is whether the usage and custom of the bank not to make demand of payment until the fourth day of grace bound the defendant unless he had personal knowledge of that usage and custom. There is no doubt that, according to the general rules of law, demand of payment ought to be made on the third day, and that it is too late if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of *Renner v. Bank of Columbia*, 9 Wheat., 582 (§§ 754-759, *supra*), that where a note is made for the purpose of being negotiated at a bank whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least so far as to bind their rights. In the present case the court is called upon to take one step further; and, upon the principles and reasoning of the former case, it has come to the conclusion that when a note is made payable or negotiable at a bank whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage whether they have a personal knowledge of it or not. In the case of such a note the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

§ 962. *Proof of execution of note or indorsement may be dispensed with by rule of court.*

Another question propounded by the defendant is whether the plaintiffs were entitled to recover without establishing their title to the note, as holders, by proof of the indorsements. There is no doubt that, by the general rule of law, such proof is indispensable on the part of the plaintiffs unless it was waived by the other side. But in all such cases the defendant may waive a rule introduced for his benefit; and such waiver may be implied from circumstances as well as expressly given. It is in this view that the rule of the circuit court of Ohio, of 1819, which has been referred to at the bar, deserves consideration. That rule declares "that hereafter, in any actions brought upon bond, bill or note, it shall not be necessary for the plaintiffs on trial to prove the execution of the bond, bill or note unless the defendant shall have filed with his plea an affidavit that such bond, bill or note was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays upon objections at trials, which were frivolous and unconnected with the merits. If the rule attempted

to interfere with or control the rules of evidence it certainly could not be supported. But it attempts no such thing. It does not deny to the party the right to demand proof of the execution or indorsement of the note at the trial, but it requires him, in effect, to give notice by affidavit accompanying the plea that he means to contest that fact under the issue. If the party gives no such notice and files no such affidavit it is, on his own part, a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardship in such a rule. It subserves the purposes of justice and prevents the accumulation of costs. It follows out, in an exemplary manner, that injunction of the judiciary act of the 2d of March, 1793, c. 22, s. 7 (1 Stats. at Large, 335), which requires the courts of the United States "to regulate the practice thereof as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant in the present case he had no right to insist upon the proof of the indorsements.

§ 963. *Recovery limited to principal sum demanded, but interest may be added if ad damnum is high enough to cover it.*

Another objection now urged against the judgment is, that the count demanded \$3,600 only, and the jury gave damages amounting to \$4,641. But there is no error in this proceeding, since the *ad damnum* is for a larger sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in the declaration, but the jury have a right to add interest, by way of damages, for the delay.

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood and Ebert, in order to help the misdescription; and that the case proved was of several liabilities of the defendants, which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the court to take cognizance of them.

Upon the whole, it is the opinion of the court that the judgment ought to be affirmed, with costs.

BANK OF UNITED STATES v. CARNEAL.

(2 Peters, 548-553. 1829.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Ohio. The Bank of the United States brought a joint action against William Steele, William Lytle and Thomas D. Carneal (the defendant in error), upon a promissory note dated at Cincinnati, on the 22d of August, 1820, whereby Steele promised to pay Carneal, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, the sum of \$11,563, in sixty days after date, which note was afterwards successively indorsed by Carneal and Lytle, and was discounted by the bank and dishonored at its maturity. The declaration is for money lent and advanced, and the suit is authorized to be brought in this form jointly against all the parties to the note, by a statute of Ohio. The process was served upon Steele and Lytle, but returned "not served" upon Carneal. Judgment was afterwards duly obtained

against Steele and Lytle, and a *scire facias* issued according to another statute of Ohio against Carneal, to which he appeared, and pleaded the general issue of *non assumpsit*, at the January term of the court in 1825. The cause was then regularly continued until July term, 1827, when by leave of the court he pleaded, as a further plea, the receipt of certain real estate of Lytle by the bank, after the commencement of the suit, in satisfaction of the debt due upon the note, and prayed judgment if the plaintiffs their action ought further to have or maintain against him. To this plea there was a replication, and issue to the country; and at June term, 1828, the cause was tried and a verdict was found, and judgment thereupon entered for the defendant. A bill of exceptions was taken at the trial, upon which the questions arose which have been discussed at the bar, and upon which the opinion of the court is now to be delivered.

§ 964. *A plea of satisfaction is a substitution of a former plea of non assumpsit.*

The first question is, whether the plea of satisfaction, so as above pleaded, is a substitution for the former plea of *non assumpsit*, so as to displace it entirely, or whether it is an auxiliary plea, so that both issues were properly before the jury at the trial, upon which they might pronounce their verdict. The latter is contended for by the defendant in error, and was supported by the judgment of the circuit court. It is admitted that a plea *puis darrein continuance* is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. Stephen on Pleading, 81, 83; Comyn's Dig., Abatement, 1, 24. The present plea was in fact pleaded after the last continuance, although it is not so stated in the plea. It differs from a technical plea of *puis darrein continuance*, only in this circumstance, that the satisfaction is alleged to have been after the commencement of the suit, instead of after the last continuance of the suit. In principle, however, they do not differ, since each of them requires the same commencement and conclusion; that is, instead of *actio non*, generally, each must be pleaded with the prayer of *actio non ulterius habere*, etc., and the judgment must follow the prayer, and is repugnant to and incompatible with that of a general judgment upon matters before the suit brought. As, therefore, the same judgment cannot be rendered upon the general issue, and upon such a plea of matters arising after the suit brought, it is difficult to perceive how they can be united. But it is the less necessary to rest any absolute decision upon this point, because we are all of opinion that the judgment below ought to be reversed upon the exceptions taken to the merits.

§ 965. *Demand by bank of note payable at its office.*

The court below ruled that the evidence adduced at the trial was not sufficient in law to charge the defendant as indorser. That evidence was supposed to be deficient in two respects: 1. That there was not a proper demand of payment of the note of the maker, at the time when it became due; and 2. That due notice was not given of the non-payment to the defendant as indorser. Upon the first point the evidence is, that on the day when the note became due, the note was in the bank at Cincinnati, the bank being the holder thereof, and it being payable there; and that, after the usual banking hours were over, it was delivered to a notary by the officers of the bank for protest, they informing him, at the time, that there were no funds there for the payment of the note. We are all of opinion that this was a sufficient proof of a due demand of payment. Where a note is payable at a bank, it is not necessary to make

any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same, and if he omits so to do, and a demand is there made of payment by the holder, within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor. But where the bank is itself the holder of the note so payable, no formal demand is necessary to be made of payment. The maker has the whole period of the usual banking hours to pay it, and if he does not pay it within those hours, it is equivalent to a demand, and refusal of payment on his part, and the note ought not to be delivered out for protest until after those hours are passed. If the bank has funds of the maker in its hands, that might furnish a defense to a suit brought for non-payment. But this is properly matter of defense to be shown by the party sued, like any other payment, and not matter to be disproved by the bank, by negative evidence. This doctrine was recognized by this court in *Fullerton v. Bank of United States*, at the last term. 1 Pet., 604, 617 (§§ 1200-1204, *infra*).

§ 966. *Sufficiency of notice by mail where defendant receives letters through several postoffices.*

Then as to the other point of notice, the facts are, that the defendant, Carneal, resides in Campbell county, in the state of Kentucky. The note became due on the 24th of October, 1820, and on the next day the notary put a sealed notice of the protest and non-payment into the postoffice in Cincinnati, directed "To Thomas D. Carneal, Campbell county, Kentucky," the postage on which was not paid. At that time Carneal's residence in Campbell county was without the limits of any post-town, and about two miles from Cincinnati, across the River Ohio; and his residence was well known to the officers of the bank, as well as the postmaster at Cincinnati. The county seat of Campbell county is Newport, where there is a postoffice, about three miles distance from Carneal's residence, the River Licking being between them; and there is also another postoffice at Covington, below the River Licking, about two miles distance from his residence. In October, 1820, the mails from Cincinnati passed once a week only through Covington, and three times a week through Newport. Carneal was in the habit of receiving letters at the Newport office, as well as at the offices in Covington and Cincinnati. He was in the habit of receiving all the letters directed to him at Cincinnati, at the office in that place, and had given orders to the postmaster to detain all such letters there until he called for them. He visited Cincinnati very frequently and almost daily, having business and being a director of a bank located at that place. The postmaster was in the habit of sending letters directed to him in Campbell county, by the Covington mail, whenever he observed the address, unless, as was sometimes the case, he called for letters at the office before the Covington mail was sent. But other letters, directed generally to Campbell county, when the place of residence of the party was unknown, were sent by the postmaster to Newport. The notary himself, when he put the present notice into the postoffice at Cincinnati, supposed that Carneal received all his letters at that office. The first mail which left Cincinnati for Newport, after the deposit of this notice, was on the 26th of October; and the first which left for Covington was on the 28th of the same month. There is no evidence in the case that the letter in question went either by the mail of the 26th to Newport, or by that of the 28th to Covington. The defendant Carneal has not produced the letter, if it was ever received by him; and the circumstances afford a strong presumption that it might have been received at Cincinnati.

§ 967. *Rule as to instruction for a non-suit.*

Such is a summary of the material facts, upon which this court is called to pronounce whether there was due diligence in the transmission of the notice to the defendant. The latter having asked the court below to instruct the jury as in case of a non-suit, and the court having acceded to his request, that instruction can be maintained only upon the supposition that there was no contrariety of evidence as to the facts which ought to have been left to the jury; and consequently, every inference fairly deducible from the facts which afforded a presumption of due notice, ought to be made in favor of the plaintiffs.

§ 968. *Rules as to diligence in giving notice to indorser.*

It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post-town. If it is not, then to the postoffice or post-town nearest to his residence, if known. But the rule as to the nearest postoffice is not of universal application, for if the party is in the habit of receiving his letters at a more distant postoffice, or through a more circuitous route, and that fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various postoffices, to suit his own convenience or business, it may be sufficient to send it to either. The object of the law in all these cases is to enforce the transmission of the notice by such a route as that it may reach the party in a reasonable time. This doctrine is fully recognized by this court, in the case of *The Bank of Columbia v. Lawrence*, decided at the last term. 1 Pet., 578 (§§ 995-997, *infra*).

§ 969. *General direction of notice to "C., Campbell county, Kentucky," sufficient, when.*

It has been objected that the direction of this letter to Campbell county generally was not sufficient, but that it ought to have been directed to the nearest office, for otherwise it might happen that it would be sent to a postoffice, which, though the county seat, might be very distant from the residence of the party. Whether a mere direction to the county without further specification, where the party does not reside in any town therein, would be sufficient in all cases and under all circumstances, we do not think it necessary to decide. That question may well be left until it is necessary in judgment. But where the description is general, if it is in fact sent to the proper postoffice, or if, after due inquiry, it is the only description within the reach of the person sending the notice, we think it may be safely declared to be sufficiently certain, and that a different doctrine would materially clog the circulation of negotiable paper. We think the description in the present case was, in every view, sufficient. There was no misdirection; for Carneal did live in Campbell county. His actual residence was well known to the postmaster at Cincinnati, and the description did not and could not mislead him. If the direction was observed, it would be sent to Covington, or would be delivered at Cincinnati. If not, it would be sent at furthest to Newport.

§ 970. *Whether a notice put into the postoffice at Cincinnati is sufficient notice to an indorser in Kentucky.*

Then, was the notice in fact duly given or duly sent through the proper postoffice? We are all of opinion that it was. The postoffice at Cincinnati was almost as near the party's residence as that at Covington. The difference is

too trifling to afford any just ground of preference; and Cincinnati was the place where he was most likely to receive the letter promptly, since it was the place of his business, and of his habitual and almost daily resort. If it had never been transmitted from that office at all, we are not prepared to say that, under such circumstances, the notice left there was not of itself sufficient, since the party was known there, and his description unequivocal. It does not appear, in point of fact, that it ever left that place for any other postoffice. If it did not, the strong presumption is that it was there delivered to the party. But if it was sent to Newport, how can the court say it was misssent? The party was in the habit of receiving letters there; it was the county seat; and the mail by that route was three times a week, and that by Covington only once a week. The probabilities, therefore, in favor of an early receipt of the letter from this circumstance might fairly balance any in the opposing scale from the increase of distance and the intervention of the river Licking. And in fact the letter would at that time have reached Newport two days earlier than it would have reached Covington. We think it would be inconvenient and dangerous to lay down any rule that the person sending a notice ought, under such circumstances, to direct the letter to the nearest postoffice. We think that the notice would have been good by either route; indeed, good if left at the postoffice at Cincinnati.

§ 971. *Notice of protest need not say that the holder looks to the indorser for payment.*

A suggestion has been made at the bar that a letter to the indorser stating the demand and dishonor of the note is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient if it may be reasonably inferred from the nature of the notice. For these reasons we are all of opinion that the judgment of the circuit court ought to be reversed and the cause remanded, with directions to award a *venire facias de novo*.

BANK OF ALEXANDRIA v. SWANN.

(9 Peters, 33-47. 1835.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This suit was brought in the circuit court of the District of Columbia, for the county of Alexandria, upon a promissory note made by Humphrey Peake and indorsed by the defendant in error. Upon the trial the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error.

The points upon which the decision of the case turns resolve themselves into two questions: 1. Whether notice of the dishonor of the note was given to the indorser in due time? 2. Whether such notice contained the requisite certainty in the description of the note.

§ 972. *Sufficiency of notice as to time. Diligence a question of law, when.*

The note bears date on the 23d day of June, 1829, and is for the sum of \$1,400, payable sixty days after date at the Bank of Alexandria. The last day of grace expired on the 25th of August, and on that day the note was duly presented, and demand of payment made at the bank and protested for non-

payment; and on the next day notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this court in *Lenox v. Roberts*, 2 Wheat., 373, 4 Cond. Rep., 163, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds that, according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock P. M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day at any time after eight o'clock A. M.; and it is argued on the part of the defendant in error that, as demand of payment was made before three o'clock P. M., notice of the non-payment of the note should have been put into the postoffice on the same day it was dishonored, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience and the usual course of business. In the case of the *Bank of Columbia v. Lawrence*, 1 Pet., 533 (§§ 995-997, *infra*), it is said by this court to be well settled at this day that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and, although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice Hosmer, in the case of the *Hartford Bank v. Stedman*, 3 Conn., 495, that it will always come to a question how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail the next day after the dishonor of the note was in due time.

§ 973. *Misstatement of amount of note will not vitiate notice of non-payment.*

The next question is, whether, in the notice sent to the indorser, the dishonored note is described with sufficient certainty. The law has prescribed no particular form for such notice. The object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof. The misdescription complained of in this case is in the amount of the note. The note is for \$1,400, and the notice describes it as for the sum of \$1,457. In all other respects the description is correct; and in the margin of the note is set down in figures 1,457, and the special verdict finds that the note in question was discounted at the bank as and for a note of \$1,457; and the question is, whether this was such a variance or misdescription as might reasonably mislead the indorser as to the note, for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the 5th day of February, 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of

this cause, there was no other note of the said Humphrey Peake indorsed by the defendant, discounted by the bank, or placed in the bank for collection or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note. The case falls within the rule laid down by this court in the case of *Mills v. Bank of United States*, 11 Wheat., 431 (§§ 958-963, *supra*), that every variance, however immaterial, is not fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In that case, as in the one now before the court, it appeared that there was no other note in the bank indorsed by Mills; and this the court considered a controlling fact to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription then complained of.

The judgment of the circuit court is accordingly reversed, and the cause sent back with directions to enter judgment for the plaintiffs upon the special verdict found by the jury.

RHETT v. POE.

(2 Howard, 457-486. 1844.)

ERROR to U. S. Circuit Court, District of South Carolina.

STATEMENT OF FACTS.—This was an action by Poe, cashier of the Bank of Augusta, against Rhett, as indorser of a promissory note for \$8,000. The note in question was in the usual form and was given to the bank as collateral security for a bill drawn by one Timberlake upon one Smith, and accepted by the latter. Both the note and bill became due on the same day, July 11, 1837. Timberlake was a merchant who was in the habit of visiting the south during the cotton buying seasons, and in the winter of 1836 and 1837 he was in Augusta, Georgia. Neither the bill nor note was paid at maturity, and they were protested. The proof of notice to Timberlake of the protest of the bill was as follows: That the notary demanded payment and protested the bill for non-payment and notified Timberlake thereof by letter by mail, addressed to Poe, cashier of the Bank of Augusta, as was the custom in similar cases; that the notary at the time did not know where Timberlake could be found; that he had heard that he resided and had done business in Augusta, but was told upon inquiry that he had left there and that it was not known where he had gone; that it was a part of the business of the discount clerk of that bank to make diligent search for parties upon whom such notices were to be served, and that the clerk generally served them personally when they were in Augusta, and if at a distance, sent them the notices by mail; that said clerk was in Augusta at the time and would have served Timberlake if he had then been there; that the clerk searched for the notice and could not find it; that Timberlake lived in a boarding house while in Augusta; that he was insolvent at the time the notice was sent; that at that time and for some time afterwards he had a box in the postoffice of Augusta, and had directed the postmaster to forward his letters to him, and that several letters were so forwarded to him; that Timberlake left Augusta before the notice was sent there. Timberlake also testified that he had never received the notice. The defense rested chiefly upon want of due diligence in giving notice to the drawer of the bill of its dishonor.

On the trial the defendant asked for two separate sets of instructions. The first set, consisting of two instructions, were as follows:

1. That by omission to inquire for the residence of Timberlake, or to send notice after him, the plaintiff has lost his right of action against him as drawer of the bill for \$8,000.

2. That if the jury find that the note was given as collateral security for the bill drawn by Timberlake, and that Timberlake is discharged, then the plaintiff cannot recover against the defendant on the note sued upon.

The second set consisted of five instructions, all of which, except the fourth, the court refused. They were as follows:

1. The parties having shown that Timberlake had drawn upon Smith four bills, amounting in all to \$21,500, which Smith had accepted, and had at the time of the acceptance of the said bills \$10,000 in hand, received of Timberlake, to meet those bills, the defendant prayed the court to instruct the jury, that, if the evidence was believed, then Timberlake had funds in the hands of Smith, and was entitled to notice.

2. The defendant having shown that Timberlake resided in New York, and came habitually, between the months of October and January, to Augusta, and resided in Augusta during the winter and spring, and that Timberlake left Augusta on the 30th June, 1837, and that the notice of non-payment of the draft was forwarded by the notary in Charleston, to the plaintiff, on the 11th July, 1837, and nothing was shown to prove that the plaintiff had made any inquiry after Timberlake, or endeavored to give him notice. The defendant prayed the court to instruct the jury that the plaintiff had not used due diligence to give the drawer notice.

3. And inasmuch as evidence had been given, that the bills drawn by Timberlake on Smith were drawn for purchases of cotton or stock, on the joint account of Smith and Timberlake, and Timberlake had diverted the property purchased on joint account to his own use, and was therefore bound to provide for the bills which fell due in May, to the amount of \$13,500, and had not done so, the defendant prayed the court to instruct the jury, that the default of Timberlake to take up the bills for \$13,500 did not excuse the want of notice to make him liable on the bill for \$8,000.

4. And the defendant prayed the court to instruct the jury, that if Timberlake had effects at any time between the drawing and the maturity of the said bill, in the hands of Smith, he was entitled to notice.

5. The defendant prayed the court to instruct the jury, that the insolvency of the acceptor and drawer, before the maturity of the bill, did not excuse the holder from giving notice of non-payment to the drawer.

Instead of the instructions refused, the court gave its own instructions, as follows:

On the first instruction asked, the court instructed the jury that if they believed, from the evidence, that Timberlake had in the hands of Smith, when Smith accepted the bill for \$8,000, \$10,000, that Timberlake was entitled to notice of the dishonor of the bill from the holder. But if the jury also believe from the evidence that the \$10,000, in the hands of Smith, was a fund raised upon Smith's letter of credit to Timberlake, and was to be applied to the payment of purchases on joint account, and had been so applied, and that there was an arrangement afterwards between Timberlake and Smith in respect to all the bills drawn by Timberlake, amounting to \$21,500; that Timberlake was to put Smith in funds to pay bills to the amount of \$13,500 of the \$21,500,

which were to become due before the bill of \$8,000 became due, and that on Timberlake doing so, Smith was to pay the \$8,000 bill; and that Timberlake did not put Smith in funds to pay the \$13,500, and that the same were protested, of which Timberlake had notice, then that Timberlake had no right to notice of the non payment of the \$8,000 bill from the holder.

On the second instruction asked, the court instructed the jury that if they believe from the evidence that Timberlake resided in New York, and was a sojourner in Augusta, from time to time, as stated in the instruction asked, that then, as drawer of the bill, he was entitled to notice of its dishonor; but if the jury believe from the evidence, though he may have resided in New York, that he had made Augusta his residence since the fall of 1834 or 1835, and that he had removed from Augusta, and out of the state of Georgia, after the bill for \$8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill.

On the third instruction asked, the court instructed the jury that if they believe from the evidence that the bills drawn by Timberlake upon Smith were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and that Timberlake had diverted the property purchased on joint account to his own use, and that after promising Smith, the acceptor, to take up the bills to the amount of \$13,500, he had failed to do so, and had not supplied Smith with money to take up the bills for \$13,500, after the same were dishonored, up to the time when the \$8,000 draft became due, and that there was an arrangement between Timberlake and Smith, after the \$8,000 bill was accepted, that Timberlake was to put Smith in funds to take up the drafts for \$13,500, which had been dishonored, and did not do so, that Timberlake was not entitled to notice of the dishonor of the bill for \$8,000.

To the fourth instruction asked, the court instructed the jury, if they believe from the evidence that Timberlake had effects in the hands of Smith at any time between the drawing of the bill and the maturity of the said bill, that he was, as drawer, entitled to notice.

To the fifth instruction asked, the court instructed the jury that the insolvency of the drawer and the acceptor, before the maturity of the bill, did not excuse the holder of the bill from giving notice of non-payment to the drawer. But the court further instructed the jury, that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for a purchase on joint account, or a transaction in which they were partners, and that the property so purchased had been diverted by the drawer to his own use, and that the payment of all the bills had been the subject of private arrangement between the acceptor and the drawer, that then the holder was excused from giving notice of the non-payment of the bill for \$8,000.

Verdict for plaintiff.

Opinion by MR. JUSTICE DANIEL.

The instrument upon which this suit was instituted in the circuit court was, as the foregoing statement evinces, in form simply a common promissory note, signed by Benjamin R. Smith, made payable to William E. Haskell, indorsed by Haskell to Robert Barnwell Smith, *alias* Robert Barnwell Rhett, and by this last individual to Robert F. Poe, cashier of the Bank of Augusta, the plaintiff in the action. Such being the nature of the instrument, and it appearing that the formalities of demand at its maturity, and notice to the indorsers, have been regularly fulfilled by the holder, a question as to the justice of a recovery by the latter could scarcely be suggested, if the rights and obligations

of the several parties shall be viewed as dependent upon their relation to the note itself considered as a distinct and separate transaction. Such, however, is not precisely the attitude of the parties to this controversy. It is in proof that there was held by the plaintiff below, besides this note, a draft for \$8,000, drawn by Timberlake on the 6th of May, 1837, at sixty days, in favor of the plaintiff, on Benjamin R. Smith, and accepted by Smith; and further, that upon the note was written, by the plaintiff's agent, a memorandum in the following words: "This note is collateral security for the payment of the annexed draft of D. Timberlake on B. R. Smith of \$8,000." Upon the effect of both these instruments, as constituting parts of one transaction, the questions propounded to the circuit court, and brought hither for review, have arisen. The further proofs contained in this record will be adverted to in the progress of this opinion, as notice of them shall become necessary to explain the instructions prayed for, and those given by the circuit court on the trial of this cause. The second series of instructions, embracing a more extended and varied survey of the evidence than is contained in that preceding it, will be first considered.

§ 974. *Drawer who withdraws funds from acceptor not entitled to notice of dishonor.*

It is to the first, second, third and fifth instructions of this second series that exceptions are taken. To the first proposition affirmed by the court in this first instruction, it is difficult to imagine any just ground of objection on the part of the defendant below, as that proposition concedes almost in terms the prayer of that defendant. To the second branch of this instruction it is not perceived that any valid objection can be sustained; for, although it might have been true that at the date of acceptance of Timberlake's draft on Smith for \$8,000, the latter had been in possession of \$10,000, placed in his hands by Timberlake, it would not follow, under the circumstances proved, or under those assumed in the instruction, that Timberlake, as the drawer of that draft, was entitled to notice. If, as the instruction supposes, the acceptances for \$21,500, which Smith had come under for Timberlake, were drawn for the accommodation of the latter, upon the faith of funds to be furnished by him for their payment; that the \$10,000 had been furnished by Timberlake in part for that purpose, but had been withdrawn by him for his own uses prior to the maturity of the draft for \$8,000, that he should have intercepted before the maturity of the draft all the funds against which he knew the acceptances of Smith were drawn, and that he, the drawer, and Smith, the acceptor, had, before such maturity, become notoriously insolvent, under such a predicament the law would not impose the requirement of notice to the drawer upon the holder. No useful or reasonable end could be answered by such a requisition. Where a drawer has no right to expect the payment of a bill by the acceptor, he has no claim to notice of non-payment. This is ruled in the following cases: *Sharp v. Baily*, 9 Barn. & Cress., 44; 4 Mann. & R., 18; *Bickerdike v. Bollman*, 1 Term R., 405; *Brown v. Maffey*, 15 East, 221; *Goodall v. Dolley*, 1 Term R., 712; *Legge v. Thorpe*, 12 East, 171. If the \$1,000 said to have been in the hands of Smith were, by the agreement or undertaking between Smith and Timberlake, to be applied in payment of joint claims against them, and falling due before the draft for \$8,000, and had been so applied, it had answered the sole object for which it had been raised, and could not, in the apprehension of these parties, constitute a fund against which the draft of \$8,000 subsequently to

become due was drawn. Those \$10,000 were gone, were appropriated by these parties themselves. Then if, after this appropriation, there was, as this instruction assumes, an arrangement between Timberlake and Smith in respect to the bills drawn by Timberlake to the amount of \$21,500, that he was to put Smith in funds sufficient to pay \$13,500 of the amount just mentioned, which were to become payable before the \$8,000 draft, and that on Timberlake's supplying those funds, Smith was to pay the \$8,000 draft, and Timberlake failed to put Smith in funds to take up the \$13,500, and that the drafts for the same were protested, of which Timberlake had notice, he, Timberlake, could have no claim to notice of non-payment of the draft for \$8,000. There could be no reason for such a notice from the holder of the draft. Timberlake could have had no right to calculate on the payment of this draft; on the contrary, he was bound to infer its dishonor. He knew that payment of the draft for \$8,000 was dependent upon a condition to be performed by himself, and he was obliged to know from the notice of the dishonor of all his bills, that he had not performed that condition, and had thereby intercepted the very funds from which the acceptances by Smith were to be met. He, therefore, *quoad* this draft, had never any funds in the hands of Smith, and consequently never had any claim to notice of non-payment from the holder. The case of *Claridge v. Dalton*, in 4 Maule & S., 226, is strongly illustrative of the principle here laid down. That was a case in which the drawer had supplied the drawee with goods which were still not paid for. To this extent, then, the former unquestionably had funds in the hands of the latter; but on the day of payment of the bill the credit upon which the goods were sold had not expired, and the court thereupon unanimously ruled that *quoad* the obligations of the parties arising upon these transactions, the drawer must be understood as having no effects in the hands of the drawee, and therefore not entitled to notice.

§ 975. *Due diligence a question of law. Removal from state an excuse for not giving notice.*

The second instruction affirms, in the first place, what must be admitted by all, and what is not understood to be matter of contest here, namely, that whenever a party to a bill or note is entitled to notice, such notice, if not given him in person, must be by a timely effort to convey it through the regular or usual and recognized channels of communication with the party or his agent, or with his known residence or place of business. It is to so much of this instruction as is applicable to what may amount to a dispensation from the regular or ordinary modes of affecting parties with notice that objection is made; to that portion in which the court charged the jury that if they believed from the evidence that, although Timberlake may have resided in New York, that he had, since the autumn of 1834 or 1835, made Augusta his residence, and that he had removed from Augusta and out of the state of Georgia after the bill for \$8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill. It is not considered by this court that this charge, in any correct acceptance of it, trenches upon the legitimate province of the jury, or transcends the just limits of the authority of the court, or contravenes any established doctrine of the law. It is a doctrine generally received, one which is recognized by this court in the case of *The Bank of Columbia v. Lawrence*, 1 Pet., 578 (§§ 995-997, *infra*), that, whenever the facts upon which the question of due diligence arises

are ascertained and undisputed, due diligence becomes a question of law. See, also, *Bank of Utica v. Bender*, 21 Wend., 643. In the case before us every fact and circumstance in the evidence which was to determine the residence of the drawer in Augusta, or his abandonment of that residence, or his removal from the state of Georgia, the unsettled and vagrant character of his after-life, the fruitless inquiries by the notary to find out his residence, the notoriety of his having neither domicile nor place of business in Georgia, the effort to follow him with notice of dishonor of his draft, were all submitted to the jury to be weighed by them. The charge of the court should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed; with reference, also, to the reasonable conclusions which that testimony tended obviously to establish. Interpreted by this rule, it amounts to this, and this only,—a declaration to the jury that if the evidence satisfied them of the residence of Timberlake in Augusta at the time of drawing the draft, of the certainty and notoriety of his having abandoned that residence and the entire state before its maturity, leaving behind him no knowledge of any place, either of his residence or for the transaction of his business; satisfied them also of the real but unavailing effort of the notary who protested the draft to discover his whereabouts, they ought to infer that due diligence had been practiced by the holder of the draft. In the case of an indorser, with respect to whom greatest strictness is always exacted, it has been ruled that the holder of a bill is excused for not giving regular notice of dishonor to the indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. Thus, Lord Ellenborough, in *Bateman v. Joseph*, 2 Camp., 462, remarks: "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive ignorance, but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice within the custom of merchants." See, to the same effect, 12 East, 433; *Baldwin v. Richardson*, 1 Barn. & Cress., 245; *Beveridge v. Burgis*, 3 Camp., 262. It has been held, in Massachusetts, that where the maker of a promissory note had absconded before the day of payment, presentment and demand could not be required of the holder in order to charge the indorser. Opinion of Parsons, C. J., in *Putnam v. Sullivan*, 4 Mass., 53. In *Duncan v. McCullough*, 4 Serg. & R., 480, it was ruled that if the maker of a promissory note is not to be found when the note becomes due, demand on him for payment is not necessary to charge the indorser, if due diligence is shown in endeavoring to make a demand. *Hartford Bank v. Stedman*, 3 Conn., 489, where the holder of a bill who was ignorant of the indorser's residence sent the notice to A., who was acquainted with it, requesting him to add to the direction the indorser's residence, it was held that reasonable diligence had been used. The measures adopted in this case by the holder of Timberlake's draft, when viewed in connection with the condition and conduct of the drawer himself, appear to come fully up to the requirement of the authorities above cited; and, therefore, in the judgment of this court, affect him with all the consequences of notice, supposing this now to be a substantial proceeding upon the draft itself.

§ 976. *If drawer and acceptor are copartners, the drawer is not entitled to notice of dishonor.*

Next and last in the order of exceptions is the fifth instruction. The first position in this is given almost literally in the terms of the prayer. The court proceeds further to charge that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and that the payment of the bills had been the subject of private arrangement between the acceptor and drawer, that then the holder was excused from giving notice of the non-payment of the bill for \$8,000. With respect to the exception taken to this instruction, all that seems requisite to dispose of it is the remark that if the drawer of the bill was in truth the partner of the acceptor, either generally, or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill, by the holder to the drawer, need not have been given. The knowledge of the one partner was the knowledge of the other, and notice to the one notice to the other. Authorities upon this point need not be accumulated; we cite upon it *Porthouse v. Parker*, 1 Camp., 82, where Lord Ellenborough remarks, speaking of the dishonor of the bill in that case, "as this must necessarily have been known to one of them, the knowledge of one was the knowledge of all;" also, *Bignold v. Waterhouse*, 1 Maule & S., 259; *Whitney v. Sterling*, 14 Johns., 215; *Gowan v. Jackson*, 20 Johns., 176.

§ 977. *Abstract propositions of law not to be given as instructions, which must be applied to facts.*

Recurring now to the first series of instructions prayed for, we will consider how far the two propositions presented by them were warranted by the correct principle upon which the opinion of the courts may be invoked; and how far the court was justifiable in rejecting the propositions in question, upon the ground either of want of connection with any particular state or progress of the evidence, or of support and justification as derived from the entire testimony in the cause. It is a settled rule of judicial procedure, that the courts will never lay down as instructions to a jury, general or abstract positions, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts, upon which the questions of law naturally and properly arise.

§ 978. *Instruction not sustained by evidence is error.*

It is equally certain that the courts will not, upon a view of the testimony, which is partial or imperfect, give an instruction which the entire evidence in a cause, when developed, would forbid. Tested by these rules, the two instructions prayed for in the first series are deemed to be improper; they are accompanied with no statement of the testimony as their proper and immediate foundation; they are bottomed exclusively upon assumption, and such assumption, too, as the testimony, taken altogether, is believed to contradict. The court, therefore, properly refused these instructions; for this refusal it was by no means necessary that the causes should be assigned by the court *in extenso*; these are to be seen in the character of the instructions themselves, and in the testimony upon the record. This court has thus considered and disposed of the several prayers for instruction in this cause, and of the rulings of the circuit court thereupon. Whilst this procedure has been proper with the view of ascertaining how far the rights of the parties have been affected by the several

questions presented and adjudged in the circuit court, it is our opinion that the true merits of this controversy are to be found within a much more limited and obvious range of inquiry than that which has been opened by these questions.

§ 979. *Guarantor not entitled to same notice of dishonor as surety. Nature of guarantor's contract.*

The note on which the action below was instituted was given as a guaranty for the solvency of the parties to the bill for \$8,000, drawn in favor of the plaintiff, and for its punctual payment at maturity. Such being the character and purposes of the note, was it necessary, in order to authorize a recovery upon it, that every formality, all that strictness should have been observed in reference to the bill intended to be guaranteed, which it is conceded are indispensable to maintain an action upon a mercantile paper against a party upon that paper? It is contended that a guaranty is an insurance of a punctual payment of the paper guaranteed; is a condition and a material consideration on which this paper is received, and therefore that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here stated, the authorities concur in making a distinction between actions upon a bill or note, and actions against a party who has guaranteed such bill or note by a separate contract. In the former instances, notice, in order to charge the drawer or indorser, is, with very few established exceptions, uniformly required; in the latter, the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course. In *Warrington v. Furber*, 8 East, 242, where the guaranty was not by indorsement of the paper sued upon, and the action was upon the contract, Lord Ellenborough said, "that the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where, by the law merchant, a demand and a refusal by the acceptor ought to be proved to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure as it were the solvency of the principal; and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him." *Le Blanc, J.*, says, in the same case: "There is no need of the same proof to charge a guarantee as there is a party whose name is on a bill of exchange; for it is sufficient, as against the former, to show that the holder could not have obtained the money by making demand of it." The same doctrine may be found in *Philips v. Astling*, 2 Taunt., 206. So, too, Lord Eldon, in the case of *Wright v. Simpson*, 6 Ves. Jr., 732, expresses himself in terms which show his clear understanding of the position of a collateral guarantee or surety; his language is: "As to the case of principal and surety, in general cases, I never understood that, as between the obligee and the surety, there was an obligation to active diligence against the principal, but the surety is a guarantee, and it is his business to see whether the principal pays, and not that of the creditor." The case of *Gibbs v. Cannon*, 9 Serg. & R., 198, was an action against a guarantor who was not a party on the note, upon his separate contract. The supreme court of Pennsylvania decided in this case that, provided the drawer and indorser of the note were solvent at the maturity of the note, notice of non-payment should be given to the guarantor, and that the latter, under such circumstances, may avail himself of the want of notice of non-payment, but it places the burden of proving solvency, and of injury flow-

ing from want of notice, upon the guarantor. The last case mentioned on this point, and one which seems to be conclusive upon it, is that of *Reynolds v. Douglass*, 12 Pet., 497, in which the court establish these propositions:

1. That the guarantor of a promissory note, whose name does not appear upon the note, is bound without notice, where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of non-payment.
2. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this court, in 12 Pet., it would seem that this case should admit of neither doubt nor hesitancy. The note on which the action was brought was given as a guaranty for the payment of the bill for \$8,000, as is proved and, indeed, admitted on all hands. It is the distinct and substantive agreement by which the guaranty of the bill was undertaken. It is established by various and uncontradicted facts and circumstances in the cause, and finally by the solemn admissions of Timberlake, the drawer, and Smith, the acceptor of the bill, both of whom have testified in the cause that, at the maturity of the bill, they were both utterly insolvent; that Timberlake was probably so before the commencement of these transactions; and that Smith, before the maturity of the bill, had made an assignment of every thing he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

Under such circumstances, to have required notice of the dishonor of the bill would have been a vain and unreasonable act, such as the law cannot be presumed to exact of any person. Upon a review of the whole case, we think that the judgment of the circuit court should be affirmed.

HARRIS v. ROBINSON.

(4 Howard, 336-352. 1845.)

ERROR to U. S. District Court, Northern District of Alabama.

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—Under the bill of exceptions in this case, the proper practice in some important particulars respecting notices of non-payment of promissory notes and bills of exchange is involved. It appears that the defendant was indorser of such a note, and at the trial the court instructed the jury that, if they believed that the notary made the inquiries stated in his depositions, and sent notice to the defendant, as therein stated, he being ignorant of his true residence, that the notice was sufficient to charge the defendant, and that, under the circumstances of the case as proved, it was not necessary to make inquiry of the holder of the note as to the residence of the indorser; to which instructions the defendant excepts. The substance of the inquiries which were made, as shown in the depositions, was that the note, being "payable and negotiable at the Planters' Bank of the State of Tennessee at Nashville," the notary, after presenting it and payment being refused, inquired of those "not unlikely" to know the residences or nearest postoffices of the indorsers, as they were not known to him. He recollects, as one of whom he inquired, the cashier of the bank, and was informed by him that Harris lived in Madison county, Alabama, but that he did not know his nearest postoffice.

The notary made similar inquiries of a Mr. Estell, who had resided in Madison county, but was found to be ignorant of the defendant's nearest postoffice; and the notary adds that, knowing "no other source from whence to derive information as to where to direct" the notice, he "accordingly directed" this and others "to Madison county, Alabama, knowing that, from the general rules of the postoffice department, they would be sent to Huntsville, the county seat."

The only "other circumstances of the case as proved" to which the judge probably refers are that the name of the present plaintiff appears on the back of the note as the last indorser; that he was then an inhabitant of Nashville; and that Joseph Bradley, a witness for the defendant, testified that, before the note reached maturity, he, then living at Huntsville, received notices from Robinson for Harris and the other indorsers, "requesting him to hand them to the defendant and the other parties," in order "to remind them when said note would fall due," and that he directed the notice for Harris to his postoffice at Cross-Roads, in Madison county. It is further stated, as a part of the case, "there was no evidence to show that the notary knew who was the holder of the bill, or where he resided." These being the facts as proved concerning the inquiries and circumstances to which the judge refers, he properly considered it a question of law whether, upon those facts, if believed by the jury, it was necessary to make inquiry of the holder himself as to the residence of the indorsers, and whether the notice as given was in all respects sufficient to charge the defendant. *Bank of Columbia v. Lawrence*, 1 Pet., 583 (§§ 995-997, *infra*); 10 Pet., 581 (§§ 950-957, *supra*); *Bryden v. Bryden*, 11 Johns., 187; *Haddock v. Murray*, 1 N. H., 140.

It is to be regretted that some other facts were not agreed or referred to the jury, such as the distance of the residence of the defendant, as well as of the Cross Roads postoffice, from Huntsville; whether he was accustomed to receive letters at the former place; and who in truth was the holder of the note at the time it fell due. But the judge properly submitted to the jury whatever facts the parties chose to present; and it is usually the best course thus to submit complicated questions of law and fact, accompanying them, however, with due legal instructions as to the rules which ought to govern. 3 Kent's Comm., 107. Then the instructions can as easily be revised as if the case was withdrawn from the jury, and, what is very desirable, the rules as to commercial paper can be preserved as uniform over the commercial world, and the holders of it have, as they ought to have, a fixed standard, on a like state of facts, for protecting as well as knowing their rights. 11 Johns., 187; 1 Durn. & E., 168; 1 N. H., 140.

§ 980. *Any agent of the holder may give notice of protest to an indorser.*

The first objection that has been raised under the instructions or ruling of the court is, that the notice does not appear to have been given by the holder of the note. There is no evidence here to indicate any person except Robinson or the bank as the holder at that time, and probably at the trial it was taken for granted to be one of them, without making any point concerning it to the court or jury. Whichever it was, there is no pretense but that the notary came into possession of the note from the agent of the holder lawfully, and with a view, as agent, to make the demand, and, if not paid, to give due notice. When notes are left at banks for collection, the notaries may often be ignorant of the names of the holders, as the notes are handed to them by the cashier. He would as properly do this business when employed by an agent of the holder,

as by the holder himself; and, having the note in either of these ways, he would be competent in law to deliver it up if paid, or, if not paid, to give notice of that fact to the indorsers. It has been adjudged that any agent of the holders may give notice. *Chitty on Bills*, 527; *Bank of Utica v. Smith*, 18 Johns., 239, in point; *Stewart v. Kennett*, 2 Camp., 177, by Lord Ellenborough, 178; 3 Kent's Comm., 108; *Stanton v. Blossom*, 14 Mass., 116; 7 id., 486; 9 id., 423. The agent to collect the note may do it. *Mead v. Engs*, 5 Cow., 303; 3 Bos. & Pull., 599; 2 Taunt., 38; 15 East, 291; 9 East, 347; 1 Camp., 349; *Ogden v. Dobbin*, 2 Hall, 112. And in 9 Yerger, 255, it was decided that a notary public is a suitable agent for this purpose. It was done by a notary of the agent in 2 Hall, 112. The meaning of the rule that the holder must give notice is, not that he may not do it by an agent, as any other commercial act, but that it shall not be given by some other party on the bill not standing in the relation in which the holder does, and who has no right to give it and try to make the indorser responsible when the holder may be willing to waive a resort to him. *Tindal v. Brown*, 1 Durn. & E., 170; 7 Ves. Jr., 597; 1 Esp., 333. In this case the notice is express, that "the holder looks to you for payment as indorser" of the bill, and the notary had the note in his possession (11 East, 117; 2 Camp., 178), in order to make demand and give notice in behalf of the holder.

§ 981. *Notary need not inquire of unknown holder as to indorser's address.*

The only remaining questions which are material are, whether any further inquiry, and especially of the holder of the note, ought to have been made by the notary, as to the residence of the indorsers, before dispatching the notices, and whether the notices sent were sufficient, considering the information he obtained, and his ignorance of the true residence of the indorsers. It was a part of the evidence that the indorsers lived remote in another state, and that the notary was ignorant of the exact places of their abode. Under such circumstances, he was undoubtedly bound to make inquiries of persons likely to be acquainted with their residences. This he did, and, among them, of the cashier of the bank, the person most likely to be acquainted with the place of abode of those making paper negotiable and payable at the bank, and of another person who had lived in the same county with the indorsers, and not getting entire certainty from either, he sent the notices, addressed as accurately as his information enabled him, to the county where they lived, and from the capital of which the notices would be likely to be forwarded to the indorsers. This, in most cases, might be sufficient as to inquiry, and especially where nobody was known to reside near who was able and bound to give fuller and more accurate information on that subject. It would usually satisfy a jury that the due diligence had been exercised which, and which only, the law imposes. *Chitty on Bills*, 525, 8th Amer. ed.; 2 Camp., 461. But it is argued in this case that the holder probably lived in Nashville, and could and ought to have been resorted to on this occasion for such information. *Chitty on Bills*, 525. This argument is not without force, and might be insuperable if the notary knew who the holder was, and did not obtain otherwise all the intelligence on this subject which the holder probably possessed. But the evidence not showing that he knew him, did he resort to the holder's agent, and obtain from him all the information on this point which the holder himself was likely to have possessed?

Supposing the bank to have been the holder, the cashier, its agent, was resorted to, and doubtless gave all the intelligence in possession of the bank on this subject. But supposing Robinson to have been the holder, which is the

only other probable presumption on the evidence, and which is contended for by the defendant, and then the cashier was doubtless his agent to collect the note, and received from Robinson all he knew as to the residences of the prior indorsers, and communicated it to the notary when applying to him on the subject. This is not only the general inference from what would be likely to take place on such occasions, but is strengthened in this case from the testimony of Bradley, on the part of the defendant, saying that Robinson, a short time prior, had sent notice to him at Huntsville for these parties, stating when the note fell due, and that he requested him to hand them to these indorsers. From this it is obvious that Robinson supposed they resided in Huntsville, or he would have sent the notices to a different place; and he would not probably have desired a resident of Huntsville to hand them to the indorsers, unless he believed they lived in the same place. There can be little doubt, on this evidence, that the real holder, whether the bank or Robinson, did give to the cashier all the information the holder possessed on this subject, and that the cashier communicated the same to the notary, and that the latter would have obtained no more had he known and resorted to the holder in person, and that the cashier, in conforming to this information, by addressing notices to Madison county, supposing that, by the rules of the postoffice department, they would be sent to Huntsville, the county town, did all which duty required of him.

§ 982. *Authorities reviewed as to diligence necessary to find residence of indorser.*

Beside the light flung on this subject, and favorable to this conclusion, by some of the general positions in the authorities cited at the bar, there are several precedents which bear more directly on a state of facts such as exists in this case, and which deserve special notice, as they fortify the correctness of the views we have presented. In *Stewart v. Eden*, 2 Caines, 121, the court ruled that the holder was bound to inquire no further than a reasonable and prudent man should, and said: "We do not exact from him every possible exertion," or inquiry. Only "ordinary diligence" is required in inquiring. *Catskill Bank v. Stall*, 15 Wend., 367. Only "reasonable diligence." *Fisher v. Evans*, 5 Binn., 543. So in *Chapman v. Lipscombe*, 1 Johns., 294, where a bill was drawn and dated in New York city, on persons there, and accepted, but protested afterwards for non-payment, and it did not appear that the holder knew where the drawers lived, but sent two notices to them, one addressed to New York and one to Norfolk, it was held that they were good, though the drawer in fact lived in Petersburg. In that case, inquiry was made at the banks and elsewhere, and notice was sent in conformity with the information received; but he did not inquire of the acceptors, who lived in New York, and could have told him correctly where the drawers lived. In 3 Kent's Com., 107, it is laid down that notice need not always be sent to the postoffice nearest to the indorser's residence. It suffices if sent to the nearest which can be ascertained on due inquiry. And in 1 Pet., 578 (§§ 995-997, *infra*), and 2 Pet., 551 (§§ 964-970, *supra*), where a notice like this was addressed to the indorser, as belonging to the county in which he lived, the same rule is recognized. It is true, that there the party in fact resided near the county seat or received some of his letters there, about which there is no particular proof here; but it is said to be proper to address a notice in that way, "if after due inquiry it is the only description within reach of the person sending the notice." It is enough to send the notices to the place where the information received reasonably requires him to send them. 2 Car. & Payne, 300; 1 Barn. & Cress., 243; Bank of

Utica v. Davidson, 5 Wend., 587. If the place it reaches is the wrong one, he is then not in fault. 5 Yerg., 67. All his duty in this case is to use "ordinary diligence" on the subject, and not to insure at all events that the notice actually reaches the indorser. 1 Pet., 582; 10 id., 581. In *Barr v. Marsh*, 9 Yerg., 255, it was held that the holder was not bound or presumed to know where the indorser lived. But it was enough if the agent of the indorsee or holder made due inquiry, and directed the notices to the places indicated by the information, though wrong. It was the best that could be done under the circumstances. *Nichol v. Bate*, 7 Yerg., 307; *Dunlap v. Thompson*, 5 Yerg., 67. Where so many postoffices exist, the residences of parties change so often, and people live so remote from each other, as in this country, it would clog the circulation of negotiable paper if the holder or his agent was bound to know every alteration in the residence of indorsers. The inquiries were at the bank, and of other persons, in the case of *Barr v. Marsh*, much as in this instance. In *Sturges v. Derrick*, Wightw. Exch. Cas., 77, an inquiry was made of the son of an indorser as to his residence, and he did not know it, and the court held that "sufficient diligence had been used." And in *Stuckert v. Anderson*, 3 Whart., 116, the case itself on examination shows that an inquiry of the officers of the bank where the note was discounted is deemed sufficient, if there be no others near who are likely to know more as to the residence of the indorsers.

Some cases, it is true, have been more stringent, such as 13 Johns., 434, and 3 Camp., 262, but they do not contradict our conclusions; as in the first one, the notice was sent to a wrong place quite remote, and the inquiry is said to have been limited; while in the last, no inquiry was made except at the "house" where the bill was payable. Most of the cases referred to on this point, of due diligence in making inquiry, are rather cases as to due diligence in respect to the time when the notices are sent. Some of those, as bearing on this, allow a very liberal time to make inquiries where the residence is remote (2 Barn. & Cress., 246; 8 id., 393; 2 Dowl. & Ryl., 385; 2 Mood. & Ry., 359), and only require the notice to be sent as soon as information is obtained under proper exertion. 1 Barn. & Cress., 245; Gow, 81; 2 Camp., 462. And some go so far as to excuse giving notice at all if the place of residence at the time is unfixed (4 Camp., 285) or cannot be ascertained. 10 Pet., 580, and 9 Wheat., 591 (§§ 754-759, *supra*), before quoted. In the case now under consideration, then, the conclusion seems well sustained that reasonable inquiries were made as to the residences of the indorsers, and notices promptly dispatched, by a proper agent, in conformity with the information received. Whether the notices were actually received or not, and whether, if received, it was not as soon as if they had been directed to the Cross Roads postoffice, does not appear, nor is it material, as the circumstances before mentioned show due diligence, and thus make out a sufficient case, whether the notices ever reached the indorsers or not. Let the judgment below be affirmed.

Mr. Justice McLEAN dissented, holding that the holder of the note, knowing the residence of the indorser, is bound to inform the notary, and that the notary is bound to make inquiry of the holder. *Preston v. Daysson*, 7 La., 7; *Hill v. Varnell*, 3 Greenl., 233; *Hartford Bank v. Stedman*, 3 Conn., 489; *Beveridge v. Burgis*, 3 Camp., 262; *Bateman v. Joseph*, 12 East, 433; Story on Prom. Notes, 370, note 1, cited. Mr. Justice M'KINLEY dissented.

FRENCH v. BANK OF COLUMBIA.

(4 Cranch, 141-164. 1807.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The material question in this case is, whether a person who indorses a promissory note for the accommodation of the drawer be discharged from the responsibility which the indorsement creates, by the failure of the holder to demand payment of the maker in the usual time, and to give notice to the indorser that the note is not paid.

§ 983. *Demand and notice necessary to charge accommodation indorser of note.*

That by the general rule of law, the omission to demand payment from the maker when the note becomes payable, and to give notice to the indorser that payment has been refused, discharges the indorser, is admitted; but from this general rule of law exceptions exist, and the counsel for the defendants in error contend that the case stated is comprehended in one of these exceptions. It is laid down as an exception to the general rule, in its application to bills of exchange, that if the drawer has no effects in the hands of the drawee, notice of the dishonor of the bill may be dispensed with, and the case of an indorser of a promissory note for the accommodation of the maker is said to come within the same reason and the same law. The correctness of this position will be best tested by considering the reason of the rule, and the reason for the exception. Why is it that notice must immediately be given to the drawer that his bill is dishonored by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice not merely as an indemnity against actual injury, but as a security against a possible injury, which may result from the laches of the holder of the bill. To this security, then, it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule. A drawer who has no effects in the hands of the drawee is said to be without the reason of the rule, and therefore to form an exception to it. This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder to give notice of its being dishonored. In reason it would seem that in such cases only can the exception be admitted, and that the necessity of notice ought to be dispensed with only in those cases where notice must be unnecessary or immaterial to the drawer.

§ 984. — *authorities reviewed.*

The reasoning of the judges in most of the cases which have been cited would seem to warrant this restriction of the exception. The case of *Bickerdike v. Bollman*, 1 Term R., 405, was a bill drawn by a debtor on his creditor, without a single accompanying circumstance which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice Ashurst gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular rea-

son given by Justice Ashhurst for his opinion is clearly inapplicable to any case in which the drawer was justified in drawing. Into the opinion of Justice Buller some general reasoning is introduced from which it is fairly deducible that he considered the drawer as having no right to expect that the bill would be paid and as being liable to no injury from the want of notice, and that these were the true grounds of the exception. He says, "If it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored." These observations were in fact applicable to the case, for the drawer was the debtor of the drawee, and had no right to draw the bill, nor reason to expect that it would be accepted. This principle was recognized in *Goodall v. Dolly*, 1 Term R., 712, in which the same idea, so far as respects the impossibility of injury to the drawer, was repeated. This point came on again to be considered in the case of *Rogers v. Stephens*, 2 Term R., 713, in which, as between the drawer and drawee, there was no pretext of a right to draw. It was said that a third person had stated himself to have funds in the hands of the drawee; that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent that, in the opinions of Lord Kenyon and Justice Grose, they would have been decisive in favor of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer. Lord Kenyon states the reason why notice need not be given to the person who draws without funds in the hands of the drawee to be, "because the drawer must know that he had no right to draw on the drawee." The opinions of Lord Kenyon and Justice Grose in this respect, though not assented to, were not controverted by Justice Ashhurst. The decision in *Rogers v. Stephens*, 2 Term R., 713, was made on the authority of *Bickerdike v. Bollman*.

It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and therefore as not coming within the exception to the general rule. The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction. Neither can it be truly said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honored. Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true when at the time of drawing the drawer has no reason to expect that his bill will be paid. A person having a right to draw, and a fair right to expect that his bill will be honored, would not come within the reason of the exception, and therefore, it may well be contended, ought not to be brought within the exception itself. This doctrine appears to be contradicted in the case of *Walwyn v. St. Quintin*, 1 Bos. & Pull., 652. In that case the bill was drawn to accommodate the indorser, who had previously placed securities, on which he wished to raise money, in the hands of the acceptor; but the drawer had no effects in his hands. It was determined that, in this case, notice to the drawer was unnecessary. If this determination should be considered

without examining the reasoning on which it was founded, the reader would conclude that the single circumstance of drawing without funds in the hands of the drawee belonging to the drawer subjected him, without notice, to the payment of his bill, if dishonored, at any period of time when not barred by the act of limitations, and that no demonstration of his perfect right to draw, or of the loss to which the want of notice had exposed him, could relieve him from the claim of the holder of the bill. For in this case the drawee, having accepted on funds, the drawer had a right to expect that the bill would be paid, could not be chargeable with fraud in drawing nor required to prepare other funds to prevent the disgrace and injury of his bill's being dishonored, or to take measures to secure himself against the acceptor or indorser. He does not appear to have come within any one reason assigned in the cases of *Bickerdike v. Bollman* or of *Rogers v. Stephens*, for the exception stated in those cases to the general rule. This induces the necessity of examining with particular attention the reasons given by the judge, which must be considered as explanatory of the decision. In delivering the opinion of the court Lord Chief Justice Eyre said: "The true fact is that this was the acceptor's bill and not the drawer's." "The transaction in this case was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor." "It seems clear that notice can be of no use to him, his situation being this: that if the acceptor do not pay, he must, and may then, and not till then, resort to the acceptor to be reimbursed. Notice, therefore, can amount to nothing, for his situation cannot be changed."

It is observable that the principle supposed to be laid down in the cases previously adjudged as constituting the reason for the exception is here expressly recognized, and forms the great and operative motive for the judgment of the court. It is that notice could be of no use; that the drawer could not avail himself of it; that he could take no step which would in any manner change his situation; that he could have no recourse against the acceptor until he paid the bill. In no case is the reason of the exception more explicitly given, and the only difficulty is to apply the reasoning to the facts as reported. The court seems to have supposed that, since the drawer could not maintain an action against the acceptor until he had taken up the bill, that it was perfectly useless to enable him, by proper notice, to employ those other various means which he might have taken to secure himself. Such is not the reasoning of the judges in the cases previously decided, and this reasoning certainly would not be permitted to apply to an indorser who had given value for the bill, not knowing that it was drawn without funds in the hands of the drawee. Yet he would be unable to recover from the drawer until he had taken up the bill. If an action could not have been maintained, might not the drawer have effects of the drawee in his hands which he might retain, or might not various other means of saving himself be neglected in consequence of the opinion that the bill would be paid? If this might be, how can it be true that notice would be of no use to him? If the fact even be that the drawer could only sue the acceptor in such a case as this, after having himself discharged the bill, still he ought to have notice, that he might immediately take it up for the purpose of proceeding against the acceptor. The reasoning of Lord Chief Justice Eyre, to be perfectly consistent with itself and with the principles laid down in previous decisions, would seem to be predicated on an understanding on the part of the drawer when the bill was drawn that it was not to be paid by the acceptor, or on the idea that a bill drawn without funds is not a commercial transaction,

and not subject to commercial rules. The presumptions are rendered the stronger from the cases afterwards stated, in which a drawer without funds in the hands of his drawee would still be entitled to notice. These are "acceptances on the faith of consignments from the drawer not come to hand," and "acceptances on the ground of fair mercantile agreement;" to which, he says, may possibly be added many others. If the exception admits of these exceptions and of many others, it would be difficult to apply it to any case of a fair transaction, where the drawer had really a right to draw, unless it be supposed not to be governed by the law merchant.

The judge next proceeds to describe the case in which notice is not requisite. He says: "Where the drawer has no effects, and has no fair pretense for drawing, or where he draws without effects intended to be applied in payment and only for the purpose of raising money by discount for himself, and *a fortiori* for the acceptor, it is fairly deducible from the cases that notice need not be given." It is not only necessary that the drawer should have no effects, but also that he should have no fair pretense for drawing. Now he may have a fair pretense, as in the case of a "fair mercantile agreement," without having any funds in the hands of the drawee, which notice of non-acceptance of the bill might enable him to withdraw; and yet in such case it would appear, from the language of the court, that notice could not be dispensed with. "Where he draws only for the purpose of raising money by discount for himself, and *a fortiori* for the acceptor," notice need not be given. Where he draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill. But how can the same reasoning be said to apply *a fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor were funds of the drawer in his hands, on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was not to pay the bill. The case of *Walwyn v. St. Quintin*, then, can only be supported on the idea of an understanding that the drawee was not to pay the bill, or that a bill, drawn, not in the usual course of business, is a transaction to which commercial rules do not apply. In the case of *Whitfield v. Savage*, 2 Bos. & Pull., 277, the drawer had funds in the hands of the acceptor, and the decision turned upon that point.

The reasoning on the cases of 'protested bills has been gone into the more at large, because it has been considered as applicable to promissory notes indorsed under the statute of Anne, which is admitted to be in force in Maryland. The indorser has been considered as the drawer, and the maker of the note as the acceptor; and in all cases of an indorsement for accommodation, the indorser is likened to a drawer without funds in the hands of the acceptor. Where the money raised upon the note is received by the indorser, so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is unquestionably without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the maker. But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the

hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor, before the draft becomes payable; the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of non-payment could be as little dispensed with in this case as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use.

Notice of non-payment by the maker is necessary, because the undertaking of the indorser is conditional; and wherever, in fact, the transaction is such that the maker of the note ought in justice to pay it, and is bound ultimately to make it good, it would seem reasonable that payment should be demanded from him, and that reasonable notice of non-payment should be given to the indorser. If, however, the course of decisions be otherwise, the indorser of a note for the accommodation of the maker must come within the exception which dispenses with notice in his case. The cases which have been adjudged in England on promissory notes are anterior, in point of time, to the cases of *Walwyn v. St. Quintin*, and of *Whitfield v. Savage*. The first which has been cited is *De Berdt v. Atkinson*, 2 H. Black., 336. This note was indorsed for the accommodation of the maker, the indorser well knowing at the time that the maker was insolvent. Four judges who tried the cause were unanimously of opinion that want of notice did not discharge the indorser. The opinion of the chief justice was founded on the known insolvency of the maker, and the consequent impossibility that loss could be sustained by the indorser from want of notice. The opinion of Justice Buller was founded on the circumstance that the note was indorsed for the accommodation of the drawer. He states explicitly that the general rule is only applicable to fair transactions, and by fair transactions he means "bills or notes given for value in the ordinary course of trade." Justices Heath and Rooke accorded in the decision, but whether for the reasons assigned by the chief justice, or for those assigned by Justice Buller, or for both, does not appear.

The same point came on to be considered in the case of *Nicholson v. Gouthit*, 2 H. Black., 609. This was a strong case, because the indorsement was made in consequence of a previous engagement on the part of the indorser to guaranty the payment of a debt due from the maker of the note, who appears, from the transaction, to have been in bad circumstances at the time, and who became insolvent before the note was payable. From his connection with the maker, and from other circumstances, the indorser must have known that the maker would not pay the note, and it was the understanding of all parties that it should be paid by the indorser. The justice of the case was said to be clearly in favor of the plaintiff, and under an impression that the want of notice in this case could not injure the plaintiff, the lord chief justice had, at the trial, instructed the jury that it was unnecessary, and, indeed, that it might be considered as received by anticipation. In this case the note was not made merely to raise money, but was made to pay a debt. The indorser, however, gave no value for it, and, if likened to the drawer of a bill of exchange, he had drawn without funds in the hands of the acceptor, and with a knowledge that the acceptor would not pay the bill. But in the argument in favor of a new trial, the counsel contended that the law upon a promissory note was different, in this respect, from the law on a bill of exchange, and though notice of the dishonor of a bill drawn without funds in the hands of the drawee need not be given, yet the rule in the case of promissory notes is totally different,

and notice must in all cases be given to the indorser. In delivering the opinion of the court, Lord Chief Justice Eyre assented to this distinction, and admitted the rule with respect to notice to the indorser to be as stated. He therefore reversed his own decision at *nisi prius*, and granted a new trial upon the strict law, contrary to his ideas of the justice of the case. Heath and Rooke concurred in this opinion. Buller was not present, and, reasoning from his opinion in the case of *De Berdt v. Atkinson*, it is probable he would not have concurred in the decision of this case.

§ 985. *When notice to accommodation indorser may be dispensed with.*

However, then, the law may be with regard to the drawer of a bill of exchange who from other circumstances may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, by the case of *Nicholson v. Gouthit*, that the law with regard to a promissory note is different, and that if, in any case where the note is made for the benefit of the maker, notice to the indorser can be dispensed with, it is only in the case of an insolvency known at the time of indorsement. In point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice than in the case of an indorsement for accommodation, the maker having received the value. This court is of opinion that the circuit court erred in directing the jury that the laches of the plaintiffs, in failing to demand payment of the maker of the note, and to give notice of non-payment to the indorser, did not deprive the plaintiffs of their remedy against the indorser, and, therefore, the judgment rendered in this case is reversed, and the cause remanded for further trial. A new trial, with instructions, etc.

Judgment reversed.

WILDES v. SAVAGE.

(Circuit Court for Massachusetts: 1 Story, 22-38. 1839.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The plaintiffs are bankers, doing business in London and in Boston. Samuel Austin, Jr., is their agent and attorney. In June, 1836, James S. Bruce, a merchant of Boston, applied to Mr. Austin for a credit upon the plaintiffs for £2,000, which said Austin agreed to issue, in behalf of the plaintiffs, upon condition that the goods purchased with the proceeds should be consigned to the plaintiffs, and that, in addition thereto, as a further security, said Bruce should furnish a personal guaranty to the amount of £500. The defendant agreed to become such guarantor, and thereupon said Austin gave to said Bruce a letter of credit for the sum aforesaid, on behalf of the plaintiffs, dated June 7, 1836, to be drawn for on account of said Bruce, by Joseph Tuckerman, Jr., then about to proceed to the East Indies, or, in his absence, by the house of Russell & Co. of Canton. Upon the letter of credit Bruce, by an indorsement in writing, promised to place the plaintiffs in funds to cover the drafts with a banker's commission, interest, charges, etc., or settle the same in Boston. And the defendant, by another indorsement in writing, guarantied to the plaintiffs a punctual fulfilment of Bruce's agreement, to the extent of £500, promising in case of his default to pay that amount on demand to the order of the plaintiffs. Joseph Tuckerman proceeded to the East Indies soon after the date of the letter of credit. On the 28th of November, 1836, Bruce became insolvent and executed a general assignment, pursuant to the statute of Massachusetts of 1836. The defendant became a party to the assignment on the day

of its date, and received dividends on the 1st of July, twenty per cent.; in October, 1837, fifteen per cent., and on September 3, 1838, ten per cent., but he has never made any claim on account of the said guaranty. On the 25th of April, 1837, Russell & Co., in the absence of Tuckerman, drew on the faith of said letter of credit and for account of said Bruce, a bill on the plaintiffs, for £2,000, payable to the order of the plaintiffs at six months' sight. The said bill was in part payment of a shipment of teas made by said Russell & Co. to Boston, for account of said Bruce, and consigned to the plaintiffs. Russell & Co. remitted the bill directly to the plaintiffs, and being then indebted to them, the said bill was received by the plaintiffs, on or about October 6, 1837, and passed to the credit of Russell & Co. in account current. On the 25th day of June, 1837, the plaintiffs suspended payment, and after that day declined accepting all bills drawn under letters of credit, heretofore granted by said Austin. Their failure and refusal to accept bills were publicly known in Boston about the 15th of July, 1837, and the defendant, who is conversant with such matters, had knowledge thereof on or soon after that day.

On the 2d of May, 1836, Austin, as agent aforesaid, gave to Bruce another letter of credit, upon which the defendant entered into a guaranty of the same date. A bill was drawn under this last mentioned letter, and on presentment thereof to the plaintiffs in London, they refused acceptance thereof, and wrote to Bruce a letter, under date of June 29, 1837. This letter was received by Bruce on or about the 9th of August, 1837, and its contents were made known by Bruce to the defendant, in the course of a few days after its receipt. The teas purchased with this bill were received in Boston by Mr. Austin, as the attorney of the plaintiffs, about August 28, 1837. On October 6, 1837, the plaintiffs notified to Mr. Bruce, by letter, that Russell & Co. had drawn on them for £2,000, under said letter of credit, and that said bill would fall due on the 8th of April then next, and requested him to provide for its payment with their partner in New York, or their agent in Boston. On the 5th of September, 1837, Bruce executed to Russell & Co. an assignment of all his interest in the teas then in the hands of Austin, which assignment was procured in Boston by Mr. Forbes, to secure Russell & Co. in case the plaintiff should not accept and pay the said draft of £2,000.

On the 5th of May, 1838, Mr. Austin made a formal demand on Mr. Bruce for the fulfilment of his engagement, stating that he had received intelligence that the bill had been received and passed to the credit of Russell & Co. by the plaintiffs. To this letter Mr. Bruce made no answer. On the 13th of October, 1838, Mr. Austin repeated that request by letter to Mr. Bruce, to which Mr. Bruce made no answer; in which last letter Mr. Austin notified to Mr. Bruce, that he should, after the Monday following, sell the teas, holding him and the defendant accountable for the deficiency, if any. The teas were afterwards sold from time to time by Mr. Austin, who remitted the proceeds to the plaintiffs in London; and on making up the account it appeared that they fell short of the amount due the plaintiffs by the sum of £728. The last parcel of the teas was sold in January, 1839; and Mr. Austin, on the 4th of March, notified to Mr. Bruce that he had received the account from the plaintiffs, showing that deficiency. In the autumn of 1838, Mr. Austin verbally notified to Mr. Savage, that the teas were on sale, and would probably leave a deficiency of more than £500, for which the plaintiffs would look to him upon his guaranty, to which Mr. Savage replied in terms neither admitting nor denying his liability. On the 11th of March, 1839, Mr. Austin received from the defendant a letter, dated

March 9th, stating that the plaintiffs' account had been shown to him by Mr. Bruce at Mr. Austin's request, but denying any right of claim against him, the defendant. To which Mr. Austin replied on the 11th of March, making a formal demand on the defendant for the deficiency. To this demand Mr. Savage replied on the 12th of March, reiterating his denial of the claim.

Russell & Co. received full payment of the bill from the plaintiffs in account current. Mr. Bruce was insolvent at the maturity of the bill, and continued to be so until the present time, as to all debts contracted before his assignment; and this suit is brought to recover the £500 and interest upon the guaranty of the defendant. If the law of England, in respect to a promise to accept a non-existing bill, shall come in question, either party may read the deposition of Sir Frederick Pollock and Mr. Hill, as evidence of the foreign law, if the court shall consider the depositions of English lawyers competent evidence in this court of the common law of England. The whole case is submitted to the court upon the law and facts, with authority to draw such inferences as a jury would be justifiable in drawing from the facts as stated.

§ 986. *Agreement to accept a non-existing bill payable a specified number of days after sight is not a virtual acceptance.*

Several points have been suggested at the argument, upon some of which I do not entertain any doubt; and, therefore, they may be disposed of in a few words. It is said that by the law of England, where the bill of exchange, drawn in this case, was to be accepted, and to be payable, a promise to accept a non-existing bill, even though the bill is taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn, in favor of the holder. The opinions of Sir Frederick Pollock and Mr. Hill, who are admitted on all sides to be very eminent counsel, taken under commission, are direct and full to the point, and leave no doubt as to the present state of the law in England, although certainly it was formerly a matter of no inconsiderable controversy. The language of Lord Mansfield, in *Pillans v. Van Mierop*, 3 Burr., 1663, and *Pierson v. Dunlop*, Cowp., 571, and *Mason v. Hunt*, Doug., 296, certainly went very far to establish the contrary doctrine in its full latitude, although it was somewhat shaken but not directly overturned in the subsequent case of *Johnson v. Collings*, 1 East, 93. It was in this state of the authorities that the question was first presented to the supreme court of the United States, in the case of *Coolidge v. Payson*, 2 Wheat., 66 (§§ 139-141, *supra*); and upon the footing of the cases before Lord Mansfield, it was then held that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill upon the credit of the letter, a virtual acceptance, binding the person who makes the promise. To this doctrine, thus limited, the supreme court have ever since steadily adhered, whenever the question has (as it has on several occasions) since come before it. But, on the other hand, the court has shown a strong disinclination in any respect to enlarge the doctrine of a virtual acceptance of non-existing bills. *Schimmelpennich v. Bayard*, 1 Pet., 264 (§§ 135-138, *supra*); *Boyce v. Edwards*, 4 Pet., 121. It is, perhaps, to be lamented that the doctrine of such virtual acceptances ever was established; and, if the question had been entirely new, I am well satisfied that it would not have been recognized as fit to be promulgated by that court, it being at once unsound in policy, and full of inconvenience. But the supreme court yielded, as did the judge who decided that case in the circuit court, to what seemed, at that time, the true result of

the English authorities upon an important practical commercial question. I am not sorry to find that professional opinion has now settled down in England against the doctrine; although there is no pretense to say that, up to this very hour, there has been any formal decision in Westminster Hall against it. But it does not appear to me that the doctrine ever was applicable, or could be applied to any bills of exchange, except such as were payable on demand, or at a fixed time after date. Where bills are drawn payable at so many days after sight, it is impracticable to apply the doctrine; for there remains a future act to be done, the presentment and sight of the bill, before the period for which it is to run and at which it is to become payable can commence, whether it be accepted or be dishonored. How can the time be calculated upon such a bill before it is presented? If a letter is written, promising to accept a non-existing bill, to be thereafter drawn at six months' sight, when is the acceptance to be deemed made? At the date of the bill? Certainly not; for that would be at war with the obvious intent of the parties, which plainly is that the acceptance shall be on a future sight of the bill. If it is said that the acceptance is to be treated as made when the bill is actually presented for acceptance, and it is dishonored by the drawee, it is as plain that we set up a prior intent or promise against the fact. Upon what ground can a court say, when a party promises to do an act *in futuro*, such, for example, as to accept a bill when it shall be drawn and presented to him at a future time, that his promise overcomes his act at that time? That his refusal to perform his promise amounts to a performance of it? It is quite another question whether the holder, who has taken such a bill upon the faith of such promise, may not have some other remedy, either at law or in equity, for the breach of it, against the promisor. My judgment is that the doctrine of a virtual acceptance of a non-existing bill by a prior promise to accept it, when drawn, has no application to a bill drawn payable at some fixed period after sight; for it then amounts to no more than a promise to do a future act. I have looked into the authorities, and I do not find in any one of them that the bill drawn and to which the doctrine was applied was a bill drawn payable at or after sight.

§ 987. *A draft is a bill of exchange, although it be payable to the drawees.*

Upon another point I have still less doubt; and that is that the bill of exchange drawn in this case was a draft within the scope of the letter of credit, and in conformity to the authority therein given. The argument is that the bill is not a regular bill of exchange, because it is drawn by Russell & Co., payable to Wildes & Co., who are the drawees of the bill. In point of fact, it was so drawn by Russell & Co. for the purpose of being passed to their credit by the drawees, to whom Russell & Co. were then indebted in a larger amount. It appears to me that this does not change its character as a bill of exchange. An instrument is not less a bill of exchange because all the parties to it in the character of drawers, payees and drawees are not different persons. A bill drawn by a person, payable to his own order, has always been deemed to be a bill of exchange in the commercial sense of the phrase. And it would not cease to be such a bill if it should be indorsed by the drawer, payable to the drawee. Now such a bill so indorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable and contains a drawer, a payee and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties should fill a double character. It is of no consequence, in such a case, what particular individuals represent the dramatic personages. Bills of exchange, so called, have sometimes been drawn by the drawer upon himself,

payable to himself or order; and they have been held valid after indorsement by him to another person. But, at all events, the present is a "draft" in the sense of the letter of credit; for the word draft is *nomen generalissimum*, and includes all orders for the payment of money drawn by one person on another.

§ 988. *Guaranty; statement of facts.*

The remaining point is that alone upon which any difficulty can be entertained. It is whether the plaintiffs (Wildes & Co.) have lost their recourse over against the defendant upon his guaranty by their omission to give him notice at an earlier period of the neglect of Bruce to pay the money due according to his engagement upon the bill for £2,000. And here it is important to advert to the dates of some of the material transactions. The letter of credit was given on the 7th of June, 1836. Bruce became insolvent and made a general assignment of his property on the 23th of November, 1836, and the defendant became a party to that assignment on the day of its date. The bill of exchange was drawn by Russell & Co., at Canton, on the 20th of April, 1837, at six months' sight. The plaintiffs (Wildes & Co.) suspended payment on the 2d and 5th of June, 1837. The bill was remitted to them by Russell & Co., and was received by the plaintiffs and passed to the credit of Russell & Co. about the 6th of October, 1837, the latter being then indebted to the plaintiffs in a larger amount. On the same 6th of October, 1837, the plaintiffs duly notified to Bruce the receipt of the bill, and that it would fall due on the 8th of April, 1838, and requested him to provide for the payment thereof accordingly. No provision was made by Bruce for the payment of the bill at its maturity. On the 5th of May, 1838, Austin, as agent of the plaintiffs, made a formal demand on Bruce for the fulfilment of his engagement, and stated to him that the bill had been received and passed to the account of Russell & Co. by the plaintiffs. Bruce made no reply. Afterwards, in December, 1838, Austin gave notice to Bruce of his intention to sell the teas, which were held by him as security for the payment; and the teas were accordingly sold and the sales completed in January, 1839. In the autumn of 1838, probably in October, Austin notified to the defendant that the teas were on sale, and would probably leave a deficiency beyond the £500, for which the plaintiffs would look to him upon his guaranty. The defendant replied in terms neither admitting nor denying his liability. A formal demand was afterwards made in March, 1839, upon the defendant, for the amount of his guaranty, which he declined paying; and the present suit has been since commenced therefor. It is upon this posture of the substantial facts (for I omit any reference to others, which have not, in my judgment, any bearing upon the merits of the present case) that the question arises, whether the plaintiffs are entitled to recover, no notice of the default of Bruce having been given to the defendant until the autumn of 1838. It was said at the argument, that in cases of guaranty of future advances, to be made to another person, notice must be given to the guarantor, by the party making the advance, that he accepts the guaranty, and consents to make the advances; and also notice that he has made the advances and acted upon the guaranty; and, lastly, notice that he has made a due demand upon the debtor, and his refusal to pay the amount, when due. The two former, it is added, are conditions precedent to the legal operation of the guaranty; and if not duly given, the guarantor is not bound by his guaranty, whether he suffers any damage or not. The notice of the non-payment, it is admitted, is not a condition precedent; but it must be given in a reasonable

time, and if the guarantor suffers any damage from the default of the creditor, he will, at least to the extent of that damage, be exonerated.

§ 989. *What notice guarantor is entitled to, discussed.*

I admit that, upon every guaranty for future advances, it is the duty of the party making the advances to give notice to the guarantor of his acceptance thereof and of his consent to act under the guaranty, and to make the advances. This is conclusively established by the decisions of the supreme court in *Russell v. Clark*, 7 Cranch, 69; *Edmondston v. Drake*, 5 Pet., 624; *Douglass v. Reynolds*, 7 Pet., 113; *Lee v. Dick*, 10 Pet., 482; *Adams v. Jones*, 12 Pet., 207; and *Reynolds v. Douglass*, 12 Pet., 497. This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and indeed constituted the consideration and basis thereof. And at all events, here there was due notice of an agreement to give the credit, and to make the advances contemplated by the guaranty.

§ 990. *A guarantor is only entitled to notice when he is or may be prejudiced by the want of it.*

Upon the other point, I have more difficulty in yielding to the argument. Where a guaranty is accepted, and notice has been duly given to the guarantor that the party will act upon it, and give credit and make advances accordingly, I am not aware that it has ever been held that it was indispensable in all cases to give another and a further distinct notice to the guarantor of the amount of the advances actually made, and the terms upon which they have been made, when the transaction is completed. All that I have supposed to be generally required of the person making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is to make a demand upon the debtor, when the credit has expired, or the amount has become due; and upon his default to give notice thereof within a reasonable time afterwards to the guarantor. There is no case, to my knowledge, which goes the length that there should be three substantive or distinct notices in all cases, as contended for at the argument; and, as an original question, I should not be disposed to entertain it; since it would throw such arduous duties on the guarantee (as I desire to call the party accepting the guaranty) as would materially tend to impair the utility and convenience of that instrument. I do not mean to say that there are not, or may not be, particular cases of guaranty in which such notice may be required. Thus, for example, in such a case as *Cremor v. Higginson*, 1 Mason, 323, where advances were contemplated upon certain future contingencies, which might or might not arise, it might be proper to hold that some notice should be given to the guarantor within a reasonable time, notwithstanding he had already signified in general terms a willingness to make the advances if they should be required, that the contingencies had arisen, and the advances had been made, and the guaranty was relied on; for otherwise the guarantor might not definitely know whether, under such circumstances, the guaranty was acted upon or not. So in the case of *Douglass v. Reynolds*, 7 Pet., 113, 127, where there was a continuing guaranty for advances, acceptances and indorsements to be made by the party *in futuro*, it would seem but reasonable that when the whole transactions are closed, notice of the whole amount, for which the guarantor is held responsible, should be communicated to him within a reasonable time afterwards. The same rule might well apply to a single transaction, such as a single advance or acceptance or indorsement, where, from the nature and objects of the guaranty, the

guarantor could not otherwise have any means of knowing the extent of his guaranty as to time, amount or other particulars, essential to guide his future conduct, and to ascertain and fix his responsibility. All such cases must stand upon their own circumstances, and do not seem to furnish just grounds for a general rule. But, without saying what is or ought to be the general rule, it seems to me that the doctrine can never properly apply to a case circumstanced as the present, where all the persons are originally privy to the whole transaction; where the case rests upon a letter of credit for a limited amount, to be drawn within a fixed time, and, subject to these restrictions, where the sums for which the drafts are to be drawn, and the times when drawn, are to depend upon the action of the debtor, and the guarantor is a party to the whole of the original contract. In such a case the guarantor has as good means of knowledge and inquiry as the guarantee, and it is quite as much his duty to make such inquiries as it is of the guarantee to give him notice of the subsequent facts. If he omits to make any inquiries, he may properly attribute any loss which he may sustain thereby to his own laches or want of vigilance, or to his own confidence in the debtor, and not to any disregard of duty on the other side.

In the present case it is impossible to avoid seeing that the letter of credit was for a limited time (eighteen months), after which no advances made would bind the guarantor; that the amount was not to exceed £2,000; that all the bills were to be drawn in China at six months' sight on London; that the sole object of the letter of credit and advances was to assist the operations of Bruce in a projected enterprise or voyage from Boston to the East Indies and back; that it was contemplated that the bills would not become payable until a very long period after the time when the guaranty was given; that the return cargo was relied on as the immediate fund by which the advances were to be primarily secured; and that the guarantee was to be merely an auxiliary security. It seems to me that, under such circumstances, no further notice of the actual advances made was necessary to be given to the defendant until the same became due from Bruce, and there had been some default on his part. The defendant, if he wished any information as to the progress or consummation of the voyage, could readily institute the proper inquiries. I am not prepared, therefore, to admit that, under the circumstances of the present case, there was any duty on the part of the plaintiffs to give notice to the defendant of the fact of the bill of £2,000 being drawn upon them and received by them and passed to the account of Russell & Co., before the maturity of the bill and the default of Bruce in not paying the same. If it had been the duty of the plaintiffs to give such notice, under such circumstances, I should still say that it would not discharge the guaranty, unless the defendant could show that he had suffered some damage from the want of such notice. Indeed, the rights and duties of parties to guaranties must, from the variety of circumstances under which they have been entered into, be materially governed by the particular circumstances of each case. Lord Tenterden held this doctrine in *Van Wart v. Woolley*, 3 Barn. & Cress., 439, 447, to which I shall presently have occasion to refer for another purpose.

It appears to me, then, that the whole question in this case turns upon the point whether the defendant has received notice of the default of Bruce and the non-payment of the bill, within a reasonable time; and, if he has not, whether he is discharged from his guaranty, unless he has sustained some damage from the want of such notice. I take the doctrine to be clearly settled, that upon a guaranty, to discharge the guarantor, there must not only be a

want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor; and that if there be a loss or damage, that the guaranty is not totally discharged, but only *pro tanto* to the amount of the loss or damage. The case is constantly distinguished in the authorities from that of an indorser to negotiable paper. The latter is entitled to strict notice; the guarantor is entitled only to notice when he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due, and no notice is given to the guarantor, and the debtor afterwards and before notice becomes insolvent, the guaranty is discharged. But where the notice would be of no avail, and the guarantor has suffered and can suffer no damage by the want of notice, he is not discharged by the omission to give it. Ordinarily, therefore, if the debtor is insolvent when the debt became due, and has ever since remained so, no notice to the guarantor is deemed necessary; nay, not even a demand upon the debtor, when the debt became due. This doctrine seems to me fully sustained by the leading authorities, beginning with the case of *Warrington v. Furber*, 8 East, 242. That case was fully recognized in *Philips v. Astling*, 2 Taunt., 206; and the like doctrine was applied in *Holbrow v. Wilkins*, 1 Barn. & Cress., 10, and *Van Wart v. Woolley*, 3 Barn. & Cress., 439, 447. In this last case Lord Tenterden said that in cases of guaranty the nature of the transaction and the circumstances of the particular case were to be considered and regarded; and that where the debtor had become bankrupt, a demand upon him was unnecessary to charge the guarantor. And in *Holbrow v. Wilkins*, and *Van Wart v. Woolley*, the court held that, as it did not appear that the guarantor had sustained any damage from the want of a due presentment to the debtor for payment, or of due notice to the guarantor of the default, the guaranty was not discharged. The same doctrine was maintained in *Gibbs v. Cannon*, 9 Serg. & R., 202, and pointedly asserted in the *Oxford Bank v. Haynes*, 8 Pick., 423. It was also recognized in the fullest extent in *Reynolds v. Douglass*, 12 Pet., 497. And the court in effect there said, that the guarantor is bound, without notice, where the debtor is insolvent at the time when the debt becomes due; and that his liability continues, unless he can show that he has sustained some prejudice by the want of notice of a demand on the debtor, and his non-payment; and if he has sustained any damage, that he will be discharged only to the amount of that damage.

Now, upon these principles, it seems to me difficult to maintain the position that the present defendant is not liable on his guaranty. Bruce (the debtor) became insolvent before the bill was drawn, and, for aught that appears, he has remained ever since insolvent. The earliest period in which it would have been practicable to give notice to the defendant of the arrival of the draft and the acceptance by the plaintiffs must have been after the 6th of October, 1837; and the earliest period at which notice could have been given of the default of payment must have been after the 8th of April, 1838, when the draft was at maturity. It is not shown, nor, as far as I know, even pretended in argument, that notice as soon as practicable after either of these periods would have been of any advantage to the defendant, or that he has sustained any damage by the omission of such notice. The debtor then was, and, as far as we know, has ever since been insolvent, and without the means to discharge the debt. If this be so, then, upon the general principles already stated, the defendant is not discharged from his guaranty. But it appears to me that there are circumstances in the present case which show that the notice was within a reasonable time; and indeed, as early, if not earlier, than

the case required. It is plain to me (as I have already intimated) that the understanding was that the teas should be the primary fund or security for the payment of the debt; and until that fund was exhausted by a sale, and the actual deficiency was ascertained, I do not well see how the defendant could be called upon to pay the sum due upon his guaranty. It would be an unliquidated deficiency. In a court of equity, at all events, the defendant would have been entitled to require that the teas should first be sold and applied to the payment of the debt *pro tanto*, before he was called upon to pay the amount secured by his guaranty. Now, in point of fact, in or about October, 1838, and before the sale of the teas, he had due notice of the advances and of the probable deficiency. He made no objection to the sale; he did not positively insist upon his being then discharged from the guaranty. The sales were not concluded until the succeeding January, and he had due notice thereof in a short period after the entire deficiency was ascertained. Now, if I am right in this view of the facts, that the guaranty was not to be insisted on until the other fund was exhausted, and the proceeds of the sales were first to be applied in discharge of the defendant, the demand was made upon the defendant within a reasonable time. It was made as soon as it properly could be. And it is not shown that an earlier sale, if practicable, would have been desirable, or of any higher benefit to the parties.

Upon the whole, upon the best consideration which I am able to give this case, the plaintiff is entitled to judgment for the amount of the guaranty, as well upon the special principles of law as the general circumstances of the case.

BOWLING v. HARRISON.

(6 Howard, 243-260. 1847.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The first assignment of error in this case is to the instruction given by the court to the jury, "That, to charge an indorser, if he lived in the town in which the note was made payable; the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the postoffice."

§ 991. *Notice to an indorser who lives in the place where a note is payable must be personal.*

As the only question on the trial of the cause was the sufficiency of notice left at the postoffice at Vicksburg to charge an indorser residing there, and not whether a copy left at his dwelling-house or place of business would be proper, the phrase "personal notice" was evidently intended and understood to include the latter in opposition to the former. This instruction is, therefore, not objected to on the ground of any inaccuracy of expression on that point. But the complaint is, that the rule of law on this subject was erroneously enunciated by the court in stating the conditions under which a personal service of notice on an indorser is required to be "residence in the town where the note was made payable." It is true the terms in which the rule of law on that subject is usually stated differ from those used by the court on this occasion. In *Williams v. United States Bank*, 2 Pet., 101 (§§ 1008-1010, *infra*), it is thus stated by this court: "If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or

note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business." Mr. Justice Story (Story on Bills, § 312) states the rule in these words: "Where the party entitled to notice and the holder reside in the same town or city, the general rule is that the notice should be given to the party entitled to it either personally or at his domicile or place of business." The indorsee or owner of the note in this case resided in Maryland, and the indorser in Vicksburg; and it is contended that, as they are the only parties, and do not reside in the same place, the rule is inapplicable to the case. But we are of opinion that, whether we regard the reasons upon which this rule is founded, or a correct construction of the terms in which it is usually stated, the instruction given by the court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them. The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling. Depositing a notice in the postoffice affords but presumptive evidence of its reception, and is permitted to be substituted for the former only where the latter would be too inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice; and, therefore, in the practical application of the rule, the relative position of the person giving the notice and the party receiving it forms the only criterion of the necessity for relaxing it. A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last indorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest, and gives notice of its dishonor to the indorsers; if they live in the same town or city where the bank is situated and the demand made, and "where the note was payable," he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest postoffice, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

§ 992. *The person having possession of the paper is the holder.*

This practical application of the rule is correctly stated by the court in their instruction to the jury as connected with the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the "holders" of this note for collection, and were bound to give notice to all the indorsers. *Smedes v. Utica Bank*, 20 Johns., 372. The notary, also, who held the note as agent of the owner for the purpose of making demand and protest, may be properly considered as the "holder" within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances, also, the rule has been stated in the terms used by the court below. See Bayley on Bills.

§ 993. *Memorandum held not an agreement to receive notice by mail.*

An exception is taken, also, to the instruction of the court "That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the postoffice and to dispense with personal notice on the indorser, and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice." The memorandum is in the following words: "Third indorser, J. P. Harrison, lives at Vicksburg." The only direct evidence of usage was, "that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place." This is, in fact, no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg postoffice; and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconstruction, of this memorandum. The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn from some equivocal or obscure expressions of the witness that there was such a usage. It is true, the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion.

§ 994. *A usage should be definite, uniform and well known.*

It is of the utmost importance to commercial transactions that the rules of law on the subject of notice which is to charge an indorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows that notaries in many places fall into loose ways of performing their duties, either through negligence or ignorance; and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note: "The indorser, J. P. Harrison, agrees to receive notice at the Vicksburg post-office," as to write it in its present form; and one can hardly conceive of the possibility of a well known and established usage, that a written memorandum should be construed without any regard to its terms or plain meaning. Those who affirm the existence of such a strange usage should be held to strict proof of it; and the court were right in not submitting it to the jury to infer such an improbable and unreasonable custom by forced or astute construction of equivocal expressions from a willing witness. Let the judgment be affirmed.

BANK OF COLUMBIA v. LAWRENCE.

(1 Peters, 578-584. 1828.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the circuit court of the District of Columbia. The defendant was sued as

indorser of a promissory note for \$5,000, made by Joseph Mulligan, bearing date the 15th of July, 1819, and payable sixty days after date at the Bank of Columbia. The making and indorsing the note and the demand of payment were duly proved, and the only question upon the trial was touching the manner in which notice of non-payment was given to the indorser, no objection being made to the sufficiency of the notice in point of time. The material facts before the court upon this part of the case, as shown by the bill of exceptions, were: That the banking house of the plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop and living in a house of his own in the said city. That about the year 1818 he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown postoffice was the nearest postoffice to his place of residence, and the one at which he usually received his letters. The notice of non-payment was put into the postoffice at Georgetown, addressed to the defendant at that place. It was proved on the part of the defendant that at the time of his removal into the country, and from that time until after the note in question fell due, he continued to be the owner of the house in Washington where he formerly lived, and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came frequently and regularly every week, and as often as two or three times a week, to this house, where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house, and where also his newspapers and foreign letters were left. That his coming to town and so employing himself was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington less than a quarter of a mile from Georgetown.

There was also some evidence given on the part of the plaintiffs tending to show that the usage of the bank in serving notices in similar cases was conformably to the one here pursued, and that the defendant was apprised of such usage. But that testimony may be laid out of view, as this court does not found its opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the court to instruct the jury that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence, but that it was sufficient, under the circumstances stated, to leave the notice at the postoffice in Georgetown, which instructions the court refused to give, but instructed the jury that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence. The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant when he indorsed the note lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the

Georgetown postoffice, addressed to the defendant at that place, by which it is understood that the notice was either inclosed in a letter, or the notice itself sealed and subscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided. If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there two or three times a week in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the postoffice at Georgetown was good, the defendant residing in the country two or three miles distant from that place in the county of Alexandria.

§ 995. *General rule as to giving notice; due diligence required.*

The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and, whether the notice reaches the party or not, the holder has done all that the law requires of him. It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed on uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the postoffice, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the postoffice nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the postoffice within which the party must reside, in order to make this a good service of the notice. Nor would we

be understood as laying it down as a universal rule, that the notice must be sent to the postoffice nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant postoffice, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

§ 996. *Where the indorser lives in the country and receives his letters at the postoffice in the town where the holder resides, the notice may be sent by mail.*

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone or the usual course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the postoffice in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other postoffice, the address was unimportant, and could mislead no one.

§ 997. *Duty of employing special messenger to give notice.*

No cases have fallen under the notice of the court which have suggested any limits to the distance from the postoffice within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the court, and the notice held sufficient. 16 Johns., 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiff such duty. We do not mean to say that no such cases can arise, but they will seldom if ever occur, and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of *Pearson v. Crallan*, 2 Smith, 404, Chitty, 222, n., is one of this description. But in that case the court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury. Judgment reversed, and a *venire facias de novo* awarded.

COOKENDORFER v. PRESTON.

(4 Howard, 817-827. 1845.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.— The questions in this case arise on the rulings of the court, to which at the trial exceptions were taken. Preston, the defendant, as the indorsee of a promissory note, brought an action against the plaintiff in error, the indorser. The signatures of the maker and indorser were admitted. These grounds of error are assigned: 1. That the court erred in admitting the testimony of the notary public. 2. In refusing the instructions asked by the defendant's counsel. 3. The declaration is defective.

George Sweeney, the notary who protested the note, testified that it was delivered to him by the Bank of Washington, who held it for collection, to demand payment, and that he did thereupon, the 4th of February, 1840, present the note to the bank, and demanded payment, but was informed by the proper officer that there were no funds to pay it, on which he protested the same for non-payment; and on the next day, the 5th of February, he delivered to Cookendorfer, the plaintiff in error, the following notice, in writing:

“WASHINGTON, February 5, 1840.

“SIR: A note, drawn by E. T. Arguelles, dated 17th May, 1839, for three hundred dollars, payable 1-4 February, 1840, due, and by you indorsed, and for which you are accountable to the president and directors of the Bank of Washington, has been this day protested for non-payment.”

And the witness stated, “that he made the demand and gave the notice according to his usual practice,” and “that said practice conformed, as far as he knows and believes, to the practice of the other notaries in the city of Washington.” And other evidence was given conducing to show that the usual practice in such cases was, “when a notice was to be sent abroad, to put it into the postoffice, and date it on the third or last day of grace; but when the notice was to be delivered in the city of Washington, a latitude was allowed to the notary, either to deliver the notice on the third or last day of grace, or the day after the last day, and in all cases to date the notice on the day of its delivery; and the usage is to extend the protest on the day on which the notice is given, as in this case, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated.”

§ 998. *Notary competent to testify as to presentment of note.*

It is insisted that the notary, by reason of his interest in this suit, is an incompetent witness. In the case of *Smedes v. Utica Bank*, 20 Johns., 372, it was held that a bank which receives a promissory note for collection, to charge the indorser, by a regular notice, is liable for neglect; but this is not the case where the bank delivers the note to a notary, who is a sworn public officer, and whose duty it is to make the demand and give the notice. The same doctrine is laid down in 3 Cowen, 662. From this, it is argued that the notary is liable directly to the holder of the paper for neglect, as a public officer, and not to the bank, as its private agent. That in the latter case, he would not be liable to the holder of the paper, but might be called on to indemnify the bank, which had suffered on account of his laches. A notary is a competent witness, on the same ground that other agents are admissible. They are always responsible to their principals for gross negligence, and yet, from the necessity of the case,

they are competent witnesses to prove what they have done in the name of their principals. It appears that the witness, who generally acted as notary for the Bank of Washington, had given a bond, with security in the sum of \$10,000, for the faithful performance of his duty as notary public, in the business of the bank committed to him. But this, it would seem, does not render him incompetent. "The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note, or for money lent or overpaid, or obtained from the officer without the security which he should have received, and even though the officer has given bond to the bank for his official conduct." 1 Greenl. Ev., § 416; *Franklin Bank v. Freeman*, 16 Pick., 535; *United States Bank v. Stearns*, 15 Wend., 314. It is further insisted that if the notary was competent to state his own acts, he could not prove the usage under which he acted. He stated that, in making the protest and giving notice, he pursued "his usual practice," "and, so far as he knew, the practice of the other notaries in the city." Now, it would be an exceedingly technical rule, which would permit a notary to say what he had done in a particular case, but prohibit him from stating that he acted in such case according to his usual practice. And this was all the witness did say; for, although he spoke of his belief as to the practice of other notaries in the city, he does not state that he had a knowledge of their practice.

§ 999. *When demand, protest and notice must be made; usage.*

The instruction prayed by the defendant's counsel, and the refusal of which is the second ground of error assigned, was "that the said evidence was not sufficient, if believed to be true, to show that payment of said note had been duly demanded and refused, and that due notice of such dishonor had been given to defendant, so as to bind him." In the case of *Renner v. Bank of Columbia*, 9 Wheat., 582 (§§ 754-759, *supra*), a suit was brought against the indorser of a note which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to be the usage of the bank, and this court held the demand was made at the proper time. In *Mills v. Bank of United States*, 11 Wheat., 431 (§§ 958-963, *supra*), this court held that, "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not." In the *Bank of Washington v. Triplett*, 1 Pet., 25 (§§ 760-768, *supra*), this court sanctioned the usage to make the demand of payment of a note, which was left in the bank for collection, on the day after the last day of grace, placing such notes, in this respect, on the same footing as notes discounted by the bank. And that such was the usage in 1817, when payment on the note or bill in question was demanded, was proved in that case. But it was also proved, as appears from the record, that the usage was changed in 1818, by all the banks of Washington and Georgetown, "so as to conform to the general commercial usage of demanding payment on the last day of grace." This referred to notes or bills sent to the banks for collection, and, of course, embraces all notes not negotiated in bank. Where a usage is sanctioned by judicial decisions, it becomes the law of the place, and no further proof is necessary to establish it; and it is said that no evidence is admissible to controvert the fact, as laid down by the court. *Edie v. East India Co.*, 2 Burr., 1221. Now, if the usage, as sanctioned in the cases above cited, governs this case, it is clear that such diligence has not been

used as to charge the indorser. For, under that usage, the demand should have been made on the day after the third day of grace, when it was in fact made on the third day of grace. This objection is met by the defendant in error by the proof of the usage as stated, which he insists governs all notes not discounted by the banks of the district. The note in question was not discounted by the Bank of Washington, it being merely left there for collection. But it is insisted that this usage cannot be shown to overthrow that which has been sanctioned by judicial decisions. A local usage may be changed in the same mode by which it was established. But parol evidence is not admissible to show that the usage was different, at the time, from what the courts have solemnly adjudged it to be. The law merchant is founded upon custom, and every modification of it, by local usage, shows that, like other laws, it may be changed.

§ 1000. *Demand and protest on the last day of grace, and notice on the following day, come strictly within the law merchant.*

The usage proved in this case, except in *Bank of Washington v. Triplett*, and that is explained by the evidence cited, does not conflict with that decided by this court, if the latter be limited to notes discounted by the banks, and the former applies to all other notes payable in the District. In other words, that the law merchant should be modified by the usage only as to demand and notice on notes discounted by the banks. And it would seem, from the decisions above cited, the usage to demand payment the day after the third day of grace had its origin with the banks, and has not been extended, since 1818, to paper not discounted by them. On all other paper, a demand is made on the third day of grace, and the "usage is to extend the protest on the day on which the notice is given, stating the demand to have been made on the last day of grace, and the protest to be dated the same day on which the notice is dated." Now, a demand and protest on the last day of grace, and a notice on the following day, come strictly within the law merchant. And this was the diligence used in the present case, except the formal date of the protest on the day of the notice. No confusion can therefore arise from this general commercial usage, as it conforms to the established law. No inconvenience has arisen, it is supposed, from the bank usage in the District, which has been so long and so firmly established.

No defects in the declaration are perceived, and none have been pointed out to us, which are not cured by the verdict. Upon the whole, we affirm the judgment of the circuit court, with costs.

LAMBERT v. GHISELIN.

(9 Howard, 552-560. 1849.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Plaintiff, the holder of a bill of exchange, desiring to notify a non-resident indorser of its non-payment, inquired of the captain of a vessel that traded between the town where the holder lived and the place where the indorser was supposed to be, as to where the indorser lived. The captain replied "Nottingham"—that he resided at Nottingham and a post-office was kept there. It was shown that the captain and his family had resided in that place for many years; that he, if anybody, was likely to know who lived there; but it turned out that he was mistaken, the indorser having removed from Nottingham to Annapolis, and then to West River. The notice

was sent to the indorser, directed to Nottingham postoffice, and failed to reach him. Subsequently the holder was informed of the indorser's actual residence, but did not send a second notice there.

§ 1001. *Due diligence a question of law, when.*

Opinion by TANEY, C. J.

The facts upon which the question certified has arisen are not disputed. The sufficiency of the notice is therefore a question of law. And it is of the first importance to the commercial community that the rules which regulate the rights and liabilities of parties to negotiable instruments in courts of justice should be plain and certain, and conform to the established usages of trade. Two objections have been taken to the sufficiency of the notice in this case.

1. That due diligence was not used by the holder to ascertain the residence of the indorser before the notice was sent to Nottingham. And 2. If reasonable diligence was used at that time, yet the information he afterwards received in Baltimore imposed on him the obligation of giving a further notice to the defendant himself, or of sending it by mail to his nearest and usual postoffice.

§ 1002. *What is due diligence in ascertaining the address of an indorser.*

As regards the first question, the court is of opinion that due diligence was used before the notice was sent to Nottingham. The case shows that there was very little, if any, trade between Alexandria and Nottingham at the time of this transaction, and but few persons, therefore, in Alexandria, would be likely to know whether the defendant did or did not reside in Nottingham. The bill of exchange was not dated at any particular place, and the acceptors resided in Baltimore. The defendant was not engaged in trade, but was a physician residing in the country, and it does not appear that he was in the practice of visiting Alexandria, or of having any business transactions there. And the proof is that Travers, of whom the holder inquired, from the nature of the trade in which he had been many years engaged, first to Nottingham, and afterwards to Baltimore, was as likely as any other person in Alexandria to give the information which the plaintiffs were seeking to obtain, if not more so. The answer he received was direct and positive, both as to the knowledge of Travers and the residence of the indorser, and he had a right to rely upon it. And although Travers was mistaken, and the notice was not sent to the nearest or usual postoffice of the defendant, yet the plaintiffs used all the diligence which the law requires, and had sufficient reason to believe that the notice would be received. The liability of the indorser was therefore fixed. The case of *Harris v. Robinson*, 4 How., 345 (§§ 980-982, *supra*), is conclusive on this point.

§ 1003. *If after due diligence a notice is sent to a wrong address, it is not incumbent upon the holder, after discovering the mistake, to send a notice to the right address.*

The second objection taken in the argument has not been so directly settled by judicial decision on the point, but is, we think, equally clear upon established principles. We have already said that the liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit the next day. Could that right be divested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary. The books are full of cases where mistakes of this kind have been committed and suits afterwards brought when the residence of the party was discovered. Yet it does not seem to have been supposed in any of them that a second notice was necessary, nor are we aware that such a point

has ever been raised. Yet, if a notice thus given, after diligent inquiry, is not equivalent to actual notice, knowledge subsequently obtained would be a defense to the action, even if the holder had brought suit before he learned what was the nearest or usual postoffice of the defendant. The case of *Firth v. Thrush*, 8 Barn. & Cress., 387, which was much relied on in the argument, depended upon different principles. In that case the holder knew that notice had not been given to the indorser. He had been engaged in making inquiries for his residence without being able to obtain any information on which he might have acted. And the question there was not whether a second notice should be given, but whether due diligence was used in sending the first. The rule contended for by the defendant would produce much uncertainty and difficulty in transactions of this kind. For if a second notice must be given, it is to be required in all cases where there has been an error in the information as to the defendant's postoffice? Certainly the practice of the courts has been otherwise. And if it is not to be required in all cases it would be impossible to fix any certain limits as to time or circumstances. The subsequent information might come to him casually, when his mind was occupied with other engagements; he might not confide in it as much as in that which he had before received; it might come to him in a few days, or months might elapse before he obtained it. The rule would be loose and uncertain in its application and constantly lead to litigation where the residence of the indorser was unknown or an error committed as to his usual postoffice. It would also be contrary, the court think, to the usages of commerce and to the uniform practice in courts of justice. In the case of *Harris v. Robinson*, before referred to, no second notice was given, nor did the court intimate that any was necessary.

§ 1004. *The law does not require actual notice, but only reasonable diligence.*

The law does not require actual notice. It requires reasonable diligence only, and reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made and information received upon which the holder has a right to rely, a mistake as to the nearest postoffice or usual postoffice does not deprive him of his remedy. He has done all that the law requires, and the notice thus sent fixes the liability of the indorser as effectually as if he had actually received it. This, we think, is the true rule, and the only one that can give certainty and security in transactions in commercial paper. We shall, therefore, certify that reasonable diligence was used by the plaintiffs to give the defendant notice of the dishonor of the bill.

BANK OF UNITED STATES v. CORCORAN.

(2 Peters, 121-135. 1829.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This case comes up by writ of error from the circuit court of the District of Columbia and county of Washington. The suit was brought by the plaintiffs in error against the defendant, as the indorser of a promissory note of Daniel Reintzel for \$3,700, payable sixty days after date, and dated the 6th of May, 1819. The only question in the cause turns upon the sufficiency of the notice to the defendant, the circumstances attending which appear in a bill of exceptions taken by the plaintiffs to the opinion of the court. From this it appears that the plaintiffs gave in evidence a letter from the defendant to the cashier of the Bank of Columbia, where this note was discounted, bearing date the 8th of May, 1822, in which the writer, after

mentioning that he had been applied to on the subject of Reintzel's notes, says: "I have no hesitation in saying that I will not take any advantage of the limitation act for my indorsement on the note of \$3,700, dated 6th of May, 1819, and the note of \$400, dated 27th May, 1819; the other note I have no knowledge of, and will call at the bank to-morrow for some explanation of it." These notes having been transferred to the Bank of the United States, the cashier of that bank, on the 14th of December, 1824, sent to the defendant a paper for the signature of himself and Reintzel, containing a general authority to some attorney to docket suits against them at the next ensuing term of the court, in the names of the president, directors and company of the Bank of the United States, for the use of that bank, and of the United States, on three notes of Daniel Reintzel, two of \$400 each and one of \$3,700, all due in 1819. On the back of this note was indorsed the following address, signed by the defendant, viz.: "Dear Sir: If Mr. Reintzel should not be able to satisfy the bank before the court, and they determine to bring suit, I will instruct and authorize Robert Dunlap to docket the case for me. December 16, 1824."

The plaintiffs proved, by the notary who made the protest of this note, who produced at the trial his notarial book in which he recorded all his protests, and in which he had entered the protest of the note in question, and the demand and notice; that the said demand and notice were made and entered in the said book; and that, although he had no recollection in relation to these, yet he believed the demand and the notice thereof were made as stated in his said book. He further stated that, at the time of the said demand and notice, the defendant lived in a house in Georgetown, except the lower front room thereof, which was occupied separately, as a store, by James Corcoran, his son; that there was a separate entrance to the dwelling part of the house occupied by the defendant, through an alley or passage apart from the store, which led to the upper rooms and back building and yard of the house; and that he believed the notice was left by him at the said store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and never was in the dwelling part of the house occupied by the defendant, nor in the passage or alley leading to it. It was further proved that James Corcoran, who occupied the store at the time spoken of, had a family, and a dwelling-house apart from his store; and that the defendant was then postmaster of Georgetown, and kept the postoffice in another part of the town, where he commonly transacted his private business, as well as that of his office, and had no concern in his son's store, but that he was often at the door, and about the door of the store; that Thomas, another son of the defendant, was concerned with his brother in the store, and was an active partner, attending in the store to the business thereof; but that he was a single man, and lived with the defendant in the house aforesaid until February, 1819, after which he ceased to live in his father's family, but continued his concern and attention in the store.

It was further proved, by the before-mentioned James Corcoran, that, until the defendant took charge of the postoffice, which was in the year 1818, written communications and notices for the defendant were sometimes left at the before-mentioned store, or at the dwelling part of the house; that the witness sometimes directed the persons bringing such notices to take them into the house, and sometimes he took them at the store, and then, unless when he forgot to do so, as he sometimes did, he delivered them to the defendant; that, after his father took the postoffice, the witness, if such notices or communications had

been left at his store in the presence of a witness, would have directed the bearer of them to take them to the postoffice, or, if he were going there, would have taken them himself; and that, if he had done so, he would, unless he forgot it, have delivered them to the defendant, but he had no recollection of any such fact having occurred; that when the defendant took charge of the postoffice, that became the place where his notices, communications, etc., were usually left, and where he transacted his business, both private and official, as postmaster and magistrate. The witness had no recollection of ever having seen or known of any notices being left at his store of the protest of the notes now in suit; that the store never was, before or after the defendant took the postoffice, his place of business, or the place appointed for the delivery of notices or other communications for the defendant.

After the above evidence was given, the defendant's counsel prayed the court to instruct the jury that, if they found from the evidence that the said notices were left at the store of James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant, as stated in the evidence, the notice was not sufficient to charge the defendant in this action, and that the jury, on the said evidence, ought to find for the defendant on the first issue, which instruction the court gave. The plaintiffs then prayed the court to instruct the jury that, if they find from the evidence that, notwithstanding the notices were left at the room occupied as a store by James Corcoran, yet that the said store was the place where notices for the defendant were generally left, and that the notices in regard to these notes were duly received by the defendant, then their being so left at the said store does not defeat the plaintiffs' right to recover, provided the defendant received the said notices in due time; and that their said papers read in evidence by the plaintiffs, and signed and given to them by the defendant, as above stated, are competent evidence from which the jury may infer that the defendant did duly receive such notices. This instruction the court refused to give; to which refusal, as also to the giving of the instruction prayed by the defendant's counsel, the exception was taken by the counsel for the plaintiffs.

The only question which the case presents is, whether such notice was given of the non-payment of the note on which this suit was brought, as the law requires to charge an indorser. It is not pretended that it was given to the defendant personally, either verbally or in writing, or that a written notice was left at his dwelling-house or place of business, or that the holders of the note were prevented from giving the notice at any time by the absence or fault of the defendant. His place of residence, and the way by which access to it was to be gained, was known to the notary; and it is quite improbable that he was ignorant of the place at which he transacted both his private and public business.

§ 1005. *Notice left at store of son insufficient.*

The inquiry is then narrowed down to the sufficiency of a notice left at the store of James Corcoran, a son of the defendant, with which the defendant had no concern, and which was not his place of business. The store of the son was as distinct and separate from the dwelling of the father as if they had been under different roofs. The former was entered from the street, the latter from an alley or passage; and it does not appear that there was any inside communication between the two. Overlooking for the present the circumstance that the notary had been in the habit of leaving notices for the defendant at the store, it must be admitted that the service of the notice in question

at the store was no more a compliance with the requisition of law than if it had been delivered to the son in the street or elsewhere, or left at his dwelling-house. Is the case then altered by the circumstance just mentioned? We think not. It seems from the evidence that the store never was, at any period, the place appointed for the delivery of notices or other communications to the defendant. But if it had been, the note in question came to maturity some time in the month of July, 1819, and the proof was that the defendant took charge of the postoffice some time in the year 1818; after which, that became the place at which notices and other communications to him were usually left, and where he transacted both his private and public business. Were it to be admitted that the service of a notice at a place not appointed by the defendant as the one at which notices to him were to be delivered, would be sufficient in law to charge him, upon the ground that other notices had been previously left at the same place, it would surely be too extravagant to contend that a service at the same place would be legal, after another place had been appointed for that purpose, and where they had, in point of fact, been usually left.

§ 1006. — *unless it actually reach indorser.*

It is unnecessary to pursue this inquiry further, because although the sufficiency of the service of the notice generally was insisted upon by the counsel for the plaintiff in error in argument, yet the instruction asked for by the plaintiff in the court below placed its validity not merely upon the circumstance that the store was the place where notices for the defendant were generally left, but upon the additional and stronger one, that the notice in this case was duly received by the defendant. Now it must be admitted that if the hypothesis that the notice in this case, though left at an improper place, was nevertheless in point of fact received in due time by the defendant, were proved, or could from the evidence in the cause be properly presumed by the jury, it was sufficient in point of law to charge him. In the case of *Ireland v. Kip*, 10 Johns., 490, 11 Johns., 231, it was decided that admitting a service of notice at the house in Frankfort street, where the defendant had directed his letters to be left by the letter-carriers, would have been good and equivalent to service at his dwelling or counting house; still, the notice, though improperly put into the postoffice, would be sufficient, if it were accompanied by proof that it had actually been delivered at the dwelling-house of the indorser, or at the house in Frankfort street. But in the present case there was not a scintilla of direct or positive proof that the notice in question ever reached the person, the dwelling-house, or place of business of the defendant, and the court was called upon by the plaintiffs' counsel to instruct the jury that the papers which they had given in evidence were competent evidence from which the jury might infer that the defendant did duly receive the said notice. Was the court wrong in refusing to give this instruction?

§ 1007. *Evidence of actual receipt of notice must be clear and certain.*

Presumptions from evidence given in a cause of the existence of particular facts are in many if not in all cases mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such instruction. For why give it, when it is manifest that, if the jury should find their verdict upon the fact so deduced, it would be the duty of the court to set it aside, and to direct a retrial of the cause? Let us now see what were the papers which the plaintiffs had given in evidence, which the court were

called upon to declare to the jury were competent evidence from which the jury might make the inference insisted upon. The first is the letter of the defendant, dated the 8th of May, 1822, and addressed to the cashier of the Bank of Columbia, in which he declares that he will not take any advantage of the limitation act for his indorsement on this and another note; the blank authority sent to the defendant by the cashier of the Bank of the United States, on the 14th of December, 1824, for the signatures of the defendant and of the maker of the notes, purporting to empower some attorney to docket suits against them on these notes, with a declaration indorsed thereon by the defendant, that if the maker of the notes should not be able to satisfy the bank before court, and they should determine to bring suit, he would instruct a particular person to docket the case for him. Let it be admitted that these papers bound the defendant to abstain from making a particular defense, to which the law entitled him, and to cause the action intended to be commenced against him to be docketed, so as not to delay the plaintiffs, could the jury from thence infer with any legal propriety, either that the necessity of proving notice of the non-payment of the notes would be dispensed with, or the fact that the notice left at the store of James Corcoran was received by the defendant at any time, much less in due time?

If this was a question of inference fit to be submitted to the discretion of the jury, it seems to the court that the rules respecting this subject, which have been laid down with so much care, would no longer be fixed and certain, but would change with the varying conclusions which a jury might draw of the fact from evidence, however slight, given to prove it. What, for example, does the rule that notice must in certain cases be served personally upon the indorser, or be left at his dwelling-house or place of business, signify, if a jury may from any evidence, however remote from the fact, presume that the notice, though left at any other place, may have found its way to the hands of the person whom it was intended to charge? It was insisted by the counsel for the plaintiffs that the evidence above noticed, and alone relied upon in the instruction asked for to warrant the inference, was strengthened by the circumstance of the connection between the defendant and the owner of the store where the notices for the former were sometimes left. But if this circumstance stood alone in the case, and a notice delivered to the son, who was not a member of the father's family, would not be a legal notice, nor competent to warrant a presumption that it had reached the father, which it unquestionably would not, the question cannot be affected by its being thrown in as a make-weight with other circumstances in themselves insufficient to justify the conclusion. In the case of *Ireland v. Kip*, the circumstances to induce a presumption that the notice reached the defendant were certainly as strong as they could well be. The letter-carrier was directed to leave all letters for the defendant at a certain house in Frankfort street. The carrier called at the postoffice three or four times every day, and took out and delivered all letters left there, and the defendant usually sent or called every day at that house for his letters. Upon the second trial of this cause, the plaintiffs insisted, upon the above evidence, that the jury had a right to presume that the notice in question had been duly received by the defendant. But the chief justice who tried the cause, instead of leaving it to the jury to make this presumption, overruled the whole of the evidence offered by the plaintiffs, and directed a non-suit. When the case came before the supreme court, it was there stated by the judge who delivered the opinion, that it would be extremely embarrass-

ing to suffer the rule to fluctuate, by making exceptions which would lead to uncertainty, and that it was of the utmost importance in mercantile transactions to have a certain and stable rule in relation to notices, in which sentiments this court entirely concur. That court finally decided that, as it did not appear that the notice was left at the defendant's place of business in Frankfort street, and it did appear that he resided in the city, the non-suit was correct. If this case be law, as to which we are not now called upon to give an opinion, it is in point upon the very question now under consideration. If the court below then committed no error in refusing to give the instructions asked for by the plaintiffs' counsel, they were right in giving that which was prayed for by the defendant's counsel, which merely affirmed that the notice left at the store of James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant, if the facts were so found by the jury, was not sufficient to charge the defendant, and that, on the said evidence, they ought to find for the defendant on the first issue.

It is the opinion of this court that the judgment of the court below ought to be affirmed, with costs.

WILLIAMS v. BANK OF UNITED STATES.

(2 Peters, 96-106. 1829.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This was an action of *assumpsit*, brought in the circuit court of Ohio by the president, directors and company of the Bank of the United States against J. Embree, the maker, and D. Embree and M. T. Williams, the indorsers of two several promissory notes. The only count in the declaration is for money lent and advanced by the plaintiffs to the defendants. Upon the plea of the general issue the case at the trial was, by consent of the parties, submitted to the court; and the above notes were given in evidence by the plaintiffs in support of the action. The court gave judgment against the defendants, and ordered it to be certified in pursuance to the statute of Ohio, that it appeared to the satisfaction of the court that J. Embree had signed the notes on which the suit was brought as principal, and D. Embree and M. T. Williams as sureties. At the trial of the cause thus submitted to the court, the plaintiffs having proved the demand and the handwriting of the indorsers of the notes, offered the following evidence of the notice to the defendant Williams, namely, "that the notary public, after the protest of the notes and the expiration of the usual days of grace, called at the house of the defendant Williams, who resided in the city of Cincinnati, which he found shut up, and the door locked, and on inquiry of the nearest resident he was informed that the said Williams and family had left town on a visit, whether for a day, week or month he did not know, nor did he inquire. He made use of no further diligence to ascertain where Mr. Williams had gone, or whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant when he should return." The court being of opinion that this evidence was conclusive of legal notice to charge Williams, his counsel took a bill of exceptions, and the cause is now for judgment before this court upon a writ of error.

§ 1008, *General rule as to notice.*

The only question which this bill of exception presents is, whether due diligence was used by the defendants in error to give notice to the indorser of the

non-payment of these notes by the maker of them? The general rule of law applicable to the subject has long been settled, that to enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill or of the non-payment of the note was given to the indorser, or, if this could not be done, he must excuse the omission by showing that due diligence had been used to give such notice.

§ 1009. *Notice where parties reside in same place.*

If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business. Either mode is sufficient, but one or the other must be observed unless it is prevented by the act of the party entitled to the notice.

§ 1010. *Notice when indorser leaves town.*

In the case now under consideration the banking house of the defendants in error and the dwelling-house of the plaintiff were located in the same city. The notary called at the plaintiff's house, which he found shut up and the door locked. Upon inquiry of the nearest resident he was informed that the defendant, with his family, had left town on a visit, but for how long a period was unknown to this person; no further attempt was made to ascertain where the plaintiff in error was gone, or whether he left any person in town to attend to his business. The question to be decided is, whether, under these circumstances, the defendants are excused for not having given the notice which the law requires? In the case of *Goldsmith v. Bland*, Bayley on Bills, 224, note, it was decided that it was sufficient to send a verbal notice to the defendant's counting-house, and if no person be there in the ordinary hours of business to receive it, it is not necessary to leave or send a written one. The principle of this decision is, that the counting-house of the defendant is the place in which the holder was entitled, during the regular hours of business, to look for the person for whom the notice was intended or for some person authorized by him to receive it, and that the omission to give it was occasioned, not by the want of due diligence in the holder, but by the fault of the party who claimed a right to receive it. The principle here stated is not peculiar to this class of contracts. If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.

The application of this general principle of law to the subject before us may be illustrated by other cases than the one immediately under consideration. The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it be absent from the state, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice. So where the parties, as in this case, reside in the same city or town, the notice should be given at the dwelling-house or place of business

of the party entitled to claim it, and the duty of the holder does not require of him to give the notice at any other place. If the giving of the notice at either of these places be prevented by the act of the party entitled to receive it, the performance of the condition is excused. In this case, the notary called at the dwelling-house of the indorser, at the regular time and at a seasonable hour, for aught that appears, to serve the notice, and found the house shut up, the doors locked, and the family absent from town upon a visit of unknown duration to the agent of the bank or to his informer. What was he to do? He was not bound to call a second time, nor was he under any obligation to leave a written notice, even if he could have found an entrance into the house. But it is insisted that the defendants in error were bound, under the circumstances of this case, to give notice to the plaintiff through the channel of the postoffice; and the case of *Ogden v. Cowley*, 2 Johns., 274, is relied upon in support of this position. In that case, the notary called at the houses of the indorser and of his deceased partner, for the purpose of giving them notice of the non-payment of the note, but found their house locked up, and, on inquiring at the next door, was told they were gone out of town. On the same day, the notary put a letter into the postoffice in the city of New York, addressed to the defendant and his partner, informing them of the non-payment of the note, and that they were looked to for payment. It appeared that at that time the yellow fever prevailed in the city. The court decided that all proper steps were taken to communicate the requisite notice to the indorser, and that the notice was, of course, sufficient. It may be remarked upon this case, that the absence of the indorsers from their houses was probably the consequence of a temporary removal from the city, on account of the prevailing sickness, and that the case does not inform us whether the place to which they had removed was known to the notary. We are not prepared to say that in such a case the parties entitled to notice were bound to be at their dwelling-houses, or to have any person there at the time the notary called to receive notice, and, consequently, that their absence and the closing of their houses ought to have excused the holder from taking other steps to communicate notice to them. But laying these circumstances out of the case, the court decided no more than that the steps taken to give notice were sufficient, in point of law, for that purpose; and it is not to be doubted but that they were so. They do not decide that, in a case freed from the circumstances before noticed, it was necessary that notice to the indorsers should have been given through the postoffice.

In the case of *Crosse v. Smith*, 1 Maule & S., 545, the cashier called at the counting-house of the drawer, for the purpose of giving him notice of the dishonor of the bill. He found the outward door open, but the inner locked. The cashier knocked, and made noise enough to have been heard, if anybody had been within. After waiting a few minutes and no person appearing, he left the house, and took no further legal step to give the notice. It was insisted, in opposition to the sufficiency of the notice, that a notice in writing, left at the counting-house, or put into the postoffice, was necessary. The answer given by the court was, that the law did not require either mode to be pursued. "Putting a letter in the post," says Lord Ellenborough, "is only one mode of giving notice; but where both parties are residing in the same post-town, sending a clerk is a more regular and less exceptionable mode." The decision in this case, as to the sufficiency of the notice, was the same as that given in the case of *Goldsmith v. Bland*, before referred to. The case of *Ireland v. Kip*, 10 Johns., 490, and 11 Johns., 231, was much pressed upon the

court in the argument of the present cause by the counsel for the plaintiff in error. We have examined that case with great attention and respect, but have not been able to view it in the same light as it seemed to have struck the learned counsel. The place of residence of the defendant, the indorser, was three and a half miles from the postoffice, within the limits of the city of New York, but without the compact part of the city, and without the district of any letter-carrier. The case does not state that the indorser had any counting-house, or place of business in the city, at which the notice could have been left. The only notice given to the defendant was a written one, put into the postoffice in the city of New York, directed to the defendant, and stating that the note had not been paid. The place of the defendant's residence was known to the clerk of the notary, who put the written notice to the defendant into the postoffice. The only question decided by the court was that, under the circumstances of that case, the holder of the note was bound to give personal notice to the defendant, or to see that the notice reached his dwelling-house; and that merely putting the notice into the postoffice was not sufficient. Upon a second trial of the cause it appeared in evidence that the defendant had given directions to the letter carriers of the postoffice, to leave all letters that came to the postoffice for him at a house in Frankfort street, in the city of New York; that the letter carriers called at the postoffice three or four times every day, and took out and delivered all letters left there; and that the defendant usually called or sent every day for his letters to the house in Frankfort street. The learned judge who delivered the opinion of the court stated that, admitting a service of the notice at the house in Frankfort street would have been good and equivalent to a service at the defendant's dwelling or counting house, still the delivery of the notice at the postoffice, unaccompanied with proof that it was actually delivered at the house, was not notice. He adds that "the invariable rule with us is, that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount, such as leaving it at the dwelling-house or place of business of the party, if absent." Now it is apparent that the question which arises in the case under consideration was not and could not be decided in the case just referred to. The objection to the notice in the latter case was, that it ought to have been given at the dwelling-house of the defendant, and could not be given through the postoffice, unless it also appeared that the notice so given reached the dwelling-house, or the house in Frankfort street. No attempt was made to give the notice in the former mode, as was done in this case; and the latter mode, so far from being considered as tantamount to the former, or as being necessary in order to excuse the want of personal notice, is declared throughout to be insufficient without further proof.

The opinion of this court is, that the defendants in error were, under the circumstances of this case, excused from taking any other steps than they did, to give notice to the plaintiff of the non-payment of these notes; and that the judgment of the court below ought to be affirmed, with costs.

[The counsel for the plaintiff in error stated another point, which he admitted had been settled by this court, in the case of *Fullerton v. Bank of United States*, 1 Pet., 612 (§§ 1200-1204, *infra*); but requested permission to reargue the point in case the court should decide the first point against him. I am directed by the court to say that the case referred to was well considered by the court; that we are entirely satisfied with the decision made in it, and see no cause to call for a reargument of the principle there decided.]

UNITED STATES v. BARKER.

(Circuit Court for New York: 2 Paine, 340-348. —.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This case comes up by writ of error to the district court for the southern district of New York, and the only question raised and argued was, whether due notice of the non-acceptance of the bill in question was given to the defendant, the drawer. The letter of the secretary of the treasury addressed to Flewelling, inclosing the protest for non-acceptance, with directions to give notice thereof to the drawer and indorsers, was dated on the 7th of December, 1814, at the city of Washington; and if put into the mail of the next day (the 8th), would, according to the course of the mail, arrive here on the 10th. And for the purpose of the question now before the court, it must be taken for granted that the letter containing the protest, and directing notice to be given to the drawer and indorsers, was received by Flewelling on the 10th of December, between eleven and twelve o'clock. But the notice of the dishonor of the bill was not given until the 12th. I do not understand any objection to have been made to the regularity of the notice of non-payment, nor is it necessary to notice that point here. This case is not distinguishable in any respect as to facts from that of *The United States v. Barker*, decided at the last term of the supreme court (12 Wheat., 559). And the law of that case must of course apply to and govern this.

§ 1011. *The rule that each party has one day after notice to notify the party to whom he looks for payment does not apply to an agent.*

A question, however, growing out of those facts, has been made here, which does not seem to have attracted the attention of the counsel or the court, according to the report of that case. It appears that the 10th of December, when the letter of the secretary of treasury was received here by Flewelling, was on *Saturday*, and that notice was given on *Monday* (the 12th), and this, it has been argued, was all that the law required of the holder. This question does not appear to have been made in that case on the trial in the court below; and I have no recollection of its having been at all started on the argument in the supreme court. If it had been, the opinion of the court would, doubtless, have been expressed upon it. And it is hardly to be presumed that if this circumstance would have furnished an excuse for the delay in giving notice, it would have escaped the notice of the bar and of the bench. But if this should be considered a new point, undecided by that case, it would not, I think, affect the question; the notice was still too late—it should have been given on Saturday; the letter was received here early enough on that day by the agent, to enable him to have given the notice within the usual business hours, without any extraordinary diligence. Mr. Flewelling could not, in any sense, be considered the holder of this bill, or having any interest in it; he was the mere private agent of the plaintiffs, who must be deemed the holders, and chargeable with all the legal consequences resulting from the negligence of their agents. A notice put into the mail at Washington, directed to the defendant at New York, would have been sufficient, and all that could have been required of the plaintiffs; they were not bound to employ an agent here to serve the notice. And had notice been sent by the mail directly to defendant, it would, doubtless, have been received by him on Saturday. The delay, therefore, in bringing the notice home to the defendant is attributable to the plaintiffs. Although notice by the mail would have been sufficient, the plaintiffs were not bound to adopt

that mode, but might cause it to be given by a private hand; but the rule seems to be well settled in England, that when such course is adopted, the holder is bound to see that it reaches the party on the same day that it would have arrived by the post. Chitty, 402, 288 and n.; 6 East, 3.

The rule which we find laid down in the books, that each party has an entire day after that on which he is informed of the dishonor of a bill, to give notice to the party to whom he looks for payment, must be a party to the bill, and who has an interest in it, and cannot apply to an agent employed by such party to give the notice. If Flewelling had been a party to this bill, he might, according to this rule, have had until Monday the 12th to give the notice; but the plaintiffs could not claim a day for their agent to give this notice after it arrived here. Such a rule might lead to great delay and abuse by employing a number of agents in succession to give such notice, if each one was entitled to a day for that purpose. This rule in England seems to have received some modification with respect to bankers employed to collect bills. In *Haynes v. Birks*, 3 Bos. & Pul., 599, it was said that as soon as a banker is informed of the non-payment of a bill, it becomes his business to acquaint his principal of that circumstance, and that if a bill be returned to a banker, he is bound to give notice to his principal that very day, if he can do so by using ordinary diligence. But by subsequent cases the rule seems now to be otherwise, and a banker is considered a distinct holder, though he is possessed of the bill merely to receive payment for a customer. But it may be inferred from what fell from Lord Ellenborough in one of the cases, that it is the custom of bankers to present the bills as distinct customers, and not as mere agents identified with their customers. 2 Taunt., 388; 15 East, 291. This cannot, however, affect the question in this case, for there is no pretense that Flewelling was, in point of fact, or that he professed to be, anything more than a mere agent, acting for and in the name of the plaintiffs. The judgment of the court below must therefore be affirmed.

UNITED STATES BANK v. GODDARD.

(Circuit Court for Massachusetts: 5 Mason, 366-377. 1829.)

STATEMENT OF FACTS.—Pickering's note, payable to Goddard, was indorsed by the latter to the Portsmouth branch of the United States Bank. Being payable at Boston, where Goddard resided, it was forwarded to the Boston branch of the United States Bank for collection. As was expected, Pickering failed to pay it at maturity. Notice of non-payment was sent by the Boston branch, on March 5th, to the Portsmouth branch, which received it on the afternoon of the 6th, the mail having been delayed by a snow storm. On the same day the cashier of the Portsmouth branch wrote Goddard, advising him of non-payment of the note. This notice reached him the 8th. In *assumpsit* against him on the note, he set up in defense that the notice of non-payment was insufficient by reason of delay. It was shown that Goddard's name was not in the directory, and that his residence was not in fact known to the officers of the Boston branch, although they might have ascertained it by reasonable inquiry.

§ 1012. *Relation of branch banks to the parent bank is that of agents and principal.*

Opinion by STORY, J.

I lay out of the case all consideration of the fact that the note belonged to

the branch bank at Portsmouth, and was remitted to the branch bank at Boston for collection, both these branches being but agents of the Bank of the United States, the real holder of the note. In the first place, it is admitted that the known course of business in each of the branches is, in respect to all notes transmitted from another branch, to deal with them in the same manner as if transmitted by a stranger bank, and to return their notes back, upon their dishonor, to the branch from which they have been received. In the next place, the branches being established by the parent bank for its own particular purposes, their agency may be limited and controlled according to the pleasure of the parent bank. So that the present case does not at all differ from that of a private principal who employs different agents in different cities to transact business, or negotiate and discount, and collect notes there upon his account. No distinction was pointed out at the argument, as growing out of this circumstance, differing the case from the common case of holder and agent, or holder and banker; and none is believed to exist. The case may, therefore, for all the purposes of this suit, be considered as if the Portsmouth branch were the real holder of the note and wholly unconnected with the branch in Boston, and employing the latter as its agent to collect the note when due.

§ 1013. Order in which indorsers and makers should be notified of non-payment.

The question, then, is whether notice of the dishonor ought to have been given by the branch bank at Boston to the defendant, or whether the notice sent by the branch bank at Portsmouth to the defendant was in due time and sufficient in point of law. It is admitted that there is no objection to the notice on account of the delay of its arrival to the defendant until the 8th of March, when it ought regularly to have arrived on the 7th. The snow storm sufficiently accounts for that; and the notice was given as early by the holder as, under the circumstances, it could or ought to be.

§ 1014. Duty of agent in giving notice of dishonor.

The case is narrowed down, then, to the consideration whether by law the defendant was entitled to notice directly from the agent in Boston, which, by due inquiry and diligence, he might have given on the 6th of March; or whether a circuitous notice through the holder was sufficient. The argument of the defendant's counsel is this. The agent is bound to give notice of the dishonor to a prior indorser, who is intended to be charged, if his residence is known to him, or if, upon reasonable inquiry, it can be ascertained, and it is in fact nearer to his own than that of the indorser, and a notice will thereby reach him earlier than from the principal holder. Reasonable diligence is in all cases sufficient in giving notice; but what is such must be judged of by all the circumstances of each case. If the agent may in all cases omit to give notice to the indorser, then, although he resides in the same city with the indorser, and the principal holder resides at a great distance, the indorser would be held, although a circuitous notice from the holder might not reach him for a week or a month, which would be unreasonable. And it is said that there is no case which justifies such a doctrine. If there be no such case, then the question must be considered upon principle. Now it is very clear that if the Boston branch had been the holders of the note, they would, under the circumstances, have been entitled to recover against the defendant, since he received due notice from the prior holders, to whom due notice was sent by them, and to whom, upon payment of the note, the defendant would have been answerable over. It is laid

down in Bayley on Bills, 163 (4th ed.), and better authority can scarcely be, that "though a holder or *any other party* gives no notice but to the person of whom he took the bill, yet if notice is communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties. It is no objection, in such case, that there was no notice immediately from the plaintiff to the defendant." And this doctrine is fully supported by decided cases. *Jameson v. Swinton*, 2 Camp., 373; *Wilson v. Swabey*, 1 Starkie, 34; *Stanton v. Blossom*, 14 Mass., 116, and *Stafford v. Yates*, 18 Johns., 327, are in point. The reason seems to be that, as the notice is sufficient to charge the defendant with the payment in favor of the person who gives it, it ought to charge him in favor of all subsequent parties, because he sustains no injury from want of notice. It is, as to him, due notice. If, then, as *holders*, they might affect the defendant with responsibility by such circuitry of notice, what is the reason why, as *agents*, they may not give their principal the same right? If there be any, it must be upon the ground that the agent is in all cases bound to give direct notice to the indorser intended to be charged, in the same way, and within the same time, and in the same manner, as his principal ought, if there was no agency, and the bill remained in his hands. Such a proposition has never yet been maintained, as far as I know, by any court of justice. And in the argument it was admitted that if the domicile of the party to whom notice is to be given be unknown to the agent, he is not bound to give any notice. And it has been decided that, when a holder transmits a note for payment to his agent, he is not bound to inform the latter where the prior parties live, so as to enable the agent to give them notice.

§ 1015. *Whether an agent to receive payment is bound to give notice to any one but his principal.*

But how is it established that in any case an agent to receive payment of a note is bound to give notice to any person, but his principal, of the dishonor? The nature of the transaction does not necessarily imply it. The authority to receive payment may be complete without any incidental authority to give such notice. It is certainly competent for the holder to authorize his agent to do no more than to demand payment, and give him notice of the dishonor. If the agent actually gives notice in due time to the antecedent parties, that may be good in favor of his principal. If the latter requires his agent to give such notice, and he neglects to do it, he may be chargeable with any loss sustained by such neglect. But the question is not what the agent may do, or ought to do, as between himself and his principal, but whether the other parties to be charged upon notice have any right to such notice from him, so as to be discharged by his neglect. As I understand the doctrine of law upon this subject, it is that an agent, upon the dishonor of a note remitted to him to procure payment, is bound to give notice of the dishonor to his principal, and transmit to him the proper evidence of it; but he is not bound to give any notice to other parties on the note. That was manifestly the doctrine of the court in *Haynes v. Birks*, 3 Bos. & Pull., 599, 601, where a bill had been remitted to bankers, as agents of the holder, to procure payment; and the argument there was that in such a case the bankers, being agents of the holder, the defendant (the indorser) was entitled to the same notice, as if the bill had remained in the plaintiff's hands. But the court overruled the objection, and said that it was the banker's business only to acquaint his principal of the dishonor. The same doctrine was held in *Tunno v. Lague*, 2 Johns. Cas., 1. That case is very strong, for the defendant, who was sought to be charged, lived in the city of

New York, the bill being drawn by him at Jeremie (N. J.) in favor of the plaintiffs upon a house in New York, and dishonored by the latter. The notice was not sufficient in the opinion of the court, having been given at New York long after the dishonor, if the party giving the notice had been the holder; but being an agent only, it was held that the notice was sufficient, because it was earlier than the defendant would have had it, if the bill had been sent back to the plaintiffs, and notice had been sent directly by them. And the court said, that the *duty* of the agent extended no farther than to give notice to his principal. The same doctrine is also asserted in *Colt v. Noble*, 5 Mass., 167. The bill was drawn in New South Wales, in favor of the defendant, and by him indorsed at Madras to the plaintiffs, who sent it to their agent in London, where it was dishonored by the drawees. The defendant resided in Portsmouth, N. H., and the defendant might have sent notice to the defendant at Portsmouth in three months; but he merely transmitted the bill and protests to his principal at Madras, who sent notice from thence to the defendant, who did not receive it until more than a year after the dishonor. The court held the notice sufficient. And Mr. Chief Justice Parsons, in delivering the opinion of the court, said, "A person appointed a factor to cause a bill to be presented is intrusted with no other powers, and it is his duty to notify his principal." It is true that in that case it did not appear that the agent knew the defendant's domicile; but that consideration was not relied on. And the court decided generally, that the holder was not bound to give information of the domicile of the indorser to his agent; nor was the latter bound to give notice to the indorser of the dishonor; and that it made no difference whether the bill was remitted to the factor to procure acceptance, or in payment of a debt due to him. The case would seem, therefore, to travel on all-fours with the present.

§ 1016. *To whom notice is to be given by a banker who holds a note for collection.*

It appears to me, also, that the cases in which it has been holden that a banker who as agent receives the bill of a customer is only bound to give notice of its dishonor to his customer, in like manner as if he were himself the holder, and his customer were the party next entitled to notice, confirm the doctrine. The legal effect of these cases is, that the customer has the like time to communicate such notice as if he had received it from a holder, and therefore by placing a bill or note in the hands of a banker, the number of persons, from whom notice must pass, is increased by one. So it is laid down in *Bayley on Bills*, 173 (4th ed.); and the cases of *Haynes v. Birks*, 3 Bos. & Pull., 599; *Scott v. Lifford*, 9 East, 347, and *Langdale v. Trimmer*, 15 East, 291, fully support the position; and it has also been recognized in the recent case of *Firth v. Thrush*, 8 Barn. & Cress., 387. In all these cases the bankers were agents; and if they were bound to give notice at all, they might have given it a day earlier than it was received from their principals. But the court treated the cases exactly as if the agents were holders, and necessarily repudiated the notion that, either as holders or as agents, they were bound to give notice to any other person than their principal. But it is said that in neither of these cases did it appear that the bankers knew the residence of the parties to be charged by notice; or that the banker's residence was nearer to the parties, than that of the principals. If that be admitted, it is still a sufficient answer, that neither of these facts was treated as material; and the judgment of the court proceeded upon a principle which comprehended all such cases. If the sufficiency of the notice depended upon the fact whether the agent had no knowledge of

the residence of the parties, or lived farther from them than his principal, that fact ought to have come from the plaintiff as part of his case; for the *onus* was upon him to show due notice. I am not satisfied, however, that the case in 3 Bos. & Pull., 599, was not a case where the banker lived nearer to the indorser than to the holder. The latter lived at Knightsbridge, and both of the former lived in London. But it seems to me that there is a far stronger reason for requiring that the banker should give notice where he and the principal live in the same town, or at least that notice in such cases should be given as early as the principal might give it if the note were in his own hands, than where the principal resides in a different town, since the communication between them is so much more easy.

§ 1017. *An agent for collection is not bound to notify the indorser.*

It appears to me that the question now before the court has been closed by authorities; if not by direct adjudication, at least by necessary inference. The doctrine is laid down, without any exception, that the agent is not bound to give notice; and if any exception had existed, it could not for so long a period have been overlooked. But if it were otherwise, and there was no authority in point, my own judgment would be the same. It appears to me that an agent is not bound to give notice to the indorser of the dishonor of any note; and that his agency does not naturally include such a duty. If he contracts with his principal to give such notice, that is a mere private contract between the parties, with which the indorser has nothing to do. It neither enlarges nor limits his rights. It may be inconvenient for him to receive a circuitous notice; but that is not sufficient to change the law. I think it would be far more inconvenient to establish the doctrine now contended for in the defense. All that is required by law is that the holder should give notice to the indorser in a reasonable time after he has knowledge of the dishonor, and that there should be no laches in getting that knowledge, if an agent has been employed. This view of the case renders it unnecessary to consider the point whether, under all the circumstances, the defendant was entitled to notice, he having received security, originally supposed to be sufficient to meet the payment; as well as some other points suggested in the argument at the bar. Judgment must therefore be entered for the plaintiffs, according to the verdict.

Judgment accordingly.

HOPKIRK v. PAGE.

(Circuit Court for Virginia: 2 Marshall, 20-42. 1823.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit is brought to obtain payment of two bills of exchange drawn by the late William Byrd of Virginia on Robert Cary & Co., merchants of London, the one in the year 1774 and the other in 1775. These bills were regularly protested, but the defendant makes several objections to paying them. The first to be considered is, that no notice of their non-payment and protest was given either to William Byrd in his life-time, or to his representatives since his death. The plaintiff contends that this notice was unnecessary, because the drawer had no funds in the hands of the drawee.

§ 1018. *How far want of funds in the hands of the drawee will excuse notice of dishonor.*

Although this application, in consequence of the state of the fund to which the plaintiff must resort, it consisting of equitable assets, is made to a court of

equity, it is admitted to be a law case depending entirely on legal principles. It requires an attentive consideration of the question, how far the want of funds of the drawer in the hands of the drawee discharges the holder of a bill of exchange from the necessity of giving notice to the drawer of its dishonor. The rule requiring this notice was for a long time supposed to be general, and Mr. Justice Blackstone in his commentaries lays it down without any exception. The first case in which an exception was admitted is *Bikerdike v. Bollman*, decided in November, 1786, and reported in 1 Durn. & E., 405; in that case the court stated that if it be proved by the holder that "from the time the bill was drawn till the time it became due the drawee never had any effects of the drawer in his hands," notice to the drawer is not necessary. The reason given is that he had no right to *draw*, and *could not be injured* by not receiving notice. An additional observation made by one of the judges is that to draw in such a case "is a fraud in itself." It does not appear from the report of this case, nor is there any reason to believe, that there were any running accounts between the parties; the whole complexion of the case, and the reasons assigned by the judges for their opinions, negative the idea; it is simply the case of a debtor drawing a bill on his creditor without a prospect of its being paid. In such a case notice is declared by the court to be unnecessary. It is remarkable that in this case, although the principle is expressly asserted by both the judges, each declares that the case would be decided in the same way on a different principle.

In *Goodall v. Dolly*, decided in 1787, 1 Durn. & E., 712, the judgment was against the holder of the bill, for want of notice; but in giving his opinion Mr. Justice Buller recognizes the principle established in *Bikerdike v. Bollman*. In *Rogers v. Stephens*, 2 Term R., 713, decided in 1788, the law is said to be settled, that no effects of the drawer in the hands of the drawee excuses the holder from the necessity of giving notice; yet it is remarkable that in this case all three of the judges rely very much on a subsequent *assumpsit* made by the drawer. In *Gale v. Walsh*, 5 Term R., 239, decided in 1793, the principle appears to be recognized; but a rule to show cause why a new trial should not be granted for this cause was discharged, because the fact did not exist in the case.

§ 1019. — *the early rule on the subject has been modified. Authorities reviewed.*

These are the earliest cases on this point; it has occurred very frequently in subsequent cases, and the principle seems to be firmly established; but as the question has come forward in different forms, and been viewed under different aspects, the principle has been greatly modified, and is no longer laid down in the general terms which were carelessly used on its introduction. It has been found necessary to define its extent with more precision and to state the rule with more accuracy. It was perceived that, in the course of commercial dealing, it would frequently occur that a person might draw a bill with the best reasons for believing that it would be honored, although, in fact, he might have, at the time, no funds in the hands of the drawee; and that all the reasons for requiring notice would apply, in such a case, with the same force as if the bill had been drawn on actual funds. In *Legge v. Thorpe*, 12 East, 171, Le Blanc and Bayley, Justices, stated the principle laid down in *Bikerdike v. Bollman*, and afterwards adhered to in these terms. They said, "that the court in that case, looking to the reason for which notice was required to be given, laid down the rule, *not generally*, that where the drawer had no effects in the

hands of the drawee at the time (which perhaps might turn out to be the case upon a future settlement of accounts between them), no notice of dishonor should be given; but that it need not be given where the drawer *must have known* at the time that he had *no effects* to answer the bill, and could have no reason to expect that his bill would be honored." In *Blackhan v. Doren*, 2 Camp., 503, Lord Ellenborough said: "If a man draw upon a house with whom he has no account, he knows that the bill will not be accepted; he can suffer no injury from want of notice of its dishonor, and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee." In *Walwyn v. St. Quintin*, 1 Bos. & Pul., 652, one of the strongest cases in the books in favor of dispensing with notice, Eyre, C. J., said: "But it may be proper to caution bill-holders not to rely on it as a general rule, that, if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may possibly be many others."

In *Brown v. Maffey*, 15 East, 216, Lord Ellenborough said: "The doctrines of dispensing with notice of the dishonor of a bill has grown almost entirely out of the case of *Bikerdike v. Bollman*. That decision dispensed with the notice to the drawer, where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due." "But that exception must be taken with some restrictions, which, since I sat here, I have often had occasion to put on it, as where the drawer, though he might not have effects at the time of the drawing of the bill in the drawee's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due. In such cases, I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honored." In *Rucker v. Hiller*, 16 East, 43, Lord Ellenborough said: "Where the drawer draws his bill in the *bona fide* expectation of assets in the hands of the drawee to answer it, it would be carrying the case of *Bikerdike v. Bollman* farther than has ever been done, if he were not at all events entitled to notice of the dishonor. And I know the opinion of my lord chancellor to be, that the doctrine of that case ought not to be pushed farther." "The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception farther, it would come at last to a general dispensation with notice of the dishonor, in all cases where the drawee had not assets in hand at the very time of presenting the bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A *bona fide* reasonable expectation of assets in the hands of the drawer has been several times held to be sufficient to entitle the drawer to notice of the dishonor, though such expectation may ultimately fail to be realized." And in the same case, Bayley, J., said: "The general rule requires notice of the dishonor to be given in due time to the drawer, and it lay upon the plaintiff to show that he could not possibly be injured by the want of it. It would be somewhat hard to call upon the drawer towards the end of six years after the bill given; and when he objected that he had no

notice of the dishonor, to tell him that he had no effects in the drawee's hands at the time when the bill was presented, though they might have come to his hands the very day after, and the drawee might have settled his accounts with the drawer on the presumption that the bill was paid."

The subject was considered by the supreme court of the United States, in the case of *French v. Bank of Columbia*, reported in the fourth volume of Cranch (4 Cranch, 141, 2 Cond. Rep., 58; §§ 983, 984, *supra*). In that case it was said "to be the fair construction of the English cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and therefore as not coming within the exception to the general rule." When the drawer is continually making consignments to the drawee, and continually drawing on those consignments, his conduct may be essentially affected by knowing that any of his bills have been protested. He may stop *in transitu*, or may suspend further consignments. It may be as material to his interest to place no more funds in the hands of the drawee, in such a case, as to withdraw the funds previously placed in his hands. Notice may be as important to him in the one case as in the other, and there seems to be the same reason for requiring it.

Supposing the rule to be, that every person having a *right to draw*, or having reason to believe that his bill will be honored, is entitled to notice, I will proceed to apply the principle to the facts of this case; and in doing it I shall consider the two bills separately. On the 19th of July, 1774, William Byrd drew on Robert Cary & Co., in favor of Edward Brisbane, for the sum of £353 6s. This bill was indorsed by Edward Brisbane to Alexander Spiers, and by him to the company. On the 17th of November, 1774, it was protested for non-payment. The first information that appears to have been given of this protest to Colonel Byrd, or his representatives, was the institution of this suit in 1819. The executor of Byrd resists its payment for want of notice, and the plaintiff alleges that notice was unnecessary, because the drawer had no effects at the time in the hands of the drawee. To support this allegation he relies on several letters written by Robert Cary & Co. to William Byrd, which have been exhibited by the executor on his requisition. The defendant objects to this testimony, that the letters are the mere allegations of Robert Cary & Co., and do not contain a full statement of the correspondence between the parties, or of their accounts; that Colonel Byrd may not have acquiesced in the accounts transmitted with these letters, or in the statements they contain, although, from the loss of papers, the death of parties and the great lapse of time, the papers cannot now be produced.

§ 1020. *Rule as to acquiescence in accounts rendered.*

The general rule is that a long acquiescence in letters containing accounts is *prima facie* evidence of an acquiescence in their contents; and there is less reason for excepting this case from the rule, because the letters of Robert Cary & Co., from November, 1773, to October, 1775, do not notice any objection on the part of William Byrd to any of the accounts, which, one of those letters says, were annually transmitted to him. The letter from Robert Cary & Co. to William Byrd, dated the 10th of November, 1773, incloses an account current, showing a balance due Robert Cary & Co. of £616 9s. 1d. This letter gives notice of the completion of a contract for the sale of Byrd's English estate; says the money is to be paid the 5th of April; that they shall imme-

diately afterwards take up the whole of his bills; and says that they have referred Farrell & Jones to him, to determine whether they shall pay a debt of about £800, claimed by Farrell & Jones. The next letter is dated the 13th of May, 1774. It states the receipt of £5,000 on account of the estate which had been sold, and the expectation of receiving the farther sum of £11,500 on the same account. It states the payment of debts to the amount of £5,544 7s. 4d., and gives a list of other debts due from Byrd, to the amount of £11,577. The letter concludes with saying that by Greenland's estimate, the produce of the estate will not exceed £15,500, out of which great charges are to be deducted. From this sketch the letter proceeds, "You will be able to judge how the account may stand, and what bills must be returned." It is observable that, among the debts paid, are several bills of exchange, which had been long protested, one of them as early as February, 1768. This fact shows an understanding by which bills were held up after a protest, in the expectation that they would be paid by the drawee, notwithstanding the protest. In such a case, if no notice be given, the law seems to be that the holder looks to the drawee, not to the drawer, for payment. The next letter, of the 5th of August, 1774, states that there are many bills which must be returned, after paying all the money received on account of the English estate. This letter speaks of a further sum for a half year's rent, accruing before the purchaser took possession, to be received after Michaelmas. This would be £371 4s. 6d. There is, too, a subsequent letter, of the 14th of March, 1775, which mentions a farther receipt of £448 12s. 1d., on account of the English estate. Colonel Byrd appears to have drawn to the full amount of his English estate, so far as Robert Cary & Co. had stated the money to have been received; and if the transactions between the parties had gone no farther, these letters would furnish strong reasons for the opinion that, in July, 1774, he acted at least incautiously in drawing the bill under consideration. But there were transactions between the parties. Colonel Byrd held a large estate in Virginia, and the usage of the considerable planters to ship their tobacco to London merchants, and to draw on their consignments, is of general notoriety. In their letter of the 17th of November, 1774, Robert Cary & Co. say: "We shall, in the disposal of your tobacco, hope to render you a safe and pleasing tale."

In a letter of the 10th of February, 1775, is an account of sales of fifteen hogsheads of tobacco, shipped in a vessel commanded by Captain Powers; and there is also notice taken of a mortgage on the estate sold to Mrs. Otway, for which no claimant had appeared, but for which Mrs. Otway had retained a considerable sum in her hands. The letter says: "We were compelled to settle the conveyance in the manner we did, yet at the same time it no ways precluded you from receiving your part of this other mortgage, if no claimants." The letter shows that Colonel Byrd had written on this subject, and had manifested the expectation of receiving a further sum on this account. The letter mentions the payment of some small orders given by Byrd. It may be considered as probable, from these letters, that Colonel Byrd was not perfectly satisfied with the sums retained on account of charges on the estate, and expected more money from it. A letter of the 20th of June, 1775, states the payment of a draft drawn by Colonel Byrd, in favor of Hornsby, for £75, and their payment for his honor of another draft on Farrell & Jones for the same sum. The last letter is dated 2d of October, 1775. It mentions the payment of several little drafts, as desired by Colonel Byrd, "which are mentioned in

an account current inclosed," but the account itself does not appear. It shows a balance, as the letter says, of 16*s.* 11*d.* in favor of Colonel Byrd.

§ 1021. *Onus probandi where a bill has been held up a long time without notice of protest.*

From this review of the letters in the cause, it is obvious that Colonel Byrd was much pressed for money; that he was sanguine in his calculations of the sums to be yielded by his estate in England; that he drew upon that fund by anticipation, and to an amount greater perhaps than was strictly justifiable. It is also apparent that a considerable part of the money for which the estate sold was retained for incumbrances, some of which were questionable, and there is reason to believe that he questioned them. It is also apparent that there were running transactions between the parties, and that the holders of his bills were in the habit of retaining them and of receiving payment long after protest. That he made shipments of tobacco in the time is unquestionable; but the amount of his shipments is uncertain; his letters are not produced; they would throw much light on this transaction. The letters giving notice of this particular draft might, and probably would, show the idea on which it was drawn and the calculations of the drawee; it might be drawn on actual consignment of tobacco, or it might be drawn on a calculation that something farther might be yielded by those items of the English estate, which the letters show had not finally been adjusted. These calculations may have been erroneous; but if they were made, the bill was not drawn with a knowledge that it would not be honored, and therefore notice of its dishonor was unnecessary. The court will not presume that these calculations were made; the court will not presume that the letter of advice which usually accompanies a bill of exchange did show that the drawer calculated on his bills being honored; but the court cannot presume the contrary; and it is to be recollected that when a protested bill is held up for a great length of time without notice, the whole *onus probandi* is thrown on the holder; he must prove everything, and nothing is required from the drawer. The case furnishes strong reason for the opinion that this bill was not returned to Virginia, but was held up by Spiers, Bowman & Co. in the expectation of its being paid by Robert Cary & Co. It was drawn on the 19th of July, 1774, and protested for non-payment on the 26th day of November of the same year. Another bill for £213 15*s.*, drawn on the 4th of July, 1774, in favor of Spiers, Bowman & Co., and protested on the 9th of November, 1774, was returned to Colonel Byrd, and was taken up; these bills drawn by the same persons, and held by the same house, at the same time, would probably have been returned by the same vessel had they been both returned. The circumstance that one was drawn in favor of Brisbane, an agent of the company, and indorsed by him to a member of the company, and by that member to the company, would not account for the appearance of one bill without the other, if both were returned. They were both the property of the same company, both due by the same person, both in possession of the company at the same time, and would probably have been both returned, if they were both returned, by the same vessel. The bill, said not originally to have been drawn in favor of Spiers, Bowman & Co., would probably have been transmitted to the same agent to whom the other bill was transmitted. The appearance of the one bill without the other is, then, a strong circumstance in favor of the opinion that the bill retained was held up in England in the expectation of its being paid by the drawee. In estimating the probabilities of the

circumstances and prospects under which the bill was drawn, this fact is entitled to some consideration.

We have no regular accounts, no statements of the consignments made by Byrd to Robert Cary & Co. We know that their connection was of long standing; that there was a considerable degree of mutual kindness and confidence; that Byrd was in the habit of shipping tobacco to Robert Cary & Co.; that there may have been a shipment at the very time this bill was drawn; that money was paid for Byrd by Robert Cary & Co. after this bill was protested; that a bill of £75 was taken up for his honor; and that in October, 1775, the balance of £616 9s. 5d., which stood against him in November, 1773, was converted into a balance of 16s. 11d. in his favor. We have not all the intermediate accounts, and we do not know how this balance may have fluctuated; add to this that the bill is not said to have been protested for want of effects. Under all these circumstances, I cannot say that the bill was drawn with a knowledge that it would be protested, and that notice of the protest could not be necessary. I cannot say that it was a fraud upon the payee, by giving him a bill which the drawer knew would not be paid. If the *onus probandi* lay on the drawer of the bill, the case would be clearly against him; but as it lies entirely on the holder, whose laches are without a precedent in a court of law or equity, I think he has not made out a case of complete justification on which he can entitle himself to a decree for the bill drawn on the 19th of July, 1774.

§ 1022. *Notice of protest excused by a state of war.*

The second bill was drawn on the 26th day of November, 1775, for £246 3s. 7d., and was protested on the 26th day of June, 1776. It was drawn after the commencement of hostilities in Virginia; and before it was protested all intercourse between the two countries was interdicted. Under these circumstances, notice is not to be expected, and ought not to be required. I at first doubted whether a bill, which, for a length of time, is held under circumstances which dispense with notice, does not lose its commercial character, and become an ordinary debt. But, on reflection, I am satisfied that this idea cannot be sustained, and that, to charge the drawer, notice of the dishonor of his bill ought to be given within a reasonable time after the removal of the impediment.

§ 1023. *Notice of protest. Small amount of funds in hands of drawee.*

The question, therefore, on this bill also is, were the circumstances under which it was drawn such as to dispense with notice? Was it drawn without reasonable ground for an expectation that it would be paid? It may reasonably be supposed that, on the 26th of November, 1775, the letter of the 2d of October, 1775, which came by the last packet to New York, was received. In attempting to show that notice of the dishonor of this bill was unnecessary, because the drawer had no effects in the hands of the drawee, the holder is met *in limine* by the fact that this letter shows a balance in his favor of 16s. 11d., and the exception under which the plaintiff withdraws himself from the general rule is that the drawer had at the time no effects in the hands of the drawee. If we may depart from the letter of the exception, there is no point at which to stop; and if notice may be dispensed with when a small sum is in the hands of the drawer, it may also be dispensed with when a large sum is in his hands, provided that sum be one cent less than the bill is drawn for. I am aware of this argument, but think it more perplexing than convincing. There are many questions in which no precise line can be marked, which must depend on sound legal discretion, and where the case itself must be decided by a jury,

or by the court, acting on the principles which ought to regulate a jury. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe his bill will not be paid, the motives for requiring notice of its dishonor do not exist, and his case comes within the reason of the exception. Where all transactions between parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in were he the debtor in the same sum. The true inquiry appears to me to be, whether the connection between William Byrd and Robert Cary & Co. remained such as to justify a hope that his bill would be honored, and to afford any shadow of justification for drawing it. I think it as demonstrable as any proposition of this sort can be, that he knew that this bill would not be paid. He had no funds in the hands of the drawee except 16*s.* 11*d.*, and no prospect of having any. He had made no shipment of tobacco by the last vessel, and Robert Cary & Co. speak of the fact with some resentment. In their letter of June, 1775, they had mentioned sending a vessel to Virginia chartered at a high price, in which they expected consignments of tobacco from their friends, and among others, from Colonel Byrd. In their letter of the 2d of October they say: "When Power came in, we were in hopes you would have offered him some assistance, but we observe the high price in the country was the cause of the disappointment, and no compliment to our charter. However, if we are no losers, we are not beholden to our friends for it."

With respect to the mortgage for which it had been supposed that the mortgagee was dead without a representative, he says, "it is feared the representative is found; but be this as it may," he adds, "the estate will be always liable, and, therefore, without a proper indemnity, little can be expected. What indemnity you may offer we know not, but we shall not engage for our own parts." After mentioning the payment of some bills, they add, "but for paying any more, or raising money on the uncertainty of the mortgage, we shall not attempt." With this letter before him, Colonel Byrd must have drawn, I think, with a moral certainty that his bill would be dishonored; and if in any case a holder can be excused for not giving notice, this is that case. There was an end of all consignments, of all intercourse between the parties; there were no funds to withdraw, and no remittances to stop. The want of notice would be no injury to him. This case seems to me to come within the exception of *Bikerdike v. Bollman*, as modified in the subsequent cases.

§ 1024. *Payment of an overdue bill of exchange presumed from lapse of time.*

This brings me to the consideration of the other objections made by the defendant to the payment of this bill. He contends that, after such a lapse of time, payment must be presumed. Admitting the doctrine of presumption to be the same in respect of a bill as of an instrument under seal, of which I am not so confident, still it is not a positive rule, depending absolutely, like the statute of limitations, on length of time, but is the mere creature of reason, resting on probabilities. The creditor may meet this presumption and rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that his debt has been paid. He has, I think, met and completely rebutted it in this case. The bill was protested in England on the 26th day of June, 1776, and Colonel Byrd died in 1777 or 1778. In the meantime war raged between the two countries; all intercourse between them was

unlawful; and Colonel Byrd's circumstances were too much embarrassed to admit of a suspicion that he would be eager in his search for those creditors who could make no legal demand upon him. It is, then, almost certain that this debt was not paid by him in his life-time. The chief argument in support of this presumption is founded on the time which has elapsed since his death, without any demand on his representatives. The plaintiff ascribes this to the insolvency of his estate; but to this it is answered that a suit had been brought in 1803, for a different claim, by the same agent, who was in possession of these bills; a bill was then filed claiming £70 19s. 10d., as a debt due from William Byrd & Co. for dealings at their store in Manchester, and £10 19s. 6½d., a debt due from William Byrd for dealings at their store in Petersburg. If the solvency of the estate did not prevent this suit, it cannot have prevented a suit on the bills.

The plaintiff assigns two reasons for this suit, by which he attempts to repel the inference which has been drawn from it. One is, that though William Byrd was supposed to be insolvent, William Byrd & Co. were not so. The other, that this suit was only preparatory to an application to the British commissioners sitting under the treaty of 1802; neither of these reasons is satisfactory; the suit does not seek for satisfaction from the effects of William Byrd & Co.; nor does it even charge that William Byrd was the surviving partner of that company, or even had any of its property in his hands; it charges him merely as a member of the company, and seeks for satisfaction out of his private estate, which is alleged to be in the hands of his executor, or of his trustees. But this reason, were it more consistent with the fact, would not apply to the claim against him as an individual. To account for this, we are told that it was necessary to establish the debt, in order to justify an application to the British commissioners. But surely it was not less necessary to establish the claim on this bill than on an open account. The production in 1804, or afterwards, of a protested bill without notice to the drawer of its dishonor, or proof of a single attempt to obtain payment of it, could never be received by the commissioners as a valid claim on the British government. But if these bills were held up in order to be laid before the commissioners, why were they not laid before that board? Is not the fact that no application has been made on them to the commissioners, a proof that this is not the cause which prevented the institution of suits on them in this country? If it be said that they have been laid before the commissioners, I ask what has been the fate of the application? Has it been rejected in consequence of the laches of the holder, or has it been successful? But there is no reason to believe that the suit in 1803 was brought with any other view than to recover the money it demanded; and the question recurs, why were not these bills put in suit also? It has been said they were overlooked by the agent; but this is not credible. There is an indorsement on the envelope which contained them, in his handwriting, and it must be supposed that bonds, bills and notes were not thrown in confusion among general books and papers, but were carefully preserved and listed, and that they would be immediately inspected by the agent to whom their collection was confided. Must it then be presumed that the agent believed them to be paid? The reasons against this presumption, so far as respects a payment made by Colonel Byrd, have already been stated. The reasons against their having been paid by his representatives are still stronger. Their accounts are all preserved, and this credit is not claimed. How could the agent have received an impression that they were paid? He must have received it

from the papers themselves, from the entries on the books, or from direct communications made by Spiers, Bowman & Co. But the papers contain no indications of payment. The books, I am told, contain none; and is it reasonable to suppose that the plaintiff would send the bills to be collected, and write to the agent that nothing was due on them? We must impute negligence to the agent, or believe that he was of opinion that the debt was not recoverable at law. The last opinion, however, does not necessarily imply his conviction that it had been paid. The bills were not accompanied with any proof of notice, and he could obtain none. Without this proof, and without any evidence that the drawer had no right to draw, he might have thought the claim desperate; but this does not create a presumption that he believed it to be paid. I think, on a consideration of the circumstances of the case, that the presumption of payment is completely rebutted.

§ 1025. *Assignment of bills of exchange. What constitutes such an assignment under the law merchant.*

I am next to consider an objection which goes to the right of the plaintiff to sustain this action, even admitting that the right to bring it exists in some person. In 1813 a contract was entered into between the plaintiff and William C. Williams, a citizen of Virginia, by which the former conveyed to the latter all his debts in this country, and authorized him to sue for them, either in his own name or in the name of the present plaintiff. It is contended that these bills passed by this assignment, and that the whole legal and equitable interest being in another, no suit on them can be maintained by the plaintiff. On the part of the plaintiff it is answered that this instrument, being made *flagrante bello*, is void, and that no action can be sustained on it even after peace. As this may probably become a question between the parties to the instrument, I would not give an opinion on it unless it should be necessary in this cause. I am rather disposed to think it is not necessary. Bills of exchange are transferable, not by force of any statutes, but by the custom of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. It appears to me that it would be extremely inconvenient to separate the evidence of ownership from the bill itself, and I think there is no usage to justify such a separation. Nothing can be more anti-commercial than the idea of transferring a negotiable paper by a deed transferring a vast number of bills, bonds, notes and accounts. Such an instrument may very properly be considered as conveying the equitable interest, the right to receive the money, but cannot be considered as a negotiation of the bill upon mercantile principles, or according to mercantile usage, so as to authorize the holder to sue in his own name. The books treat of no such mode of transfer. The person to whom a bill is transferred is never denominated an assignee. He is always termed an indorsee. Upon this ground I am of opinion that in this case a suit could not be maintained in the name of William C. Williams. Were this even doubtful, the instrument now relied on contains an authority to sue in the name of the plaintiff, and may therefore fairly be considered as not being intended to have the legal effect of an assignment, but to operate as an agreement authorizing William C. Williams to exercise all the powers of ownership in the name of the plaintiff. But I rely on the principle that a bill of exchange is not, by the custom of merchants, transferable by such an instrument as is produced in this case.

§ 1026. *Parties in equity. All persons having distinct interests must be joined.*

But the defendant contends that, admitting the suit to be maintainable in the name of the plaintiff, still William C. Williams ought to be a party, be-

cause in a court of equity all persons concerned in interest must be parties. I do not think the rule applies to such a case as this. All persons having distinct interests must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not, I think, always necessary to bring both before the court. Thus a trustee may sue without naming the *cestui que trust* as a party; an executor or administrator may sue without naming legatees or distributees. And the obligee in a bond, where it is not by law assignable, may sue, or the equitable assignee may sue in his name, without being named himself as a party. This may, I think, be done in a court of equity as well as a court of law. The person having the equitable interest, if the suit be not really brought for his benefit, may insist on being made a party, and the court will direct it; but I do not think the omission of persons in this situation any objection to the suit. Had this suit been brought by William C. Williams, Hopkirk must have been made a party; but I do not think Williams a necessary party to a suit brought by and in the name of Hopkirk. I am of opinion that the plaintiff is entitled to a decree for £246 3s. 7d. sterling, with interest thereon, at the rate of ten per cent. per annum, for eighteen months, and with interest on the whole sum at the rate of five per cent. per annum, either from the expiration of eighteen months, or from the time that this claim was asserted in court, according to the manner in which the act in the revisal, 1745, which regulates this transaction, has been construed. I shall give the five per cent. only from the assertion of the demand in court, unless by a reference to the records of the general or district court it can be shown that the law has been expounded, to allow interest from the expiration of the eighteen months.

YEAGER v. FARWELL.

(18 Wallace, 6-18. 1871.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—Farwell & Co., of Boston, loaned \$15,000 to Kerckhoff on his note secured by mortgage on real estate. Yeager & Co., of St. Louis, negotiated the loan for Kerckhoff, and at Farwell's request Yeager indorsed the note with his firm's name. The note fell due; no demand was made, nor was it protested, but on the last day of grace Yeager & Co. wrote to Farwell that the note would not be paid, but that they were responsible and would see it paid. Suit was brought against Yeager & Co. as indorsers, and there was judgment against them.

Opinion by MR. JUSTICE DAVIS.

This case resolves itself into two points: First. Were Yeager & Co. indorsers of the note in controversy? Secondly. If so, were Farwell & Co. relieved from the necessity of proving on the trial that they demanded payment of the maker, and gave notice to the indorsers of the dishonor of the note?

§ 1027. *A person who indorses a note at the request of the payee before negotiations are closed is liable as indorser.*

It is very clear that Yeager & Co. were liable as indorsers, if they placed their names on the back of the note in question before Farwell & Co. closed the negotiations for the loan to Kerckhoff, or made any advances on it to him. And the condition of the parties is not altered by the fact that Yeager & Co.,

without consideration, indorsed the note at the request of Farwell & Co. after negotiations concerning the loan had been some time in progress, and when they had a right to suppose Farwell & Co. were satisfied with the landed security which Kerckhoff offered. It may be true that Farwell & Co. originally intended to let the money go on the security of the trust deed, but they were not legally bound to do so, and could alter their minds on the subject, and forbear to loan the money unless Yeager & Co. (who were the middlemen in the negotiation) should also indorse the note. If they chose to do this before the transaction was completed or any portion of the money loaned was actually advanced to Kerckhoff, then their liability as indorsers is fixed, and so the learned court told the jury. Whether the indorsement was before or after the conclusion of the negotiations for the loan, or before or after the advancements to Kerckhoff, were questions of fact for the determination of the jury. As there was evidence tending strongly to support the finding of the jury on this point, and as they were correctly instructed in relation to it, the plaintiff in error cannot justly complain of the action of the jury.

§ 1028. *The promise of an indorser to see the note paid at an early day is equivalent to a waiver of notice, even if made on the last day of grace.*

The undertaking, however, of the indorser of a negotiable note is only to pay it in case the maker does not, and he is immediately notified of this default. The remaining defense set up in this action is that this was not done, and, therefore, the indorsers were not chargeable. But the indorser can, by his own conduct, place himself in such a position that he is estopped from alleging want of demand and notice of non-payment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet, after it is due, he can waive proof of them; or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial. 1 Parsons on Bills & Notes, ch. 13, p. 594. The inquiry is whether Yeager & Co. have, by their course of action, put themselves in this category. The court below held that they had, and, as the evidence on the subject was undisputed, took it from the jury and decided it as a question of law. The letter of Yeager & Co., which constituted this evidence, substantially informed the Farwells that Kerckhoff was unable to pay his note, but would be able to do so in a week or ten days at farthest. After expressing the annoyance felt by the writers, on account of the dishonor of the paper, it concludes in these words: "But we hold ourselves responsible for the payment of the note, and shall see it is done at an early day." Necessarily, this letter could not have reached its destination in due course of mail until after the note was due; but, for the purpose of holding the indorser, this is immaterial, for, as we have seen, he can dispense with the conditions for his benefit as well after as before the paper matures. It has been held by this court, in *Sigerson v. Mathews*, 20 How., 496, that if the indorser, with full knowledge of the fact that no demand has been made or notice given, makes a subsequent promise, he is liable, and cannot, when sued, set up as a defense the want of such demand and notice; and to the same effect are the decisions of the courts in this country generally. See 1 Parsons on Bills & Notes, p. 595, note m. Applying the principle of these decisions to the admitted facts of this case there is no difficulty in charging the indorsers. Their promise to pay was expressly made after they knew of the laches of the maker of the note, and they cannot now be allowed to repudiate it. The most formal demand and notice could have been of no service to them, for they

knew the demand would be useless, and the notice could only tell them what they were advised of without it. Acting under the weight of the knowledge of Kerckhoff's default, they did not choose to wait in order to see whether Farwell & Co. had taken the requisite steps to charge them, but preferred at once to acknowledge their liability, and, accordingly, made the direct promise to pay the note. Under these circumstances this promise is binding, and does not require for its enforcement the proof of demand and notice.

Judgment affirmed.

BURROWS v. HANNEGAN.

(Circuit Court for Indiana: 1 McLean, 309-313. 1833.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action is brought by the plaintiffs as indorsees of the defendant. A jury was sworn, and the facts admitted are, that the notes assigned by the defendant to the plaintiffs were given by Tillinghast and Gardner, for goods sold at Cincinnati; the notes were dated there, and Hannegan was to indorse them. The makers of the notes lived at Newport, Indiana. Notes being first drawn, payable at a bank in Indiana, but being objected to, they were drawn payable generally as they now appear. After the goods were forwarded, the notes were sent to Washington city, where they were indorsed by the defendant. When the notes became due, a notary public not finding Tillinghast and Gardner in Cincinnati, made a demand of payment in that city, and protested the notes for non-payment. At this time, and indeed at the time the notes were assigned, Tillinghast and Gardner were in doubtful circumstances, and the defendant obtained a mortgage on a lot as an indemnity. This lot did not give a full indemnity, but it was all the property that could be pledged. The defendant, on being written to by plaintiffs, replied that the notes must be paid without suit, and this was admitted to have been written by him. And he also admitted that he had received a partial indemnity; but eventually he observed that he would not pay the notes, unless compelled by law. On this evidence the counsel for the defendant moved the court to instruct the jury to find for the defendant. This motion was resisted by plaintiff's counsel, and they cited 2 Greenl., 809; 2 Am. C. L., 288, 282; 5 Mass., 176; 1 John. Ch., 99; Chitt. on Bills, 279.

§ 1029. *Assignment of note governed by law of place.*

Whether the assignment be considered as having been made at the city of Washington, or at Cincinnati, it is governed by the law merchant, and a demand of the drawers and notice of non-payment to the indorser was essential to charge him. If the contract of assignment be considered as governed by the Indiana law, then a suit and prosecution to insolvency was necessary. In deciding the case, it is not necessary to determine which law regulates the assignment.

§ 1030. *Demand at the holder's counting-house is not sufficient.*

The note upon its face was not made payable at a particular place. It was payable to the plaintiffs, who reside at Cincinnati; but the drawers did not promise to pay the money at their counting-house. If they had fixed the place of payment, a demand at such a place, when the note became due, and notice to the indorser, under the law merchant, would have charged him. And this is the kind of diligence relied on by the plaintiffs as entitling them to recover the money from the defendant as indorser. The notary states the demand was

made at Cincinnati, but at what place is not specified, and, if specified, the demand would have been equally defective, as the drawers did not agree to pay the money at a particular place. The demand should have been made of the drawers personally, or at their usual place of abode or of business. This was not done, and consequently the diligence which the law requires, to give a recourse against the indorser, was not used by the plaintiffs.

§ 1031. *Assurances by indorser of payment by maker not a waiver of notice.*

But it is insisted that the defendant, by assurances given to the plaintiffs, and by taking a mortgage from the drawers, for his indemnification, has waived a demand of the drawers and notice. The defendant on different occasions assured the plaintiffs before the note became due, and perhaps afterwards, that the drawers should or would pay the note. But there was no promise on his part to pay it.

§ 1032. — *review of authorities as to waiver.*

It was formerly held that an express promise to pay under a misapprehension of a legal liability by the indorser was not binding, and that a payment of the money under such circumstances could be recovered back again. *Bilbie v. Lumley*, 2 East, 471; *Williams v. Bartholomew*, 1 Bos. & Pull., 326; *Stevens v. Lynch*, 12 East, 38; *Chitt. on Bills* (ed. 1839), 535. But this doctrine has been overruled. *Brisbane v. Dacres*, 5 Taunt., 143; *Brown v. M'Kinally*, 1 Esp., 279; *Marriatt v. Hampton*, 2 Esp., 546, 723. Where a promise of payment is now made by the indorser it is held as an evidence of his liability to pay, and consequently an admission of legal demand and notice. *Potter v. Rayworth*, 13 East, 417. *Contra*, *Warder v. Tucker*, 7 Mass., 449; *Freeman v. Boynton*, 7 Mass., 483; 9 Mass., 332; 1 Bays., 291; *Griffin v. Goff*, 12 John., 423; *Trimble v. Thorne*, 16 John., 152. If an indorser propose to the holder to pay the bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice. *Goodall v. Dolley*, 1 Term R., 714. A promise to pay without a knowledge of a refusal to accept will not be binding. *Blesard v. Hirst*, 5 Burr., 2672; *Williams v. Bartholomew*, 1 Bos. & Pull., 326; *Stevens v. Lynch*, 2 Camp., 333; *Hopley v. Dufresne*, 15 East, 276-7. This is denied by other authorities. But an offer to the holder of a bill of a general composition of so much in the pound of all a party's debts, although not accepted, has been held to dispense with a notice of dishonor. *Margetson v. Aitken*, 3 Carr. & P., 338. The assurances of the defendant had no reference to his own liability, and they therefore do not come within the rule sanctioned by the above cases.

§ 1033. *Partial indemnity taken by the indorser after the maturity of the note does not operate as a waiver of notice.*

It appears that the defendant, subsequent, it is believed, to the notes becoming due, took a mortgage from the drawers on a lot of ground of small value, in part to indemnify him, should he be held responsible, and on this ground it is contended there was a waiver of notice. In the case of *Bond v. Farnham*, 5 Mass., 170, it was held if the indorser before the note becomes due takes an assignment of all the property of the maker as security for his indorsements, it is a waiver of demand on the drawers and notice of non-payment. But, if the assignments of property were made to secure him against the indorsement of other specified notes, it would not have this effect. In the case of *Prentiss v. Danielson*, 5 Conn., 175, the same principle held. The court held if the indorser of a note, to protect himself from eventual loss, take collateral security of the maker on account of the particular note indorsed, it was a waiver of the

legal right to require proof of demand on the maker and notice to himself. *Mead v. Small*, 2 Greenl., 207. The holder of a bill, by taking collateral security of the drawer, not giving time, does not release the indorser. Nor does he release any one of the names on the bill by receiving payment in part from the drawer or immediate indorser. *James v. Badger*, 1 Johns. Cas., 131; *Kennedy v. Motte*, 3 McCord, 13; *Hurd v. Little*, 12 Mass., 502; *Ruggles v. Patten*, 8 Mass., 480. It has been considered in the above cases that when an indorser takes an indemnity for indorsing a note he waives a notice of demand. This must be on the ground that having a pledge from the maker of the note his interest cannot be affected by want of notice. But if the holder of the note take additional security from the indorser, the indorser is not released. He has a right to pay the note, and to be substituted to the collateral security held by the holder.

If the above principle be sustainable, still the defendant in this case is not liable. His mortgage was taken after the note became due, and, at best, it was but a partial indemnity. And this property he offered to relinquish to the plaintiffs, which they refused to receive and exonerate him. So that in no point of view does it seem that the defendant has waived the notice which the plaintiffs as holders of the note were bound to give him of its dishonor. A partial indemnity given by the maker to the accommodation indorser of a note to secure said indorser in part against his liability, etc., does not excuse the holder from making due demand, and giving notice to such indorser. *Brunson v. Napier*, 1 Yerg., 199. But a full indemnity will dispense with demand and notice. *Durham v. Price*, 5 Yerg., 300. To the same effect is the case of *Mechanics' Bank v. Griswold*, 7 Wend., 165; *Chitt. on Bills* (ed. 1839), 473; *Corney v. Da Costa*, 1 Esp., 303; *Brown v. Maffey*, 15 East, 216; *Baker v. Birch*, 3 Camp., 107; *Clegg v. Cotton*, 3 Bos. & Pull., 239; *Bailey on Bills* (5th ed.), 303.

THORNTON v. WYNN.

(12 Wheaton, 183-193. 1827.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—This was an action brought by the defendant in error against the plaintiff in error, in the circuit court for the District of Columbia and county of Washington, upon a promissory note given by one Miller to Thornton, and by him indorsed to Wynn. The declaration contains a count upon the note, and also the common counts for money laid out and expended, and for money had and received. At the trial of the cause upon the general issue the defendant below took two exceptions to the opinion of the court, which are to the following effect: The first states that the plaintiff gave in evidence the note and indorsement mentioned in the declaration, and in order to dispense with the proof of the ordinary steps of diligence in presenting and demanding the note of the drawer, and giving notice to the indorser, the plaintiff offered evidence to prove that a few weeks before the institution of this suit the note in question was presented to the defendant, who, being informed that Miller, the drawer, had not paid the note, said "he knew Miller had not, and that Miller was not to pay it; that it was the concern of the defendant alone, and Miller had nothing to do with it; that the note had been given for part of the purchase money of a certain race-horse called Ratler, and that the defendant offered to take up the said note if the plaintiff's agent would give time, and receive other notes mentioned in payment;" to the admission and competency of which evidence the defendant objected; but the

court overruled the objection and admitted the evidence as competent to support this action without any further proof of demand upon the drawer or notice to the indorser. That the said evidence being so admitted by the court, the defendant offered evidence to prove that the said note was given for part of the purchase money of the said race-horse, then celebrated for his performances on the turf, sold by the plaintiff to the defendant and the said Miller, the drawer of the note, for \$3,000, of which \$2,000 had been paid; that the plaintiff, at the time of so selling this horse, warranted him sound, and declared him capable of beating any horse in the United States, and recommended the purchasers to match him against a celebrated race-horse in New York called Eclipse; that he also gave a representation of his pedigree, which he described as unexceptionable, and promised to procure his pedigree and send it to the defendant. And the defendant then offered evidence to prove that the said horse at the time of the said sale was utterly unsound and broken down, and had been broken down whilst in the plaintiff's possession, and was reputed and proven by persons in the neighborhood of the plaintiff, who afterwards communicated the same to the purchaser; and was wholly unfit for and incapable of the action and fatigue necessary to a race-horse; and that the plaintiff had wholly failed to procure and furnish the pedigree of the horse, as he had agreed, and that a pedigree was an essential term in the purchase of the horse, or ordinarily is so in the purchase of such horses, without which this horse was worth nothing; and that the said Miller, as soon as it had been ascertained by repeated trials that the horse was incurably unsound, offered to return him to the plaintiff, who refused to take him back, although the former offered to lose what he had already paid for the horse, which offer was made after the note fell due. Whereupon the court instructed the jury, at the prayer of the plaintiff, that if they should be of opinion from the said evidence that the said horse was, at the time of the said sale, utterly unsound and broken down, and had been broken down whilst in the plaintiff's possession, and was wholly unfit for and incapable of the action and fatigue necessary to a race-horse, but that the said facts were not known to the plaintiff at the time of the said sale, the said facts are not a sufficient defense in this action to prevent the plaintiff from recovering. Upon these instructions of the court the jury found a verdict for the plaintiff, and the cause now comes before this court upon a writ of error.

This bill of exceptions presents two questions for the decision of this court. The first is, whether the evidence offered by the plaintiff, and admitted by the court, dispensed with the necessity of proving a demand of payment of the maker of the note, and due notice to Thornton of non-payment; and, secondly, whether the court below erred or not in stating to the jury that the alleged breach of the warranty of the horse, if proved to their satisfaction, was not a sufficient defense in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff at the time of the sale. In the argument of the first question, the counsel on both sides considered the evidence offered by the plaintiff as presenting a double aspect. 1. As authorizing a conclusion, in point of fact, that the note of hand on which the suit is brought was made and passed to Thornton without consideration, and merely for his accommodation; and 2. As amounting to a promise to pay the note, or at least to an admission by Thornton of his liability to pay it, and of the right of the plaintiff to resort to him, whether it was made solely for his accommodation, or was given for value in the ordinary course of trade.

§ 1034. *Whether demand and notice necessary to bind accommodation party to note, quære?*

As to the first, the counsel treated the note throughout as an accommodation note, and submitted to the decision of this court the question, whether the indorser of such a note was entitled to call for proof of a demand of payment of the maker, and notice to himself? Whether this question was ever raised in the court below, or in what manner it was there treated, does not appear from the bill of exceptions. It is possible that that court may have intended nothing more by their direction to the jury than to sanction the admissibility of the evidence, and its sufficiency to authorize a verdict for the plaintiff, without other proof of demand and notice, provided the jury should be of opinion that it warranted the conclusion that the note was given without consideration. But such is not the language of the court, as stated in the bill of exceptions. The jury were informed that the evidence was competent to support the action without such further proof of demand and notice, without leaving the inference of fact that the note was given without consideration to be drawn by the jury. Had the court distinctly stated to the jury that this was such a note, and, therefore, that further proof of demand and notice was unnecessary, the incorrectness of the direction could have been doubted by no person, since the court would, in that case, have inferred a fact from the evidence which it was competent to the jury alone to do. And yet it seems difficult to distinguish the supposed case from the one really presented by the bill of exceptions, upon the hypothesis that the court below decided anything as to the particular character of this note, since it is very obvious that no question of fact was submitted to the consideration of the jury. It is, therefore, due from this court to the one whose decision we are revising, to conclude that that decision did not proceed upon the assumption that this was a note drawn for the accommodation of the indorser.

§ 1035. *Waiver of demand and notice by express promise to pay.*

It remains to be considered whether the direction was correct upon the other aspect of the evidence. It is now well settled, as a principle of the law merchant, that an unconditional promise by the drawer or indorser of a bill to pay it, after full knowledge of all the circumstances necessary to apprise him of his discharge from his responsibility by the laches of the holder, amounts to an implied waiver of due notice of a demand of the drawer or acceptor, and dispenses with the necessity of proving it. Such are the cases of *Borradaile v. Lowe*, 4 Taunt., 93; *Donaldson v. Means*, 4 Dal., 109, and others which need not be cited. So if, with a knowledge of these circumstances, he answer that the bill "must be paid;" "that when he comes to town he would set the matter right;" "that his affairs were then deranged, but that he would be glad to pay it as soon as his accounts with his agents were settled," or "that he would see it paid;" or if he pay a part of the bill,—in all these cases it has been decided that proof of regular notice is dispensed with. 2 Term, 713; Bull. N. P., 276; 2 Camp., 188; 6 East, 16; 2 Stra., 1246. The principle upon which these decisions proceed is explained in many of the above cases, and particularly in that of *Rogers v. Stephens*, 2 Term, 713. It is this: that these declarations and acts amount to an admission of the party that the holder has a right to resort to him on the bill, and that he has received no damage for want of notice. See, also, *Stark. Ev.*, 272. The same principle applies with equal force to promissory notes, which, after indorsement, partake of the character of bills of exchange; the indorser being likened to the drawer, and the maker to the

acceptor of a bill. The case of *Leffingwell v. White*, 1 Johns. Cas., 99, is that of a promissory note, where the indorser, before it became due, stated that the maker had absconded, and that, being secured, he would give a new note, and requested time. The court say that the defendant had admitted his responsibility, treated the note as his own, and negotiated for further time for payment, by which conduct he had waived the necessity of demand of the maker and notice to himself. *Taylor v. Jones*, 2 Camp., 105; *Vaughan v. Fuller*, 2 Stra., 1246, and *Anson v. Bailey*, Bull. N. P., 276, were all cases of actions on promissory notes against the indorser. In this case the defendant below, upon being informed that Miller, the maker of the note, had not paid it, observed that he knew he had not, and that he was not to pay it; that it was the concern of the defendant alone, and that Miller had nothing to do with it, it having been given for part of the purchase money of a horse. These declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder in not making a regular demand of payment of the note, by which he was discharged from his responsibility to pay it. The knowledge of this fact formed an indispensable part of the plaintiff's case, since without it it cannot fairly be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law. For anything that appeared to the court below, from the evidence stated in the bill of exceptions, the admissions of the defendant may have been made upon the presumption that the holder had done all that the law required of him, in order to charge the indorser. That due notice was not given to the defendant he could not fail to know; but that a regular demand of the maker of the note could not be inferred by the court from the admissions of the defendant. For the reasons above stated the judgment of the court below must be reversed and the cause remanded for a new trial.

§ 1036. *When purchaser may set up breach of warranty in defense to suit for purchase price.*

But since the second question before mentioned has been distinctly brought to the notice of this court, has been fully argued, and must again be decided by the court below, it becomes necessary that this court should pass an opinion upon it. That question is whether the alleged breach of the warranty of the horse, the price of which formed part of the consideration of the note, if proved to the satisfaction of the jury, was a sufficient defense in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff below at the time of the sale. The question is, not whether the purchaser of a horse, which is warranted sound, has a remedy over against the vendor, upon the warranty, in case it be broken, but whether, in an action against him for the purchase money, he can be permitted to defend himself by proving a breach of the warranty? The cases upon this subject are principally those where the vendee, having executed the contract on his part, by paying the purchase money, brought an action of *indebitatus assumpsit* against the vendor, as for money had and received to his use. But it is perfectly clear that the reasoning of the court in those cases applies with equal force to a case where the breach of the warranty is set up by the vendee as a

defense against an action against him to recover the purchase money. The first case we meet with on this subject is that of *Power v. Wells*, of which a very imperfect report is to be seen in a short note in *Doug.*, 24, and in *Cowp.*, 818. There the plaintiff gave a horse and twenty guineas to the defendant for another horse, which he warranted to be sound, but which proved otherwise. The plaintiff offered to return the horse, which was refused; and the plaintiff brought two actions, one for money had and received, to recover back the twenty guineas which he had paid, and an action of trover for the horse, possession of which the plaintiff had delivered to the defendant. The court decided that neither action could be maintained; not the second, because the property had been changed. This case was referred to, by the judge who had decided it, at *nisi prius*, in the case of *Weston v. Downes*, *Doug.*, 23, which soon after came before the court of king's bench. That was an action for money had and received; and the case was, that the plaintiff had paid a certain sum to the defendant for a pair of horses, which the defendant agreed, at the time, to take back, if they were disapproved of and returned within a month. They were returned, accordingly, within the stipulated period, and another pair was sent in their stead, without any new agreement. These were likewise returned, and accepted by the vendor, and a third pair were sent, which, being likewise offered to be returned, the vendor refused to take them back. Lord Mansfield was against the action; because, the contract being a special one, the defendant ought to have notice by the declaration that he was sued upon it. Ashhurst, J., was of the same opinion; but added, that if the plaintiff had demanded his money on the return of the first pair of horses, this action would have lain, but that the contract was continued; from which expression nothing more is understood to have been meant than that the contract remained open. The ground upon which Buller, J., thought that the action could not be maintained was, that, by refusing to take back the horses, the defendant had not precluded himself from entering into the nature of the contract; and that, whenever that is open, it must be stated specially. The meaning of these latter expressions is distinctly stated by the court and particularly by this judge, in the case of *Towers v. Barrett*, 1 Term R., 133, which followed next in order of time; that was also an action for money had and received. The money was paid for a horse and chaise to be returned in case the plaintiff's wife should not approve of them. They were accordingly sent back to the defendant in three days after the sale, and left on his premises against his consent to receive them.

Lord Mansfield, C. J., and Willis, J., distinguish this case from that of *Weston v. Downes*, upon the ground that that was an absolute, and this a conditional agreement, which was at an end by the return of the horse and chaise, and was no longer open. Both the judges treat the case as if the vendor had taken back the property, although, in fact, he had not consented to do so. Ashhurst, J., was of opinion that this case would have resembled that of *Weston v. Downes*, if, in that, the plaintiff had returned the horses. It is very clear, from what was said by the same judge in that case, that his meaning in this was if the plaintiff had returned the first pair of horses, and then demanded his money; for he adds, that in that case there was an end of the first contract by the plaintiff's taking other pairs, and this constituted a new contract, not made on the terms of the first. But in this case the contract was conditional, and when the horse and chaise were returned, the contract was at an end, and the defendant held the money against conscience. Buller, J., is still more explicit.

He says that the defendant, by the contract, had put it in the power of the plaintiff to terminate it, by returning the horse and chaise, and that the plaintiff had no option to refuse to take them back; and that, being bound to receive them, the case was the same as if he had actually accepted them. He adds that the distinction between those cases where the contract is open, and where it is not, is, that if it be rescinded, either by the original terms of the contract, as in this case, where no act remains to be done by the defendant, or by a subsequent assent by him, the plaintiff may recover back his whole money, and then this action will lie. But if it be open, the plaintiff's demand is only for damages arising out of the contract. The court proceeded upon this distinction in deciding the case of *Payne v. Whale*, 7 East, 274, which followed the one just noticed. The action was to recover back money paid to the defendant for a horse sold by him to the plaintiff, which he warranted sound. The plaintiff offered to return the horse, upon an allegation of his unsoundness, which the defendant denied and refused to take him back, but agreed that, if he was in fact unsound, he would take him back and return the purchase money. The unsoundness was proved at the trial, but the court was of opinion that the action could not be supported, and distinguished this case from the preceding one by observing that in that the plaintiff had an option, by the original contract, to rescind it on a certain event; but here it was no part of the original contract that the horse was to be taken back; and that the subsequent promise amounted to no more than that he would take him back if the warranty were shown to be broken, which still left the question of warranty open for discussion, and then the form of the action ought to give the defendant notice of it by being brought upon the warranty.

The case of *Lewis v. Cosgrave*, 2 Taunt., 2, was precisely like the present, in which the same distinction and the same principles were recognized by the judge who tried the cause at *nisi prius*. It was an action on a bill drawn for the price of a horse, which, on the sale of him, was warranted sound, but turned out not to be so. The defendant offered to return the horse, which was refused, and the defendant left him in the plaintiff's stable, without his knowledge. The judge decided that, as the plaintiff had refused to take back the horse, the contract of sale was not rescinded, and, consequently, that the defendant must pay the bill, and take his remedy by action for the deceit. But upon a rule to show cause why a new trial should not be granted, the court said that it was clear the plaintiff knew of the unsoundness of the horse, which was clearly a fraud, and that no man can recover the price of an article sold under a fraud. See, also, the cases of *Fortune v. Lingham*, 2 Camp., 416, and *Solomon v. Turner*, 1 Stark., 51.

§ 1037. *Effect of an offer by the vendee to return the article.*

The result of the above cases is this: if, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other.

But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendere. a return of it within a reasonable time. We are, therefore, of opinion that the direction of the court in this case, upon the second exception, was entirely correct. The judgment is to be reversed, and the cause remanded to the court below for a new trial.

FOOTE v. BROWN.

(Circuit Court for Indiana: 2 McLean, 363-373. 1841.)

Opinion by the COURT.

STATEMENT OF FACTS.— This action is brought on a guaranty, by the defendants, of a note given to the plaintiffs, by Daniel Brown. The declaration contained three counts: First. On a promissory note. Second. On an agreement to pay on condition. Third. A general count for money had and received, etc. To the first and third counts *non-assumpsit* was pleaded. To the second the defendants demurred, on the ground that it contains no allegation of notice to delendants of demand and non-payment of the note by Daniel Brown. The defendants also filed two pleas of set-off in the form of "special payments," under the practice act of Indiana of 1838. The pleas were, that certain drafts for money had been given defendants on a house in New Orleans; that defendants left the same with H. and H., of that city, for collection, and took their receipt for them. That afterwards defendants assigned the receipt to the plaintiffs, who receipted for it, agreeing to collect and apply the money to defendants' account. That the plaintiffs had given no notice that the house who held the drafts had refused to deliver them to the plaintiffs, or that the drafts had not been paid, etc. Demurrers were filed to these pleas.

On the part of the plaintiffs it is contended that, as the names of the defendants were not on the note guarantied, they were not entitled to notice. That to avoid their guaranty they must show that they have sustained damage for want of notice. That the principal had property when the note became due, so that they could have secured themselves from loss, if notice had been given. Mr. Chitty, in his Treatise on Bills, page 324, says: "In these cases of collateral guaranties, where the parties' names are not on the bill, they are not entitled to the strict and immediate notice of dishonor, as a party is who has drawn and indorsed the bill, and, unless he has really sustained loss by the want of notice, he continues liable on his guaranty." *Warrington v. Furber*, 8 East, 242; 6 Esp., 89. Chitt. on Bills, 365: "A person who has guarantied the due payment of a bill may, in some cases, be released from the responsibility by the neglect of the holder duly to present it for payment, if he can show that he was thereby prejudiced." And again, page 441: "In general, if the bill or note be given as a collateral security, and the party delivering it were no party to it, either by indorsing or transferring it by delivery, when payable to bearer, but merely cause it to be drawn or indorsed, or delivered over by a third person as a security, or has guarantied the payment, it has been considered that he is not, within the custom of merchants, an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liability by the neglect of the holder to give him such notice, unless he can show, by express evidence, or by inference, that he has actually sustained loss or damage

by the omission." *Philips v. Astling*, 2 Taunt., 206; *Swinyard v. Bowes*, 5 Maule & S., 62; *Holbrow v. Wilkins*, 1 Barn. & Cress., 10; 2 D. & Ry., 59; *Van Wart v. Woolley*, 3 Barn. & Cress., 439. These authorities are somewhat questioned in the case of *Camidge v. Allenby*, 6 Barn. & Cress., 373; 9 D. & Ry., 391. In page 497, Mr. Chitty says, "it is expedient, though not in general absolutely necessary, to give notice to a person who has guarantied the payment of the bill."

§ 1038. *A collateral guarantor is entitled to notice.*

Whatever doubt may exist in England, under their decisions, whether notice is necessary to charge a guarantor whose name does not appear on the note, there can be none under the decisions of the supreme court. In the case of *Douglass v. Reynolds*, 7 Pet., 126, the doctrine is clearly laid down. That was a continuing guaranty to *Reynolds & Co.*, as indorser, etc., for one *Haring*. And the court say, "the fourth instruction insists that a demand of payment should have been made of *Haring*, and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guaranty." "And we are of opinion that this instruction ought to have been given. By the very terms of this guaranty, as well as by the general principles of the law, the guarantors are only collaterally liable on the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part, to perform his engagements, are indispensable to constitute a *casus fœderis*." This notice need not be given with as much strictness as to charge a party whose name is on the bill, but it must be given in a reasonable time. See the case of *Lewis v. Brewster*, 2 McL., 21 (§§ 561-565, *supra*). The principle may be laid down as generally applicable to commercial paper, that where the undertaking is collateral to pay the debt of another, on his default, a notice of demand and non-payment is necessary. And this whether the name of the party be on the dishonored note or not. The only difference in principle seems to be that, where the individual is a party to the note, strict notice is required; but where he is not a party, reasonable notice is sufficient. This view is decisive of this case, as there is in the declaration no averment of a demand of payment and notice to the defendants; but a remark or two may be made on the pleas which are demurred to.

§ 1039. *Duty of holder of negotiable paper given as conditional payment.*

These pleas are filed under a special statute of Indiana. Where negotiable paper is given as conditional payment, the proceeds to be collected by the holder, and applied in payment of the debt, it is incumbent on the holder to use due diligence in collecting the money, by making a demand when it becomes due, and in giving notice of non-payment to those whose names are on the paper. If, in this respect, the holder is guilty of laches, so as to release the parties on the bill, he makes the paper his own, and must sustain the loss. In *Camidge v. Allenby*, 6 Barn. & Cress., 373, above cited, where, in payment for goods sold, certain notes on a country bank were delivered, which bank, unknown to the parties, had stopped payment at an earlier hour on the same day, and no notice for one week was given to the person who paid the notes, it was held that there were laches which released him from responsibility. Mr. Justice Bailey remarked, "the rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them."

§ 1040. *An agent must observe the usual course of transacting business.*

An agent to save himself from responsibility must observe the usual course of transacting the business in which he is engaged. If he procure an insurance, and neglect to have inserted in the policy the common and usual clauses in the like policies, and a loss should occur, which would have been covered by such clauses, the agent would be responsible for the loss. *Mallough v. Barber*, 4 Camp., 150; 6 Taunt., 495. If the agent deposit the money of the principal in his own name and on his own account, and the bank fail, the agent would be responsible. *Massey v. Banner*, 1 Jac. & W., 245, 248. And so if an agent sell the goods of his principal on credit contrary to usage, or fail to demand the money when the credit has expired; or if he should sell to persons of doubtful credit, or actually insolvent, he is responsible. *Story on Agency*, 189. And if he give time for payment after the money became due, or should omit to use the common diligence to collect it, the loss would be his own. *Caffrey v. Darby*, 6 Ves. Jr., 494, 495. In the case under consideration, if the plaintiffs, having possession of the drafts, neglected to make the proper demand when they became due, or to give notice, so as to hold liable the parties to the drafts, in case of non-payment, through which the recourse of the defendants was cut off, the loss must fall on the plaintiffs. Under the circumstances the plaintiffs were bound to do what the law required, to collect the money on the drafts, and, in case of failure, to notify all persons concerned. But, as the case turns upon the demurrer to the second count, the question arising on the pleas need not be decided. Demurrer to the second count is sustained. The plaintiffs abandoned their claim under the other counts.

ALLEN v. KING.

(Circuit Court for Michigan: 4 McLean, 128-133. 1846.)

Opinion of the COURT.

STATEMENT OF FACTS.—This action was brought to recover a balance which the defendant owes to the plaintiff, for goods, wares and merchandise purchased. A draft, payable in four months, drawn by Harleston on N. G. Ogden, of New York, and indorsed by King, was procured by King and handed to the counsel of the plaintiff, with the view of paying, when the proceeds should be received, so much on account. This draft was forwarded and accepted, but was eventually protested for non-payment. It seems that due notice was not given to the drawer and indorser, and that was made the principal ground of defense. The trial took place in the absence of the circuit judge, and now a motion is made for a new trial, on points stated, before a full court. The jury found for the defendant.

A new trial is asked: 1. Because the court rejected Harleston, the drawer of the draft, who was offered as a witness to show that the remedy against him has not been lost, as the drawer of the bill, for want of strict notice. 2. Because the jury were instructed that it was incumbent on the plaintiff to prove that the draft had been presented for payment at maturity, at the place where payable, and that it had been regularly protested for non-payment, and notice to the drawer and indorser given. 3. Because, in the instruction, a decision in 2 Washington's Rep., 191, 157, was not followed, on which the plaintiff relied. 4. Because the court refused to charge the jury, upon the request of plaintiff's counsel, that unless the jury are satisfied, from the testimony,

there was an express agreement by the plaintiff to take the thousand dollars' draft in payment, and at his own risk; that the plaintiff was but the agent of King for the collection of said draft; and that the draft remained his property, and at his risk; and that although the draft was not presented for payment at maturity, and no notice of non-payment given, yet that constitutes no defense to this action. 5. That if the draft was not taken in payment, although no notice was given, if thereby the amount of the draft, or any part, were lost, by reason of such neglect, it was a ground of action for damages he thereby sustained against the plaintiff by the defendant. 6. Because the court charged the jury that, by failing to make the demand and give notice, the plaintiff made the bill his own, and that the remedy against the defendant upon the open account was consequently lost. Other causes were assigned, but which are substantially embraced in those above stated.

§ 1041. *Note or bill no payment unless accepted as such.*

There can be no doubt that where a bill has been received payable on time, that it is no discharge of a pre-existing debt, unless there be an agreement to that effect. Nor would a draft payable on presentation be a payment unless it was agreed to be so received. Until the money on a bill is paid, it is at the risk of the drawer and the holder of the bill; whether he be entitled to the money, or a mere agent for the drawer, he is bound to make the demand, and give notice of non-payment, and if he fail he will, in many cases, be responsible to the drawer or indorser for damages.

§ 1042. *Measure of damages for failure to make demand.*

The damages are not to be estimated by the face of the bill, in regard to the drawer, he having no effects in the hands of the drawee, but by the actual damages suffered by him. It is true when the holder of a bill, regularly negotiated, neglects to make a demand at its maturity, and give notice, he loses his recourse against the names on the bill, who are entitled to notice. There is no evidence to show that the bill in question was taken in payment. It must then have been received for the purpose of applying the proceeds, when paid, to the payment of the balance due by the defendant to the plaintiff. 8 John., 389; 5 John., 69; 5 Wend., 492; 9 John., 310; 1 Cowen, 306; 4 Mason, 248. If it be agreed to receive the bill in payment, the rule is different. 5 John., 69; 3 Cowen, 303; 3 Wend., 344; 10 Pet., 532. In all cases the plaintiff may produce the note at the trial to be canceled. 10 John., 104; 15 John., 249; 8 Cowen, 80. And the court will require the bill to be produced.

§ 1043. *An agent failing to make demand and give notice is liable for damages.*

The holder of the bill, being an agent merely, is not considered a party to it. As, where a bill is forwarded to a bank for collection, and demand or notice is neglected, the bank is responsible only for the damages sustained, and they are to be ascertained by a jury. The same principle, it is contended, applies where a bill is received, the proceeds of which, when received, are to discharge a debt. Until the proceeds shall be received, the risk is the drawer's, and if there be a failure, the agent is responsible to the extent of the damages suffered. This, it is argued, is under the law of agency. Story on Agency, 217; 20 John., 384; 3 Cowen, 662. "The drawer of a bill, or the indorser of a note, is not discharged by the omission of the holder to make presentment or demand, or to give notice of non-acceptance or non-payment, where it is clearly shown that he has sustained no damages in consequence of such omission." *Commercial Bank of Albany v. Hughes*, 17 Wend., 94.

§ 1044. *When presumption of damages from failure of demand and notice is held to be rebutted.*

Where this duty of an agent has been neglected, damages are presumed, but this presumption is rebutted by proof of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill, until and after the day it fell due, and this under such circumstances as to show that the drawer had no right to expect payment.

§ 1045. *Every person whose name is on a bill, or who has any recourse on another, is entitled to notice.*

In *Dennis v. Morrice*, 3 Esp. R., 158, an action was brought by an indorser against the drawer; it appeared that no notice had been given to the defendant of non-payment by the acceptor, to excuse which, the plaintiff offered to prove that in fact the defendant had not been prejudiced by the want of such notice. But Lord Kenyon said: the only case in which notice is dispensed with is where the drawer has no effects in the hands of the drawee. The rule is, that every person is entitled to notice whose name is on the bill, and who has any recourse against some other person or persons. On this ground it was held by Lord Kenyon, in 1 Pardess, 459, in an action against the indorser of a bill, drawn by Vaughan on Eustace and Holland; it appeared that notice had not been given to defendant, upon which plaintiff offered to show that Vaughan had no effects in the hands of Eustace and Holland; but the court said that the want of effects in the hands of the drawee by the drawer will not avail the plaintiff, and that the rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice, for he has no concern with the accounts between the drawer and the drawee. "The plaintiff then proved a letter from the defendant, acknowledging the debt and promising to pay, and upon that he had a verdict."

§ 1046. *One who receives bill to apply proceeds on debt due him is a party to it, not an agent to collect it.*

Now, if the plaintiff in this case was strictly a party to the bill, his recourse against King, the indorser, was lost by not giving him notice. For it seems he has nothing to do with the matter of account between the drawer and drawee. From the statement of the drawer, there can be no doubt that King had his recourse against the drawer of the bill, who admitted his liability continued. From this it would seem that he could have had no effects in the hands of Ogden, or any just expectation that any one would honor the bill. But still the question recurs, did the plaintiff, by failing to give notice to the indorser, release him from responsibility. And if he did, can the fact be set up in defense to the present action? Although the bill was not received by the plaintiff in payment, yet he cannot be treated as a mere agent. The proceeds of the bill, when received, were his, to be applied in part payment of the balance due him. He was the holder of the bill, and neither the drawer nor indorser had a right to withdraw it, nor take any steps in regard to it, which might in the least degree be prejudicial to the interest of the plaintiff. Now this is not the case with a mere agent, who has no interest in the bill, and the owner of it has a right to withdraw it, or appropriate the proceeds of it as may suit his convenience. In this view, it is difficult to distinguish between the rights and duties of the plaintiff in regard to the bill, and those which appertain to the holder who has received the bill in the ordinary course of business. It is his property, and he has a right to negotiate it if he shall choose to do so. He may receive payment of it in property, and make any other disposition of

the bill that may be convenient for him. He is, then, more than an agent. He is the holder of the bill, and has recourse against the indorser, on condition of demand and notice. The drawer may be responsible, but the question here is, whether the indorser is responsible, no notice having been given to him of the non-payment of the bill? He was entitled to notice, and the fact that the drawer still acknowledges himself responsible does not, as regards the indorser, affect the question. In failing to give the notice, the plaintiff made the bill his own, and his recourse against the indorser is lost. He received the bill and was bound, by the commercial law, to demand payment and give notice. Whatever recourse the plaintiff may have against the drawer, he can have none against the indorser as such. And if he cannot recover in this form, by reason of his negligence, it is a good defense against an action on the original consideration. Had the plaintiff given the notice, he might have had his choice, whether to proceed against the defendant, as indorser, or on the original ground of action.

§ 1047. *Drawer's admission of liability not competent on behalf of indorser.*

The evidence of the drawer was rightfully rejected, as his admission of liability on the bill could not affect the rights of the defendant in this action. And this was the object for which the witness was offered. Upon the whole, the motion for a new trial is overruled.

CHICOPEE BANK v. PHILADELPHIA BANK.

(8 Wallace, 641-650. 1869.)

STATEMENT OF FACTS.—A bill was sent for collection by the Philadelphia Bank to the Chicopee Bank, which, inclosed in a letter, was laid on the cashier's table, slipped through a crack into a pile of loose papers and was lost until after its maturity. No offer to pay it was made by the acceptor, nor was any presentment made or any regular notice given, nor indeed any notice at all until too late. The Philadelphia Bank sued the Chicopee Bank because its negligence had caused the discharge of the indorsers. Judgment for plaintiffs.

Opinion by MR. JUSTICE NELSON.

The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that if it was, the bank was responsible. The jury found for the plaintiffs.

§ 1048. *Law of demand and notice.*

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one; if not, at his dwelling or residence, and demand payment; and if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the bank, and

the burden rests upon the defendant to show that the acceptor called to pay it. Chitty on Bills, p. 865*a*, 353, Springfield ed., 1842; 1 Parsons on Notes and Bills, pp. 363, 421, 437; Byles on Bills, p. 251 and note; Fullerton v. Bank of United States, 1 Pet., 604 (§§ 1200-1204, *infra*); Bank of United States v. Carneal, 2 id., 543 (§§ 964-971, *supra*); Seneca Co. Bank v. Neass, 5 Denio, 329; Bank v. Napier, 6 Humph., 270; Folger v. Chase, 18 Pick., 63.

§ 1049. *The presence of a bill in a bank, if unknown to the cashier, is not a sufficient presentment and demand.*

In the present case it is argued that the bill was in the Chicopee Bank at the time of its maturity, and as the acceptors had no funds there, a sufficient presentment and demand were made according to the law merchant. It is true the bill was there physically, but within the sense of this law it was no more present at the bank than if it had been lost in the street by the messenger on his way from the postoffice to the bank, and had remained there at maturity; and this loss, which occasioned the failure to take the proper steps, or rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defense being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

§ 1050. *Notice that the bill had not been received is not notice that will charge drawer and indorser.*

But if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

§ 1051. *Refusal to instruct as to burden of proving negligence.*

Some criticism is made upon the refusal of the court below to charge as to which side the burden of proof belonged in respect to the question of negligence and want of care, after the paper came into the hands of the defendant. No objection is taken to the charge itself upon this question, and indeed could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

§ 1052. *When a bank loses a bill remitted to it for collection, negligence is presumed, and the burden is upon the bank to rebut that presumption.*

If, however, the court had inclined to go further and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the bank carried with it the presumption of negligence and want of care; and if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or dam-

aged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted. *Dawson v. Chamney*, 5 Q. B., 164; *Coggs v. Bernard*, 2 Ld. Raym., 918; *Day v. Riddle*, 16 Vt., 48; 1 Phillips on Ev., Cowen & Hill's Notes, p. 633.

Judgment affirmed.

ESSEX COUNTY NATIONAL BANK v. BANK OF MONTREAL.

(Circuit Court for Illinois: 7 Bissell, 193-200. 1876.)

STATEMENT OF FACTS.—A. sent B. a check to collect. B. presented it, and was told that the cashier was out and that it could not be paid until he came in. B. presented it a second time, was met with the same reply, and thereupon requested that the check be certified, which was done, but the next day the bank failed. The check was never paid, and A. sues B. for the amount of it.

Opinion by HOPKINS, J.

The testimony is not very clear as to whether the bank had currency enough on the 9th to pay the check, if payment had been insisted upon, but as this point is not material in the view I have taken of the law of this case, I shall not stop to settle it; when it was presented after certification it was not paid because the bank was insolvent.

§ 1053. *Duty of agents in collecting a check stated.*

The defendants had the check to collect. It was transmitted to them for that purpose, and their duty as collecting agents was to present and demand payment within the time prescribed by law, and, if not paid, notify the proper parties of its dishonor. If that had been done, the rights and remedies of all parties liable upon it, when it came into their hands, would have remained intact. If loss occurs by the acts or omissions of the party thus assuming the duty of collection, it should fall upon the delinquent agent, not upon the absent owner.

§ 1054. *Drawee of bank check not liable to any but the drawer thereof until acceptance.*

The State Street Savings Bank was not liable to the holder of the check without acceptance. It was liable before acceptance only to the drawers. *Chapman v. White*, 6 N. Y., 412. It could not be made liable to the holder of the check except by its own consent. It had the funds of the drawers, and according to the usual course of dealing with its customers was under obligation to pay on demand all checks drawn upon it by them, but a refusal to do so would not give the holder of the check the right to sue the bank. The drawer in such case would be liable, and he could sue the bank immediately, without redeeming the check, and the bank would be liable for damages for its refusal to perform its undertaking with him as depositor. *Merchants' Bank v. State Bank*, 10 Wall., 604; *Bank of Republic v. Millard*, id., 152 (§§ 349, 350, *supra*).

§ 1055. *The collecting agent of a check, who accepts a certification thereof by the drawee, becomes liable to the payee for the amount of the check.*

This being the law, the duty of the defendant, upon receipt of the check for collection, was plain. It was to present it for payment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not; it went farther; it asked for and received the

certification of the bank upon the check. By this act a new relation was created between the parties. The amount the check called for was withdrawn from the drawers' account and control, and thereafter they had no right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawers' funds and right of action against the bank. It superseded the previous rights and obligations of the parties, particularly of the drawers. Before that the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembled after certification more a certificate of deposit than a check. Now, what was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check? And if such should be found to be the consequence, does it not follow that the defendants are liable to the owners for the amount? If they have by their acts released the responsible drawers, whereby the instrument is made worthless, why should they not make good the loss?

In *Smith v. Millar*, 43 N. Y., 176, it is said that presenting a check for payment and accepting a certificate as good "is equivalent to payment." In *Morse on Banking*, p. 282, it is laid down that, if the holder chooses to accept the bank's certification, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue. If this is the result of the act of the defendant in accepting the certification of the check, it would seem too clear for discussion that the defendant had incurred a liability to pay the amount of it to its principal. The drawers being released by the certification, and the bank being unable to pay, it follows irresistibly that the plaintiff is entitled to recover of the party releasing the drawers, whereby the amount of the check is lost to them.

§ 1056. *Damages presumed where collecting agent of commercial paper is negligent.*

It was claimed on the part of the defendant on the trial that the plaintiff must show some damages by the act. If the act released a responsible party that would be damage enough. But the law presumes damages from the negligence or unauthorized act of the collecting agent of commercial paper whereby any party to it is released or not charged. *Commercial Bank of Albany v. Hughes*, 17 Wend., 94. And if this presumption is not conclusive, but liable to be overthrown by proof to the contrary, it is the duty of the party at fault to show clearly that no damages did result to the holder of the paper from their negligence, which in this case the defendant did not do. It did not clearly show that the check would not have been paid on the 9th of August if payment had been insisted upon.

§ 1057. *Agent to collect a check assumes risk of payment when he gets the paper certified.*

I think the only safe and maintainable doctrine in this case is that the defendant assumed the risk of payment by the bank when it accepted the certifica-

tion, and if the bank did not pay, then it must. In laying down this rule I assume that the certificate operated as a release or payment as to the drawers, and that they were no longer liable upon the paper. This release I regard as the pivotal point in this case, and upon that point I am not forced to rely upon my own judgment. I find the precise question has been decided by the court of appeals of New York in the case of the First National Bank of Jersey City *v. Leach*, 52 N. Y., 350. That was an action on a check drawn by defendant on the 21st of November, 1871, on the Ocean National Bank, payable December 12, 1871. The bank, the plaintiff in that case, discounted it for the payee, and at eleven o'clock A. M., on the 12th day of December, they presented it to the Ocean Bank and got it certified as good. The drawer then had an account there sufficient to pay it, which was on the certification charged up to him on the Ocean Bank books. Within an hour after that the Ocean Bank suspended. The check was again presented on that day for payment, and was duly protested for non-payment. The bank then sued the drawer to recover the amount of it. The court upon that state of facts held that the plaintiff could not recover; that the certification operated as a payment as between the holder and drawer. In the opinion it is said, "the law will not permit a check, when due, to be then presented and the money left with the bank for the accommodation of the holder without discharging the drawer;" that if the holder chooses to have it certified instead of paid, he will do so at the peril of discharging the drawer. But they say that "this would not discharge the drawer of a check who himself procured it to be certified and then put it in circulation; that the reason of the rule would not apply to him;" and conclude the opinion by saying, "that upon principle it must be held that the bank holds the money after certification by request of the holder, not at the risk of the drawer, but of the holder of the check." This is the only direct authority I have found upon this question, from which I judge that the practice of holders of checks getting them certified is not very usual, for if it were, other cases would have found their way into the books and come under judicial consideration.

The defendant on the trial cited *Bickford v. First National Bank of Chicago*, 42 Ill., 239, and *Bounds v. Smith*, id., 245. From an examination of those cases, I do not see that they conflict with the case of *Bank v. Leach*, 52 N. Y., *supra*. In those cases the checks were certified at the request of the drawer before delivery. This expressly appears in the last case, and the judge in his opinion in that says, "the case in all its important features is the same as *Bickford v. Bank*," so that I may assume that the checks in both these cases were certified by request of the drawer, which presents an entirely different question from this, and leaves the point involved here unconsidered in those cases. In *Brown v. Leckie*, 43 Ill., 497, cited by the defendant's counsel, the check was also certified by the request of the drawer before it was passed by him, so that the reasoning of the court in that case was not predicated upon the same facts as appear here. But, as I understand those cases, that court holds that a check operates to transfer the amount named in it to the payee, and authorizes him to sue for and receive it from the bank. If such is the doctrine of that court, I am not at liberty to follow it, for the supreme court of the United States, in the *Bank of the Republic v. Millard*, 10 Wall., 152, has decided differently. And as the question involved is one relating to commercial securities, and belongs to the domain of general jurisprudence, this court is not bound by the decision of the state courts where the matters arise. Township

of *Pine Grove v. Talcott*, 19 Wall., 666. But, waiving this view and difference between the courts on this point, I do not think that the decision of the learned court of Illinois above referred to, when carefully examined, will be found to touch the point involved here. It was not before that court in either of those cases, and, although the general language used might seem to be in conflict with the conclusions I have reached in this case, still, when read and considered as used in reference to the facts and question before that court, no conflict or discrepancy of opinion will be found to exist. Those cases are clearly distinguishable on the facts from this case, and are, therefore, not authority upon the point involved here. I am, therefore, of the opinion that the defendant is liable for the amount of the check, with interest from the certification, as by its certification the drawers were discharged.

§ 1058. *Right of plaintiff to sue; amendment.*

A question was suggested as to the right of this plaintiff to sue the defendant, as it was not its agent, alluding to the recent decision of the supreme court of the United States in *Hoover v. Wise*, 1 Otto, 308, but it was stated, and not disputed, that the plaintiff's attorneys had authority to sue in the name of the German-American Bank as well as in the name of the present plaintiff, the real owner, and that an amendment, under the laws of the state, was allowable, in the discretion of the court, by inserting the name of the German-American Bank as plaintiff in lieu of the present plaintiffs, and as the decision making the change necessary has been announced since the commencement of the suit, and as no injury can result, as it appears to the court, to the defendant thereby, I direct and allow an amendment in that respect, by striking out of the process and pleadings the name of the present plaintiff, and inserting in lieu thereof the name of the German-American Bank, and as so amended that judgment be entered for plaintiff and against defendant for \$882.76, the amount of the check and interest, with costs of this suit to be taxed.

BIRD v. LOUISIANA STATE BANK.

(8 Otto, 96-99. 1876.)

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case was tried by the court below, a jury being waived. From the findings of fact it appears that R. A. Stewart made a promissory note at New Orleans, on the 28th of January, 1859, payable to the order of H. Doyal, at twelve months after date, with interest, at the Citizens' Bank, New Orleans, and that said note was indorsed by Doyal. A. Bird, of Manchac, La., as the agent of John Bird, of St. Louis, Mo. (the testator of the plaintiffs), before the maturity of the note, indorsed it, and deposited it in the branch of the Louisiana State Bank, at Baton Rouge, for collection. W. S. Pike, the cashier of the said branch bank, indorsed the note, as cashier, before its maturity, and transmitted it for collection to the defendant—the mother bank at New Orleans. When it became due, the defendant placed it in the hands of the notary, whom it usually employed in its own business, for demand of payment and protest; and said notary duly made demand, and protested the note for non-payment, and mailed notices for the indorsers to Pike, cashier of the branch bank at Baton Rouge. Doyal, the indorser, on whom reliance was principally placed, resided, when the note was made and indorsed, on a plantation at New River, in the parish of As-

cension, which adjoins that of Baton Rouge; but he died two days afterwards, and executors of his will were immediately qualified. No notice of protest was served on them, and for this cause, in an action brought against them by the plaintiffs, they were held not liable. No suit was ever brought against the maker of the note, he being wholly without credit, as to the payment of any debt when it became payable; and as to him the note is now prescribed. Neither the notary, nor any of the officers of the bank or branch, knew of Doyal's death when the note was protested, nor does it appear that it was known to the testator of the plaintiffs. This suit was brought to recover the amount of the note from the defendant, by reason of its alleged negligence in not giving notice to the executors of the indorser, Doyal, whereby the liability of his estate was lost. The court, having found these facts, and some others which we do not deem material to the decision, gave judgment for the defendant; whereupon the plaintiffs brought this writ of error.

§ 1059. *Agent's negligence in failing to notify prior indorser of non-payment.*

Without stopping to inquire whether the mother bank and its notary did their whole duty in reference to protesting the note, and giving notice to the indorsers, we think it manifest that the branch bank was delinquent, after receiving the notices from the notary, in not giving notice to Bird and the executors of Doyal, or at least to Bird. Had the notices been sent to the latter, it would then have been his duty to notify the executors of Doyal; but the branch bank, so far as appears from the facts found in this case, did neither. The inclosing of notices by the notary to the branch was notice to it that he (the notary) had not served them on the prior indorsers. And as an agent, charged with the duty of collecting the note, and doing whatever was necessary to insure the liability of the indorsers if it was not paid, the branch was bound to give notice of its non-payment, at least to its principal, in order that he might do what was requisite to protect himself.

§ 1060. *Parent bank liable for negligence of its branches.*

The neglect to do this rendered the branch bank liable to the plaintiffs' testator for the loss of the money; and it is conceded that the negligence of the branch bank is chargeable upon the defendant. They are one concern as to liability, though treated as separate establishments and distinct entities in the transaction of business.

§ 1061. *Holder's laches in not prosecuting maker of note; limitation or prescription.*

The only remaining question is, whether the plaintiffs or their testator have by their conduct or laches released the defendant from liability. It is contended that the holder of the note was bound to prosecute the maker, or to have prosecuted his claim against the defendant in time to enable it to do so, on being subrogated to his rights; whereas, the plaintiffs have delayed this suit until all claim against the maker is lost by prescription; and that it is no answer to this defense to say that the maker was insolvent when the note became due, as he may have since become abundantly able to pay. There is much plausibility in this position; but a careful examination of the dates shows that the note was not prescribed on the 5th of January, 1870, when the plaintiffs made a legal demand on the defendant by instituting this action. Less than ten years had then elapsed since the maturity of the note, and, deducting the period during which the war continued, according to the rule adopted in the case of *The Protector*, 12 Wall., 700, it will appear that the time of prescription of five years had not elapsed. The defendant, by pay-

ing the note at that time, could have been subrogated to the rights of the plaintiffs, and maintained suit against the maker in their names. The court below seems to have supposed that the time of trial was the point of time to which the estimate was to be made; but in this it was mistaken. The time of commencing the action was the proper point.

Judgment reversed, and record remanded, with directions to award a *venire de novo*.

§ 1062. Waiver.— Notice of non-payment must be given to the indorser, unless he knew the maker to be insolvent at the time of the indorsement. *Morris v. Gardner*,* 1 Cr. C. C., 218. See §§ 925-928.

§ 1063. In a suit against A. and B. as partners, on a bill drawn by A., want of notice of non-acceptance is not excused by proof of an agreement between the plaintiff and A. *Nicholson v. Patton*,* 2 Cr. C. C., 184.

§ 1064. A conversation by the indorser with the indorsee, requesting the latter to pursue the maker, is not evidence of a waiver of demand and notice; but the jury may infer due notice from such fact. *Riggs v. St. Claire*,* 1 Cr. C. C., 606.

§ 1065. Objection of want of notice may be waived after notice of laches. *Bank of Columbia v. Mackall*,* 2 Cr. C. C., 681.

§ 1066. A general agent authorized to draw checks and generally to transact business for the drawer may waive notice of non-payment. *In re Brown*, 2 Story, 502 (§§ 807-811).

§ 1067. Joint indorsers; notice; contribution.— Where there are two joint indorsers, notice of non-payment must be given to both; and if one who has notice pays the note, he cannot recover a moiety from the one who had no notice. *Gantt v. Jones*,* 1 Cr. C. C., 210.

§ 1068. Want of funds; reasonable expectation; indorsee.— The fact that the drawee of a bill of exchange has in his hands no funds of the drawers, nor any reasonable ground to expect that the bill will be honored, affords no ground for dispensing with notice of the dishonor of the bill to an innocent indorsee who has paid full value for it. *Ramdulolliday v. Darieux*,* 4 Wash., 61. See § 919.

§ 1069. Where the drawer has no funds in the hands of the drawee, protest for non-acceptance is unnecessary; and suit may be brought immediately on non-acceptance. *Baker v. Gallagher*,* 1 Wash., 461.

§ 1070. A., having no funds in bank, lent his check to B., who delivered it to C. *Held*, that if A. expected that funds would be placed in the bank by B. to meet the check, and this was known to C., A. was entitled to notice of non-payment. *Mackall v. Goszler*,* 2 Cr. C. C., 240.

§ 1071. No notice of non-payment is necessary to charge a drawer where the drawee has not in fact, nor in the expectancy of the drawer, any funds in his hands at the time fixed for payment, and has made no arrangements with the drawer at all events to pay the bill. Especially is this the law where the drawer has withdrawn all the funds in the drawee's hands before acceptance, and has since intercepted funds which might have come into the drawee's hands with which to pay the bill. *Valk v. Simmons*,* 4 Mason, 118.

§ 1072. Notice is not necessary to charge an indorser who knew at the time of his indorsement that the drawer had no right to draw. *Fenwick v. Sears*, 1 Cr., 270.

§ 1073. The drawer is not entitled to notice of non-payment, if he had not funds in the hands of the drawee. *Cox v. Simms*,* 1 Cr. C. C., 228.

§ 1074. Days of grace.— Where payment of a note was demanded on the third day of grace, notice given on the next day is good. *Read v. Carberry*,* 2 Cr. C. C., 417; *Bank v. Walker*,* 2 Cr. C. C., 294. See §§ 284, 719-725, 841.

§ 1075. Where a foreign bill is protested for non-acceptance, the holder must give notice as soon as possible under all the circumstances, according to the usual course of communication, whether by land or water. *Lindenberger v. Wilson*,* 1 Cr. C. C., 840.

§ 1076. Notice to an indorser on the third day of grace is sufficient. *Lindenberger v. Beall*,* 6 Wheat., 104. See §§ 904, 905, 917, 918.

§ 1077. Notice to the indorser on the last day of grace, after three o'clock P. M., not good. *Auld v. Mandeville*, 2 Cr. C. C., 187. *Contra*, *Munroe v. Mandeville*,* 2 Cr. C. C., 187.

§ 1078. Where a note matures on Saturday, notice to the indorser on Monday is good. *Crawford v. Milligan*,* 2 Cr. C. C., 228.

§ 1079. A usage to give notice on the day following the last day of grace binds an indorser who knows and assents to it. *Bank of Columbia v. Lawrence*,* 2 Cr. C. C., 510.

§ 1080. By mail; time.— Where an indorser resides in a different place from the holder, notice of default of the maker of a note should be put into the postoffice early enough on the

last day of grace to be sent by the mail of the succeeding day. *Lenox v. Roberts*,* 2 Wheat., 373. See §§ 902, 903, 912, 913.

§ 1081. Notice should be mailed so as to go by the first mail leaving after the opening of business hours of the day succeeding the last day of grace. *Fullerton v. Bank of United States*, 1 Pet., 604.

§ 1082. Saturday being the last day of grace, notice was put in the postoffice on Monday. *Held*, too late. It should have been mailed Saturday or Sunday. *King v. Foyles*,* 2 Cr. C. C., 303.

§ 1083. A note matured on Saturday. *Held*, that notice of its dishonor should have been mailed to an indorser the following Monday before the departure of the mail carrying letters in the indorser's direction. This mail left at three P. M. The notice was not in fact put into the postoffice until seven P. M. of Monday, and was decided insufficient. *Seventh Ward Bank v. Hanrick*,* 2 Story, 416.

§ 1084. The general rule is that notice to an indorser must be personal, or left at his usual place of abode, business or "the place where he ought to be found." If the indorser and holder live in the same town or postoffice district, a notice left in the postoffice is not sufficient, unless sanctioned by usage of the banks. *Bank of Columbia v. Lawrence*,* 2 Cr. C. C., 510.

§ 1085. A notice not mailed until the day after the note was dishonored is too late. *Bank of Alexandria v. Swann*,* 4 Cr. C. C., 136.

§ 1086. Where notice to the indorser at Alexandria was put into the postoffice at Washington on the day after the last day of grace, and after the Alexandria mail had closed, it was held too late. *The Bank v. Swann*,* 2 Cr. C. C., 368.

§ 1087. Leaving a notice of demand and non-payment in the postoffice, all parties living in the same city, and the person notified in fact receiving the notice, is sufficient. *Hyslop v. Jones*,* 3 McL., 96.

§ 1088. Demand of payment should be made on the last day of grace, and notice of the default of the maker should be put into the postoffice early enough to be sent by the mail of the succeeding day. *Lenox v. Roberts*,* 2 Wheat., 373.

§ 1089. The question as to the residence of the indorser of a note at the time it was protested, and whether the postoffice to which notice was sent was the one nearest the residence of the indorser at that time, are questions for the jury; and if it is found that notice was sent to the nearest postoffice, it is sufficient notice to the indorser, and that the holder used due diligence. *Whitney v. Hunt*, 5 Cr. C. C., 120.

§ 1090. A notary having made demand and protest in New York must deposit the notice in the postoffice, directed to the party notified. *Orr v. Lacey*,* 4 McL., 243.

§ 1091. Where notice to an indorser is sent by mail it must be directed to the postoffice of his place of residence. *Fowler v. Warfield*,* 4 Cr. C. C., 71.

§ 1092. The indorser had an office in town, at which he generally attended every day, and in his absence had a servant there to receive messages, etc. He lived five miles out of town, and the town postoffice was the nearest office. *Held*, that a notice put into the town postoffice was not sufficient without proof that the indorser actually received it on the day on which it was put into the mail. *Nowell v. Patton*,* 2 Cr. C. C., 312.

§ 1093. It is not indispensable to send a notice to an indorser's nearest postoffice, if he is in the habit of receiving his mail from another postoffice more remote from him. *Sherman v. Clark*,* 3 McL., 91.

§ 1094. An indorser lived about two hundred yards outside the city limits, and about half a mile from the banking house where the note was payable. Notice of protest was deposited in the postoffice. And there was testimony tending to show that he did not receive it until seven days had elapsed, and that he had a place of business in the city which he attended daily. *Held*, that if this was a place where his own business was conducted by him — a place known to be his place of doing business, — notice of protest ought to have been left there, and could not have been given through the postoffice, although if given in the latter mode and actually received by the indorser from the postoffice on that day or the next, or if within such time it was received from the postoffice by those in charge of his business house, it would be sufficient. *Spalding v. Krutz*,* 1 Dill., 414.

§ 1095. Notice to indorser's employee. — A notary went to the indorser's shop and demanded payment. He did not remember whether he demanded it of the indorser or of his employee, but thought he did not see the indorser. *Held*, not a sufficient notice of non-payment by the maker. *Mechanics' Bank v. Taylor*,* 2 Cr. C. C., 217. See §§ 888-890.

§ 1096. Notice to assignee. — Both maker and indorsers of a note became bankrupt and the same assignee was appointed for each. *Held*, that generally notice of protest might be given to the bankrupt or the assignee, as might be most convenient to the holder; but that in this case no notice to either was necessary, the assignee having, as assignee of the bank-

rupt maker, knowledge of the non-payment of the note, and his knowledge as such assignee being imputable to the indorsers whose assignee he also was. *Russell v. Paul*,* 16 N. B. R., 477.

§ 1097. Notice to members of congress.— Leaving a notice at the postoffice of the place where an indorser resides is not a good service; it must be delivered personally to the indorser or left at his place of business or dwelling. If the indorsers are members of congress, they are residents of Washington for the time being, and leaving notices in the postoffices of the respective houses of congress to which they belong is not a good service. Such postoffices cannot on principle be considered as different from the postoffice of the city. *Hill v. Norvell*,* 3 McL., 582.

§ 1098. Notice given to servant.— A written notice of the dishonor of a note, delivered to a servant of the indorser at the indorser's dwelling, is sufficient. *Greatrake v. Brown*, 1 Cr. C. C., 541.

§ 1099. To attorney; executors.— Notice of non-payment given to the attorney of the indorser, after the death of the indorser, will not excuse the holder from giving notice to the indorser's executors. *Bank of Washington v. Pierson*, 2 Cr. C. C., 685.

§ 1100. Death of indorser; notice.— A notice of non-payment left with a person who was authorized by the indorser, when alive, to receive such notices for him, does not bind executors of the indorser. *Brent v. Bank of Washington*, 2 Cr. C. C., 517.

§ 1101. Indorser's deputy.— Delivery of the note to the indorser's deputy is not *per se* notice. *Bank of Columbia v. Mackall*, 2 Cr. C. C., 681.

§ 1102. Demand at bank.— Dishonor.— Demand at the bank where a note is payable will charge the indorser; and if the maker has no funds there, the note is dishonored. *The Bank v. Oneale*,* 2 Cr. C. C., 466.

§ 1103. Where the payee sues, he need not prove demand at the place specified in the note. *Beverley v. Beverley*,* 2 Cr. C. C., 470.

§ 1104. Leaving notice in indorser's room.— It is competent to prove that an indorser, who is a clerk, has a separate room in which he attends to the business of his employer, and that a written notice was left at such room, though the indorser was not there. *Bank of United States v. Macdonald*,* 4 Cr. C. C., 624.

§ 1105. At shop of indorser's son.— Notice left at the shop of the indorser's son is insufficient, although the shop was in the dwelling-house of the indorser, but having a separate entrance. *The Bank v. Corcoran*,* 3 Cr. C. C., 46.

§ 1106. Leaving at house.— Where the notary calls at the dwelling-house of the indorser, and does not find him at home, he may leave the notice with the person who comes to the door when he knocks. *Cana v. Friend*,* 2 Cr. C. C., 870.

§ 1107. Left with fellow boarder.— A notice of the dishonor of a bill left at the boarding house of an indorser with his fellow boarder is sufficient. *United States Bank v. Hatch*,* 1 McL., 90; affirmed, *Bank of United States v. Hatch*, 6 Pet., 250.

§ 1108. Absence in New York.— Notice in Philadelphia.— An indorser's known place of residence was in Philadelphia. He was in the habit of visiting other cities temporarily. He went to New York intending to embark for England, but informed no one of his intention. Held, that a notice of non-payment left at his known place of residence in Philadelphia was sufficient. *MMurtrie v. Jones*,* 3 Wash., 206.

§ 1109. Personal service.— Where made.— Where the service of notice of demand is personal, it is immaterial where it was made. *Hyslop v. Jones*,* 3 McL., 96.

§ 1110. Death; leaving notice with son.— Where a note became due on the 8th-11th, and the indorser died on the 9th, a notice left at his counting-house, with his son, on the 11th, was sufficient. *The Bank v. King*,* 2 Cr. C. C., 570.

§ 1111. So where another note matured on the 15th-18th, a notice left with the son on the 18th was good, although the administrator was appointed on that day. *Ibid*.

§ 1112. But where the next note matured on the 22d-25th, notice served on the son is not sufficient. *Ibid*.

§ 1113. Surety.— Where a party signs as surety for any part of the amount of the note, he is entitled to strict notice; but he is not entitled to notice if he was jointly interested in property the forfeiture of which was prevented by the execution of the note. *Thornton v. Stoddert*,* 1 Cr. C. C., 534.

§ 1114. To accommodation indorser.— An accommodation indorser is liable without strict notice, unless he has suffered damage from want of notice. *Bank of Columbia v. French*,* 1 Cr. C. C., 221.

§ 1115. To guarantor.— A collateral guarantor of a note, whose name is not indorsed upon it, is entitled to reasonable notice of demand and non-payment. *Foot v. Brown*, 2 McL., 369 (§§ 1088-40).

§ 1116. Claiming a credit.— Claiming a credit upon a note sued upon, without objection for want of demand and notice, is a waiver of such notice. *Bank of United States v. Lyman*, 1 Blatch., 297 (§§ 1189-98).

§ 1117. Part payment or acknowledgment.— A part payment, a promise to pay or an acknowledgment of liability, by an indorser of a promissory note, after its maturity, is presumptive evidence of presentment and notice. *Bank of United States v. Lyman*, * 20 Vt., 666.

§ 1118. Where an indorser, with knowledge that he has not had notice, promises to pay a balance due on the note if the maker does not, he waives notice. *Perry v. Rhodes*, * 2 Cr. C. C., 87; *Sherman v. Clark*, * 3 McL., 91.

§ 1119. Where the indorser, after suit brought, told a stranger that he was willing to pay the note if he knew the amount of the costs, *held*, that this did not dispense with proof of demand and notice, and of the defendant's handwriting. *Gassaway v. Jones*, * 2 Cr. C. C., 334.

§ 1120. Failure of holder to return bill.— If an indorser once receives due notice of the non-acceptance of a bill no delay of the holder to return the bill and demand payment takes away his right to recover upon it, although the drawer may in the intermediate time have failed. *Wild v. Bank of Passamaquoddy*, 3 Mason, 505 (§§ 308, 309).

§ 1121. Indorser also a joint maker; notice to.— An indorser who is jointly interested in the discount of a note is not entitled to notice of non-payment, notwithstanding he may have signed as surety for the amount in excess of his interest. *The Bank v. Way*, * 2 Cr. C. C., 249.

§ 1122. War; notice by packet; duplicate.— Where notice of protest was sent to an indorser in London, by a British packet, in time of war between England and France, and not followed by a duplicate, *held*, insufficient. *Philips v. Janney*, * 1 Cr. C. C., 502.

§ 1123. Premium notes; duty as to demand and notice.— The taking of a draft by a life insurance company, in payment of a premium, imposes upon it all the duties as to presentation and notice that devolve upon a holder who takes the draft for any other consideration; and a failure on the part of the company as to presentation and notice is a breach of duty that precludes it from claiming a forfeiture of the policy, unless such failure is excused by want of funds in the drawee's hands or by want of reasonable expectation that he will accept or pay it. *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. R., 238.

§ 1124. Protest necessary on foreign bills.— A foreign bill of exchange, in order to charge the drawer, must have been regularly protested by a notary public. *Orr v. Lacey*, * 4 McL., 243.

§ 1125. Notice of non-acceptance should be given. *United States v. Parker*, * 4 Wash., 461.

§ 1126. Checks.— If payment of a check be refused, and notice is not given to the drawer, but the payee retain possession of the check until the bank fails, the loss falls upon the holder. *Clark v. Metropolitan Nat. Bank*, * 2 MacArth., 249.

§ 1127. The holder of a time check on a bank must give notice to the drawer if the bank refuse payment, and allege such notice in the declaration. *Sherman v. Comstock*, * 3 McL., 19.

§ 1128. Collateral security.— A creditor who takes a note as collateral security for a debt is not held to the same strict rule as to giving his indorser (debtor) notice of its non-payment at maturity as if the note were indorsed to him in the ordinary course of business. *Westphal v. Ludlow*, 2 McC., 506.

§ 1129. Where a debtor remits to his creditor a bill of exchange in discharge of the debt, and the creditor in any manner accepts it as such, the debtor is thereafter liable only as an indorser, and must have due notice of dishonor to be charged. *Denniston v. Imbrie*, 3 Wash., 396.

§ 1130. When notice is necessary.— A protest is only necessary in the case of foreign bills. It is not necessary to employ a notary to make demand of a promissory note. *Nicholls v. Webb*, 8 Wheat., 326; *Young v. Bryan*, 6 Wheat., 146; *Ish v. Mills*, * 1 Cr. C. C., 567. See §§ 880, 882, 886.

§ 1131. In Mississippi the holder of an inland bill of exchange can recover against an indorser the amount due on the bill, with interest, upon proof of default and notice; protest is only necessary to recover the five per cent. damages given by the statute. *Wanzer v. Tupper*, * 8 How., 234, following *Bailey v. Dozier*.

§ 1132. One who puts his name on the back of a note before delivery is considered by the law as a maker, and notice of its non-payment is not necessary to charge him upon it. *McGee v. Connor*, * 1 Utah T'y, 98.

§ 1133. Failure to give indorser notice of protest releases him. *Craig v. Brown*, * Pet. C. C., 171.

§ 1134. In Virginia an indorsee may recover against a remote indorser without giving notice of the maker's default or insolvency. *Dunlop v. Silver*, * 1 Cr. C. C., 27.

§ 1135. Conditional payment; notice to creditor.—Creditors of an indorser who transfers his bill to an agent for collection, directing him to pay such creditors out of its proceeds, are not entitled to notice of the dishonor of the bill, they not being parties or indorsers of it, and such creditors cannot hold the agent liable for a failure to give them notice. *Hutz v. Karthause*,* 4 Wash., 1.

§ 1136. Protest need not name bank officer who made demand.—A protest showing that the M. Bank, where a bill was payable, was the holder of it, and that the notary presented it for payment at the bank and demanded payment thereof, and was answered that it could not be paid, is sufficient. It is not necessary to give the name of the person or officer of the bank to whom it was presented, or by whom the notary was answered. Nor will a statement in the protest that the bill was presented to the *proper* officer of the bank give any additional validity to the protest. For when the law requires the bill to be presented to any particular person or officer of a bank, the protest must show that it was presented accordingly, and it would not be sufficient to say that he (the notary) presented it to the proper person. *Hildeburn v. Turner*,* 5 How., 69.

§ 1137. Error as to name in notice.—Notice of non-payment of a note of John B. is good as to a note by James B., if the indorser was not misled by the error. *Underwood v. Huddestone*,* 2 Cr. C. C., 93.

§ 1138. Protest must state demand.—A protest which stated that the notary had, upon the day following the last day of grace, demanded payment of the maker, who did not pay, and from the indorser, who did not pay, but did not state that he informed the indorser that a demand had been made upon the maker and payment refused, is not evidence of a sufficient notice. *Bank of Alexandria v. Wilson*,* 2 Cr. C. C., 5.

§ 1139. Protest; what sufficient.—A protest in which the notary swears that he made a demand for payment at the bank at the maturity of the bill; that he regularly protested it for non-payment and gave notice at a date named, which protest is sealed by the notary in the manner prescribed by the law of the place where the notary acts, is, *prima facie*, a sufficient protest. *Orr v. Lacey*,* 4 McL., 243.

§ 1140. A protest which states a demand on the drawer, the non-payment, and that notice was given to the indorser, is sufficient *prima facie* evidence of notice. *Eldredge v. Chacon*,* Crabbe, 296.

§ 1141. Misstatement of amount.—A notice of protest describing the note as being for \$1,457, when in fact it was for \$1,400, is not a good notice. *Bank of Alexandria v. Swann*,* 4 Cr. C. C., 136.

§ 1142. Reasonableness; question for jury.—Reasonableness of notice is a question for the jury. *Cox v. Simms*,* 1 Cr. C. C., 238; *Ish v. Mills*,* 1 Cr. C. C., 567.

§ 1143. Sufficiency a question of law.—The sufficiency of the protest and notice of dishonor of a bill is a question of law for the court. *Watson v. Tarpley*, 18 How., 517 (§§ 1174-77).

§ 1144. When the facts are not disputed, due notice of protest is a question of law. *United States v. Barker*,* 1 Paine, 156.

1145. Notice; requisites; printed signature.—The following notice of protest: "New York, 8d July, 1839, \$2,250.00. Gentlemen—Please to take notice that a promissory note made by Sidney Ketchum, for \$2,250.00, with interest, indorsed by you, is protested for non-payment, and that the holders look to you for payment thereof. Signed, Stephen Mernhew, Notary Public," and directed to the indorsers, contains all the requisites of a good notice, although the signature is printed, that being the mode of signing in New York. *Cooper v. Gibbs*,* 4 McL., 396; *Spalding v. Krutz*,* 1 Dill., 414. See §§ 883-890.

§ 1146. Notice must state demand.—A notice must be sufficient to apprise the drawer of the bill that it was not paid, though demand for payment was made, and that the holder will look to him for payment. *Orr v. Lacey*,* 4 McL., 243. See §§ 883-890.

§ 1147. Notice to an indorser that a bill has not been received by a bank for collection is not such a notice of non-payment as will bind the indorser and drawer, although the fact of non-payment might have been inferred from the fact of the non-receipt of the bill. *Chicopee Bank v. Philadelphia Bank*, 8 Wall., 641 (§§ 1048-52).

§ 1148. Protest need not go with notice.—The protest of non-acceptance or a copy thereof need not accompany the notice to the drawers. *Wallace v. Agry*, 4 Mason, 386 (§§ 773-776).

§ 1149. Nine days' delay fatal.—Where the parties live about two miles from each other, a delay of nine days in giving notice is fatal. *Morris v. Gardner*,* 1 Cr. C. C., 213.

§ 1150. Mistake in date.—Notice to an indorser is not vitiated by a mistake as to the date of the note. *Bank of the United States v. Watterston*,* 4 Cr. C. C., 445.

§ 1151. Notice may be written after business hours.—The certificate of a notary need not show that notice of demand and non-payment was written during business hours, after demand. Any time during the day will suffice. *Bonner v. City of New Orleans*, 2 Woods, 135.

§ 1152. By notary's clerk.—A notice of non-payment made by a clerk but signed by the notary is sufficient. Not being a matter regulated by statute, nor by local law, but of general commercial law, federal courts are not bound by state decisions as to the sufficiency of a notice of protest. *Browning v. Andrews*, * 3 McL., 576.

§ 1153. Negligence by agent in giving notice.—The agent of the United States treasury in New York, where the bills were drawn and where the drawer and indorsers resided, received a letter from the secretary of the treasury dated Washington, December 7, 1814, requesting him to notify the drawer and indorsers of the bills of the non-acceptance of the first set of bills, and notice was accordingly given on December 12, 1814. The mail which left Washington December 8th arrived in New York December 10th at 10:35 A. M. The agent received a letter from the secretary of the treasury, dated May 8, 1815, directing him to give notice of non-payment of the second set of bills to drawer and indorsers, and they were notified on May 12, 1815. Letters mailed in Washington on the 8th were proved to have reached New York on the 11th, early in the morning. No notice of non-acceptance of the second set of bills was proved. *Held*, not due diligence. *United States v. Barker*, * 12 Wheat., 559. See §§ 918, 938-937.

§ 1154. Presence of indorser.—The presence of the indorser at the time demand is made of the maker is not constructive notice, or such knowledge as will excuse notice. *Grant v. Spencer*, * 1 Mont. Ty, 130.

§ 1155. Creditor; conditional payment; duty as to collecting.—A debtor remitted a bill of exchange on a third person to his creditor, who presented it for acceptance, which was refused, with an intimation that it might possibly be accepted when the drawer (a person other than the debtor) should be heard from. The creditor held it for a time and again presented it, when acceptance was refused. He then kept it over three months and then returned it by mail to the debtor, but the letter never reached him. *Held*, that he could not recover the amount of the bill from the creditor; that the bill was not received in satisfaction of the pre-existing debt and hence no discharge of it, there being no laches of the creditor in collecting it; that the creditor was not bound by the same strict rules as to presentation and notice as an indorsee in due course of trade; and that the debtor could not recover of the creditor the amount of the bill. *Gallagher v. Roberts*, 2 Wash., 191; *Westphal v. Ludlow*, 2 McC., 505. See §§ 930, 931.

§ 1156. Notary agent of holder; negligence; liability of bank.—A note was sent to a bank with instructions to present it, and, if not paid upon presentation, to protest it, and notify the indorser. It was not so paid, and the bank handed it to a notary public with instructions to demand payment, make protest and send notices. *Held*, that the notary became the agent of the holder, and the bank was not liable for any default upon his part as to demand, protest and notice. *Britton v. Niccolls*, 14 Otto, 757. See BANKS, §§ 207, 208.

§ 1157. The United States are bound to observe the usages of the commercial world when dealing with commercial paper. *United States v. National Bank, etc.*, * 6 Fed. R., 184.

§ 1158. Note held as collateral; negligence; extinguishment of debt.—The holder of a note as collateral is not bound by strict rules as to demand and notice, but if, through his negligence, the amount of the note is lost, as by insolvency of the maker after the note matured, the original debt is extinguished. *Westphal v. Ludlow*, 2 McC., 505. See §§ 930, 931, 1155.

§ 1159. Lex loci.—A note made and indorsed in Cincinnati is governed by the laws of Ohio as to what demand, notice and diligence are required to charge an indorser. Where suit on such note was brought in Indiana against an indorser, *held*, that demand of maker and notice of non-payment to indorser was sufficient to show due diligence according to the Ohio laws, although the laws of Indiana would have required also the prosecution of the maker to insolvency. *Burrows v. Hannegan*, 1 McL., 309 (§§ 1029-1033).

§ 1160. For non-acceptance.—Protest of foreign bills for non-acceptance is not required by the custom of merchants in order to justify a recovery on a protest for non-payment. *Brown v. Barry*, * 3 Dal., 365.

§ 1161. Where presentment for acceptance is unnecessary, a bill need not be protested for non-acceptance owing to the drawee's absence from home; and a failure to protest under such circumstances is not negligence. *Bank of Washington v. Triplett*, 1 Pet., 25 (§§ 760-768).

§ 1162. Government orders on sub-treasuries.—When the federal government by its authorized agent becomes a party to negotiable paper, it has all the rights and assumes all the responsibilities of other parties to such instruments. But this is a general rule to which exceptions may be established by the practice of the departments. Thus, requisites of time or notice may be dispensed with, e. g., where drafts of the treasurer on various local depositaries of the government are returned unpaid; such drafts are always paid in Washington without regard to time or notice. *Government Drafts*, * 8 Op. Att'y Gen., 1.

VIII. ACTIONS.

SUMMARY — *Right of action on non-acceptance*, § 1163. — *Suits in federal courts*, § 1164. — *Suit on second of a set*, § 1165. — *Agent for collection*, § 1166. — *Note payable to a cashier*, §§ 1167-1169. — *Facts may be inquired into, when; liability of agent*, § 1170. — *Recovery on original consideration*, § 1171. — *Joint action in federal court against makers and indorsers*, § 1172. — *Indorsement back to immediate indorser*, § 1173.

§ 1163. A right of action accrues against drawer or indorser of a bill upon its non-acceptance, followed by protest and notice, without waiting for the maturity of the bill. *Watson v. Tarpley*, §§ 1174-1177; *Evans v. Gee*, §§ 1178-1182. See § 1206.

§ 1164. An indorsee of one state may sue an indorser of a different state in a federal court. *Evans v. Gee*, §§ 1178-1182. See § 1263.

§ 1165. An indorsee may recover from the indorser on the second of a set of bills of exchange protested for non-acceptance, without producing or accounting for the first part of such set. *Downes v. Church*, §§ 1188-1185.

§ 1166. A. indorsed a draft to B., who paid for it. Both supposed the transfer was an actual purchase and sale of the draft; but the indorsement was to pay A. "or order for account" B., etc. *Held*, that by this indorsement B. became agent merely of A. to collect the draft, and could not recover upon it in his own name, but might recover from B. the money he paid for it in a suit for money paid for the use of B. *White v. National Bank*, §§ 1186-1188.

§ 1167. If a negotiable note be payable to J., cashier, but is not indorsed by him, the bank of which he is cashier cannot sue upon it in its own name, or upon the original consideration for the note, even though the bank be the real owner of it. *Bank of the United States v. Lyman*, §§ 1189-1198.

§ 1168. A note was payable to A. as "cashier," but did not name the bank. *Held*, that evidence was admissible to show that the cashier was acting for a bank to which in fact the note was intended to be given. *Bank of Newbury v. Baldwin*, § 1199.

§ 1169. A note was given to A., "cashier." It was agreed in the case that this meant in fact cashier of the Newbury Bank. *Held*, that the case was to be considered as if the words "of Newbury Bank" had been written in the note. *Ibid*.

§ 1170. Between the original parties to a bill or note the general rule is that the facts are open to inquiry, and an agent is not liable to be sued upon a contract made by him for his principal, if the name of the principal is disclosed to the person contracted with at the time of making the contract. *Ibid*.

§ 1171. Where plaintiff's bill of particulars is only a promissory note, he cannot recover on the pre-existing debt, or upon the original consideration. *Bank of United States v. Lyman*, §§ 1189-1198.

§ 1172. The circuit court of the United States may adopt as a rule of practice a state statute authorizing the holder of negotiable paper to sue makers, drawers and indorsers jointly; and if so adopted, a several note with several indorsements thereupon is admissible to prove the demand in such a joint action. *Fullerton v. Bank of United States*, §§ 1200-1204.

§ 1173. A second indorsee reindorsed the note to his immediate indorser (payee) in the course of trade and not as an accommodation indorser. This indorsee (payee) then indorsed it to plaintiff, who sued the maker and payee and second indorsee. *Held*, that the second indorsee was not liable. *Howe Machine Co. v. Hadden*, § 1205. See § 1209.

[NOTES.— See §§ 1206-1311.]

WATSON v. TARPLEY.

(18 Howard, 517-521. 1855.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.— On the 29th April, 1850, the plaintiff in error, a citizen of Tennessee, brought this action of *assumpsit* against the defendant, a citizen of Mississippi, in the circuit court of the United States for the southern district of Mississippi, upon a bill of exchange, dated 4th April, 1850, drawn by the defendant upon Messrs. McKee, Bulkely & Co., of New Orleans, Louisiana, for \$2,327.49, payable twelve months after date, in favor of James Bank-

head, and by him indorsed to the plaintiff, and declared in two counts — one on the non-acceptance and the other on the non-payment of the said bill. Pr. Rec., p. 4. The defendant pleaded "*non-assumpsit*," and on this plea issue was joined (page six), and the action tried on the 11th of January, 1855, when a verdict was found for the defendant. On the trial a bill of exceptions was taken by the plaintiff in error, from which it appears that the plaintiff read in evidence the bill of exchange, and proved the presentment thereof to the drawers, at their office in New Orleans, for acceptance on the 27th of April, 1850, the due protest thereof for non-acceptance, and a notification of its dishonor given the same day by letter addressed to the defendant at his residence in Mississippi. See notarial protest and depositions, 17-22. The plaintiff also proved the presentment of the said bill for payment on the 7th April, 1851, the refusal of payment, the due protest thereof, and notice to the defendant. See notarial protest and depositions of H. B. Cenas, A. Commandeur, and Charles F. Barry, 7-15.

The defendant then offered to read in evidence a certificate, set out on the twenty-third page of the record; and which being read, after objection taken thereto by the plaintiff, the judge instructed the jury (Record, 23): "That the plaintiff was not entitled to recover on the count in the declaration on the protest of the bill for non-acceptance, unless due and regular notice was proved of the protest of the bill for non-payment, though the jury might be satisfied from the proof that the bill had been regularly protested for non-acceptance, and due notice thereof given to the defendant; that, to entitle the plaintiff to recover, notwithstanding the proof of protest for non-acceptance and due notice thereof, the plaintiff must prove protest for non-payment and due notice thereof, to the defendant; and that the jury were the judges of the testimony, and could give to the witnesses such credit as they thought them entitled to, looking to all the circumstances of the case."

The material questions involved in this case are comprised within a comparatively narrow compass, and present themselves prominently out upon the face of the record. On each of the questions thus deemed material, we think that the circuit court has erred. Upon the relevancy or effect of the certificate of H. B. Cenas, under date of the 7th of April, 1851, and which was, under an exception by the plaintiff, permitted to be read in evidence with the view of impairing the previous statement of this witness as to the regularity of his proceedings upon the dishonor of the bill, we do not think it necessary to express an opinion. Our views of the law of this case as applicable to the instruction given by the circuit court are in no degree affected by the character of the statements in that certificate.

§ 1174. *The sufficiency of protest and notice of dishonored bill is a question of law for the court.*

We think that the instruction of the court was erroneous in committing it to the jury to determine whether the proceedings as to protest and notice upon the dishonor of the bill for non-payment were regular and legal. This is a matter which must, upon the facts given in evidence, be determined by the court as a question of law, and which cannot be regularly submitted to the jury. Such is the doctrine uniformly ruled by this court; we mention the cases of the *Bank of Columbia v. Lawrence*, 1 Pet., 578 (§§ 995-997, *supra*); *Dickins v. Beal*, 10 id., 572 (§§ 950-957, *supra*); *Rhett v. Poe*, 2 How., 457 (§§ 974-979, *supra*); *Camden v. Doremus*, 3 id., 515 (§§ 585-588, *supra*); *Harris v. Robinson*, 4 id., 336 (§§ 980-982, *supra*); *Lambert v. Ghiselin*, 9 id., 552 (§§ 1001-4, *supra*). To

the same point might be cited the several English decisions referred to in the case of *Rhett v. Poe*, already mentioned.

§ 1175. *Right of action accrues against drawer or indorser of bill on non-acceptance.*

We also hold to be erroneous the instruction of the court declaring that after presentment of the bill for acceptance, and after regular protest and notice for non-acceptance, an action could not be maintained by the payee or indorsee until after the maturity of the bill, and then only upon proof of demand for payment, and of a regular protest and notice founded upon the refusal to pay. It is a rule of commercial law too familiarly known to require the citation of authorities, or to admit of question, that the payee or indorsee of a bill, upon its presentment and upon refusal by the drawee to accept, has the right to immediate recourse against the drawer. Upon no principle of reason or justice can he be required to await the maturity of the bill, by the dishonor of which he has been assured that it will not be paid, and with which the drawee has disclaimed all connection. Justice to the drawer, with the view of enabling him to guard himself from injury, imposes upon the holder the obligation of protest and notice upon non-acceptance; but beyond this, he sustains no connection with the drawee of the bill, and is under no obligation afterwards to present the latter for payment; of course, he cannot be rightfully held to protest and notice for non-payment. In the several compilations of the law of bills and notes by Kyd, Bayley, Chitty, Byles, and Story, are collected the decisions by which this doctrine has been settled.

§ 1176. *State laws of no force in federal courts, except in purely local matters.*

It has been suggested that the instruction by the judge at circuit may have been founded upon a provision in a statute of the state of Mississippi of 1836, contained in a collection of the laws of that state by Howard and Hutchinson, pp. 375, 376, § 18, by which, amongst other enactments, it is declared that "no action or suit shall be sustained or commenced on any bill of exchange, until after the maturity thereof;" and this prohibition or postponement of the right of action it is thought may have been interpreted by the judge as requiring after presentment for acceptance, and after protest and notice upon non-acceptance, a like presentment and demand for payment upon the maturity of the bill; and upon refusal to pay, a like protest and notice, in order to authorize a recovery. The answer to the above suggestion is this: that if such be a just interpretation of the statute of Mississippi, that interpretation, and the consequences deducible therefrom, we must regard as wholly inadmissible. Whilst it will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation. In the case of *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*), this court in giving a construction to the thirty-fourth section of the judiciary act, which declares "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they

apply," he said: "It never has been supposed by us that this section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract, or what is the just rule furnished by the principles of commercial law to govern the case." Again, in the same case it is said by this court: "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr., 883, 887, to be in a great measure not the law of a single country only, but of the commercial world." In the cases of *Keary v. Farmers, etc., Bank of Memphis*, 16 Pet., 89, and of *Dromgoole v. Farmers' Bank*, 2 How., 241, it was ruled by this court that the courts of the United States themselves can have no authority to adopt any provisions of state laws which are repugnant to or incompatible with the positive enactments of congress, upon the jurisdiction, or practice, or proceedings of such courts.

§ 1177. *Effect of state statutes on commercial questions.*

The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigation and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof, in their fullest acceptance under the commercial law, must be nugatory and unavailing. The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair, the right of a non-resident holder of a bill of exchange, immediately after presentment to, and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative. The same want of authority may be affirmed of a provision in the statute which would seek to render the right of recovery by the holder, after regular presentment and protest, and notice for non-acceptance, dependent upon proof of subsequent presentment, protest, and notice for non-payment. A requisition like this would be a violation of the general commercial law, which a state would have no power to impose, and which the courts of the United States would be bound to disregard.

We think that the instruction given by the circuit court in this case was erroneous; that its decision should be, as it is hereby reversed; and the cause is remanded to the circuit court, to be proceeded in upon a *venire de novo*, in conformity with the principles above ruled.

EVANS v. GEE.

(11 Peters, 80-85. 1837.)

ERROR to U. S. District Court, Southern District of Alabama.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This action is brought upon a bill of exchange, of which the following is a copy:

"\$5,350.

WILCOX COUNTY, Dec. 16, 1834.

"Twelve months after date of this, my sole and only bill of same tenor and date, pay to the order of Thomas Evans, five thousand three hundred and fifty dollars; negotiable and payable at the office of discount and deposit branch bank of the United States at Mobile for value received, this the 16th day of December, 1834.

H. SMITH EVANS.

"To George M. Rives, Mobile."

The plaintiff in error, the payee of the bill, indorsed the same in blank, and the defendant in error became the *bona fide* holder of it by delivery; though the indorsement in blank was at the time of delivery to the holder by himself, and subsequently by his attorney, converted into a full indorsement, the words, pay to Sterling H. Gee, having been written over the indorser's name. Upon the trial of the cause in the court below, the bill, with proof of protest for non-acceptance and notice to the drawer and indorser of the bill, was given in evidence. To resist a recovery, "the defendant offered to prove that the bill was given by him to Charles Gee for property purchased by himself; that the property belonged jointly to Charles J. Gee and Sterling H. Gee, the plaintiff; that they then were and continue to be, and now are, general copartners; that when the indorsement was made it was in blank, and that the said indorsement has been filled up by the plaintiff's counsel since the suit had been commenced; that Charles J. Gee resides in this state, and did when the suit was brought, and is a citizen of the state of Alabama; and that H. Smith Evans and George M. Rives, the drawer and drawee of the bill, are also and were citizens of the state." The court rejected this evidence, stating: "That the indorsement having been made and given in blank, the plaintiff was authorized to fill it up, as had been done; and that the facts set forth could constitute no defense and were not proper evidence; the court further instructed the jury that the bill being drawn in this state by a person residing in this state, and made payable in the state, upon non-acceptance and notice, the indorser was liable for ten per cent. damages on the amount of the bill for non-acceptance. We consider the court was right in rejecting the evidence and in instructing the jury as to the liability of the indorser for damages.

§ 1178. *Jurisdiction of United States courts where indorser and indorsee are citizens of different states.*

If by the evidence proposed it was intended to deny the jurisdiction of the court on account of the citizenship of the parties to the action, that being averred on the record, a plea to the jurisdiction should have been filed, and such evidence was inadmissible under the general issue. If it was intended to apply to the jurisdiction on account of the original parties to the bill having been citizens of the same state when the bill was drawn, then the rule laid down by this court in *Turner v. Bank of North America*, 4 Dal., 8, which was a suit by the indorsee of a promissory note against the drawer, does not apply to the parties in this case; but the rule established in *Young v. Bryan*, 6 Wheat., 146, does apply, which was that the circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who was a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker or not. This is a case of an indorsee of one state suing an indorser of a different state. If the evidence was intended to resist a recovery upon the merits on account of the interest which another copartner or other person had in the consideration for which the bill was indorsed, we observe, the plaintiff being the *bona fide*

holder of it, such a fact could not be inquired into in an action on the bill, as it would import a different bargain and agreement from the tenor of the bill and indorsement when the bill was given or transferred; and a copartner's interest could only be inquired into in a suit in equity between the copartners for its recovery.

§ 1179. *A bona fide holder may fill out a blank indorsement without becoming an indorser.*

As regards the right of a *bona fide* holder of a bill to write over a blank indorsement to whom the bill shall be paid at any time before or after the institution of a suit against the indorser, it has long been the settled doctrine in the English and American courts; and the holder, by writing such direction over a blank indorsement, ordering the money to be paid to particular persons, does not become an indorser. *Edie v. East India Co.*, 2 Burr., 1216; Com., 311; Str., 557; *Vincent v. Horlock*, 1 Camp., 442; *Smith v. Clark, Peake*, 225.

§ 1180. *Non-acceptance gives right of action against drawer and indorser, even though bill has not matured.*

But it was urged in argument that this suit could not be maintained, because it appears by the record that the action was brought before the expiration of the time limited by the bill for its payment. The law is otherwise upon reason and authority. The undertaking of the drawer is not that he will pay the bill, but that the drawee will accept and pay; and the liability of the drawer only attaches when the drawee refuses to accept; or having accepted, fails to pay. A refusal to accept is then a breach of the contract, upon the happening of which a right of action instantly accrues to the payee to recover from the drawer the value expressed in the bill, that being the consideration which the payee gave for it. Such is also the undertaking of an indorser before the bill has been presented for acceptance, he being in fact a new drawer of the same bill upon the terms expressed on the face of it. The case of an indorser is not distinguishable from that of a drawer in regard to such liability. *Ballingalls v. Gloster*, 3 East, 481; *Milford v. Mayor, Doug.*, 55; *Mason v. Franklin*, 3 Johns., 202.

§ 1181. *Damages allowed in Alabama against indorser.*

As to the damages which the court ruled the indorser in this case to be liable for, we need only say the statute of Alabama gives them, and applies directly to the case. *Aiken's Alabama Digest*, 328, § 5. "Every bill of exchange of the sum of \$20 and upwards, drawn in, or dated at, and from any place in this territory, and payable at a certain number of days, weeks or months after date or sight thereof, shall, in case of non-acceptance by the drawee, when presented for acceptance, or if accepted in case of non-payment by the drawee, when due and presented for payment, be protested by a notary public, in like manner as foreign bills of exchange, and the damages on such bill shall be ten per cent. on the sum drawn for, and shall in every other respect be regulated and governed by the same laws, customs and usages which regulate and govern foreign bills of exchange. Provided, that such protest shall, for want or in default of a notary public, be made by any justice of the peace, whose act in such case shall have the same effect as if done by a notary public."

§ 1182. *Irregularities waived by going to trial.*

The counsel for the plaintiff in error also contended for the reversal of the judgment on the ground of sundry irregularities in the progress of the cause in the court below, apparent on the record. Such as that a general demurrer had been filed, and had not been disposed of; that a non-suit had been taken

by the plaintiff in error, and that a motion to set it aside had been overruled; that the case had been submitted to a jury, without an issue between the parties; and, finally, that the verdict, if an issue was made, had been returned by eleven instead of twelve jurors. These irregularities, whatever might have been their original imperfections, if not waived, were, in our opinion, waived by the defendant going to trial upon the merits, and cannot now constitute any objection upon the present writ of error. For a writ of error does not bring up for review any irregularities of this sort. Judgment affirmed, with six per cent. damages.

DOWNES v. CHURCH.

(13 Peters, 205-208. 1839.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of a certificate of division of the judges of the circuit court for the district of Mississippi. The action was *assumpsit*, founded on the second part of a foreign bill of exchange, by the indorsee against the indorser for non-acceptance. The plaintiffs declared upon the second of the set of exchange, which second of the set was protested for non-acceptance, and the same, with the protest attached thereto, was read to the jury. Whereupon a question arose, whether the plaintiffs could recover upon the said second of exchange without producing the first of the same set, or accounting for its non-production; upon which question the judges were opposed in opinion, and the same has been accordingly certified to this court under the act of congress.

We are of opinion that the plaintiffs are entitled to recover upon the second of the set without producing the first, or accounting for its non-production. No authority has been referred to which is exactly in point, nor are we aware that the question has ever been judicially decided. Mr. Starkie, in his work on Evidence, part 4, p. 228, 1st ed., has said: "In the case of a foreign bill drawn in sets, both the sets should be produced." But for this proposition he has cited no authority. The question must, then, be decided upon principle. The object of drawing a foreign bill in sets is for the convenience of the payee, or other holder, to enable him to forward the same for acceptance by different conveyances, and thus to guard against any loss, by accident or otherwise, which might occur if there were but a single bill. But from the very frame of the set, if one is paid or discharged by the acceptor, or other party liable on it, he is ordinarily discharged from the others, since each part contains a condition that it shall be payable only when the others remain unpaid.

§ 1183. *When one of a set of bills is protested for non-acceptance, the drawer and indorsers are prima facie liable on it.*

Now, when one of the set is protested for non-acceptance, and due notice is given to an indorser, and on the trial of an action brought against him by the indorsee, the same bill of the set on which the protest is made is produced, that is *prima facie* proof of his being responsible thereon.

§ 1184. *—and a right of action arises against all antecedent parties to the bill, upon notice, without any other of the set being presented.*

Either of the set may be presented for acceptance, and, if not accepted, a right of action presently arises upon due notice against all the antecedent parties to the bill, without any others of the set being presented; for it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder.

§ 1185. *The law does not presume that the other bills of the set have been negotiated to other persons; this is matter to be shown on defense.*

Under such circumstances, it is properly a matter of defense on the other side, to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defense exists, which displaces the *prima facie* title made out by the plaintiff. The law will not presume that the other bills of the set have been negotiated to other persons, merely because they are not produced. And the indorser is not put to any hazard or peril by the non-production of them; since, like the acceptor, if he once pay the bill, without notice of any superior adverse claim, by a negotiation of another of the set to another party he will be completely exonerated. On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production, as he might not be able satisfactorily to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover upon their being dishonored. Such a requirement would create most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be greatly obstructed in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby. We are therefore of opinion that the question upon which the judges of the circuit court were opposed ought to be answered in the affirmative, and we shall send a certificate to the court accordingly.

WHITE v. NATIONAL BANK.

(12 Otto, 658-663. 1880.)

ERROR to U. S. Circuit Court, District of Colorado.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is an action by White, who was plaintiff below, for the sum of \$60,000, against the Miners' National Bank of Georgetown, Colorado. The declaration contains twelve special counts, upon as many drafts, drawn by the Stewart Silver Reducing Company on Thomas W. Phelps, payable in the city of New York to the order of the defendant, and indorsed by J. L. Brownell, its president, to S. V. White, and duly protested for non-payment. To these counts is added another, in this language: "And for that also, heretofore, to wit, on the 1st day of April, A. D. 1876, at the said county of Clear Creek, the said defendant was indebted to plaintiff in \$60,000, for so much money, by the plaintiff, before that time, paid to the use of said defendant at its request, which said sum of money was to be paid to the plaintiff on request," with an allegation of request and refusal. To this declaration the defendant pleaded the general issue and several special pleas, which it is unnecessary to notice. The case was tried by a jury. The plaintiff recovered \$15,000 debt and \$2,625 damages for interest, on account of three of the drafts. His claim on the other drafts, and for money paid at defendant's request, was rejected.

He therefore brings this writ, and assigns for error the rulings of the court in the progress of the trial, which are set forth in a bill of exceptions.

J. L. Brownell, a partner in the firm of J. L. Brownell & Brother, doing business as bankers and brokers in the city of New York, was also president of the defendant, and interested in the Stewart Silver Reducing Company during the time of the transactions involved in this suit. As such president, he sold or transferred the several drafts on which this suit is founded to White, and received of the latter for the use of the bank the amount of said drafts less the discount. They were not paid at maturity, but due demand, protest and notice were made. Those on which plaintiff recovered need not be further noticed. The others were rejected by the court as evidence against the defendant, on account of the form of the indorsement. As they were, in this respect, alike, the form of one will be given here as a specimen of the whole:

"\$5,000.]

OFFICE OF THE STEWART SILVER REDUCING COMPANY,

[L. s.]

"GEORGETOWN, COL., Oct. 25, 1875.

"Four months after date pay to the order of the Miners' National Bank, Georgetown, Colorado, payable at the Third National Bank, New York City, five thousand dollars.

"STEWART SILVER REDUCING COMPANY,

"By J. OSCAR STEWART, President.

"*To Thos. W. Phelps, Esq., Georgetown, Colorado.*

Across the face, in red: "Accepted.—THOS. W. PHELPS.

Indorsed:

"No. . Pay S. V. White or order, for account Miners' National Bank, Georgetown, Colorado. J. L. Brownell, p't. S. V. WHITE."

Because of the words "for account of Miners' National Bank of Georgetown, Colorado," in this indorsement by Brownell, as president of the bank, the circuit court ruled that there arose out of the transaction no obligation on the part of the bank to pay the draft or return the money, although due demand of the acceptor and refusal to pay was proved, with notice to the bank. This is the principal question which we are to decide.

The plaintiff relies largely on two propositions to establish his right to recover against defendant on this indorsement. The first of these is that these words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted. The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract. We are not satisfied that either of these propositions is sound.

§ 1186. *An indorsement to A. "for account," etc., only constitutes A. an agent to receive the money.*

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly

construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.

§ 1187. *Neither custom nor parol proof admissible.*

If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it. But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For, assuming this to be correct, we think the plaintiff was still entitled to recover more than he did.

§ 1188. *Under a common count one who has paid his money to the use of the owner of negotiable paper under the mutual mistake that he was buying it can recover it back.*

The court below seems to have paid but little attention to the issue on the count for money paid to the use of defendant. It appears distinctly by the evidence, and is uncontradicted, that the money paid by plaintiff on account of these drafts was placed to the credit of the defendant with its corresponding bankers in New York, and paid out on checks of the defendant, so that there is no question that the latter received the money. There is also no question but that plaintiff thought he was buying these drafts, and that they became his property by their delivery to him. It is also evident that Brownell, the president of the bank, thought he was selling him the drafts, and there is evidence that neither White nor Brownell noticed the restrictive words of the indorsement. But if the court below was correct in holding that the indorsement — the evidence in writing of what the parties did — only made White the agent of the bank, and left the bank the owner of the drafts, then both White and Brownell were mistaken, and the money was paid and received under a mutual mistake. If White paid his money as purchase money of the drafts, he paid it without any consideration, for he did not purchase the drafts. He only burdened himself with the duty of collecting the money for the bank, and the bank received and used his money without giving him any consideration for it. So, also, if White did not become the owner of the drafts, and if, when he should collect the money on them, he would hold it, in the language of the indorsement, "for the account of the bank," the jury might have been left at liberty to presume that the money which he paid was a loan or advance on the security of the paper delivered to him at the time. Either of these views of the transaction would justify a recovery under the money count, in which the delivery of the money and the delivery of the drafts with the qualified indorsement would be evidence of the payment and receipt of the money and the circumstances which attended it. This indorsement is treated by counsel here as an assignment of the paper without recourse, in which the title to the paper passed but the right to recourse to the assignor was cut off. But this is evidently an error. If the court below was correct neither the title to the paper nor the right to the money under it passed. The only effect was to justify the acceptor in paying to the indorsee for the account of the bank. The legal effect of the transaction, as evidenced by the writing, was merely to enable White to collect the money for the bank. Though a restricted indorsement, it was no assignment at all. It is not, therefore, a contradiction or a varying of the meaning of the written instrument to prove that, in the delivery of this paper to White, he and the bank were under a mistake as to the effect of it, or that he paid this money to the bank without any consideration, or that he ad-

vanced money to the bank in the idea that he was to be reimbursed out of the draft when collected.

The instructions given by the court and the refusal of the prayer of plaintiff fairly raised this question. All the drafts except the three which had no such indorsement were excluded from the jury. The jury were told that nothing else was before them. The thirteenth instruction asked by plaintiff and refused by the court distinctly affirmed that if Brownell obtained from plaintiff sums of money on account of the drafts, which the court had refused as evidence, which money was placed to the credit of defendant in a New York bank and afterwards drawn by defendant, the defendant was liable for such money.

The judgment will be reversed and the case remanded with directions to set aside the verdict and grant a new trial; and it is so ordered.

BANK OF UNITED STATES v. LYMAN.

(Circuit Court for Vermont: 1 Blatchford, 297-317. 1848.)

STATEMENT OF FACTS.—The Bank of the United States, created by congress, had located a branch at Burlington, Vermont. On March 10, 1836, the defendants offered to purchase of the Bank of the United States the property of the office at Burlington as it was upon the 2d day of March, 1836, for a specified sum, on an estimate of itemized assets, which offer was accepted, and on April 1st was consummated, the defendants giving their notes for the purchase.

Opinion by PRENTISS, J.

The declaration in this case contains two counts, one for money had and received, and the other on an account stated. In support of the counts two promissory notes were given in evidence, with several accounts current, letters of correspondence and other documents and testimony. Out of the evidence so given various questions have arisen, some involving the admissibility, and others the effect or sufficiency of the evidence. The questions possess different degrees of importance, both intrinsically and in their bearing upon the case; and I shall notice them in such order and manner as will enable me to dispose of them with as much brevity and as little repetition as practicable, entering no further into the facts than may be necessary to present, fully and intelligibly, the grounds of decision upon each particular point.

§ 1189. *Presumption as to time of organizing bank.*

1. The plaintiffs were incorporated as a banking company, by the name of the Bank of the United States, by an act of the state of Pennsylvania, passed February 18, 1836. The contract which is the origin or foundation of the principal claim in question was made sometime after the 10th of March, and was carried into execution on the 1st of April, in the same year. The precise day of the organization of the plaintiffs as a banking company not being shown, it is objected that it does not appear that they were organized and competent to act as a corporate body at the time the contract was made. To this, it seems to me, an answer was given by the counsel for the plaintiffs which is quite sufficient. The act of incorporation having provided that notice of the organization should be given on or before the 3d of March then next ensuing, and the bank being found in operation afterwards under the act, it is to be presumed that it was organized as early as the time prescribed, which was of course before the making of the contract.

§ 1190. *Successor of bank, under new charter, held entitled to enforce contracts made with bank.*

2. It appears that the Bank of the United States, incorporated many years before by an act of congress, although it ceased to have any power to carry on banking operations after the 3d of March, 1836, continued in existence two years thereafter for the purpose of suits, for the final settlement of its affairs, and for the sale and disposition of its estate and effects. As that company established the branch at Burlington, and was in existence at the time the contract for the purchase of the property of the branch was entered into, it is insisted that it must be taken, in the absence of direct proof showing it to be otherwise, of which it is said there is none, that the contract was made with that company, and, consequently, that the plaintiffs, as to one and much the most considerable of the claims in question, are mere strangers, for anything that appears, without right or interest. But it is to be observed that the company established by the act of Pennsylvania was established in anticipation of the dissolution, so far as banking powers were concerned, of the company established by the act of congress, the new company having, with one exception, the same stockholders and capital, the same name and style, and the same capacity, so far as a state institution could have the capacity of a national institution. It was the substitution of a new charter under the state government in place of the old charter under the general government, so that the banking operations which would cease under the one might be continued, without intermission or interruption, under the new powers given by the other. Accordingly, the new company, as we have seen, was to come, and did come, into existence as an organized corporate body before or simultaneously with the termination of the banking powers and operations of the old company; and all the estate and effects of the old company were transferred to the new. The particular time of the transfer, it is true, does not appear. But it is obvious that it would naturally follow the organization immediately, in order to fulfil the purpose in view; and one of the witnesses states expressly that it included the estate and effects sold the defendants. This, therefore, connected with the bringing of the action and possession of the written evidences of the debt by the plaintiffs, is sufficient and very decisive evidence that the contract was in fact made with the new company.

§ 1191. *Acts and admissions of one of several joint promisors admissible against the others, when.*

3. To establish several material facts in the case, various letters, acts and admissions of John Peck, one of the defendants, were given in evidence. This evidence, it is said, was inadmissible, at least so far as it concerns any of the defendants but Peck himself. The objection to it rests upon the ground that though the defendants were joint purchasers of the property, and gave their joint notes for the price, they were not partners, at least in such a sense as to make the acts and admissions of one evidence against the others. Admitting that the defendants are to be regarded, not as partners, properly and strictly speaking, but only as joint contractors or promisors, still the evidence, for some purposes, was undoubtedly admissible. It is a familiar rule of law that an acknowledgment by one of several joint debtors, either by word or act, is evidence to take the debt out of the statute of limitations as to all. Thus, "payment by one," says Lord Mansfield, in *Whitcomb v. Whiting*, Doug., 652, "is payment for all, the one acting virtually as agent for the rest; and, in the same manner," he adds, "an admission by one is an admission by all." This

principle, however, does not extend to the creation of a new substantive obligation, or a new additional liability; nor to anything which is necessary to be done by the party claiming, to perfect or give effect to a conditional or imperfect obligation or liability—such, for instance, as a demand of payment and notice of non-payment of a promissory note indorsed by several joint payees. There the admission of one of the indorsers, either as to the demand or notice, is probably no evidence against the others; especially so as notice is necessary to each. But payment by one on a note, in pursuance of an existing joint liability, or an admission by one that the note is unpaid, or that a particular balance is due upon it, whether by stating an account or otherwise, is good evidence against all, in an action for the money due upon the note. That neither creates a new contract nor enlarges the pre-existing obligation or liability, but merely shows that that obligation or liability has not been discharged, or discharged but in part only. But, however that may be, if it sufficiently appears that Peck was the agent to take care of the joint concern, and transact the business growing out of it, in behalf of the other defendants as well as himself, his acts and admissions while so acting, relative to anything within the scope of his authority, are, undoubtedly, in law, the acts and admissions of all and binding upon all. Now it very fully appears that the business was in fact conducted and transacted wholly by and through Peck. The original proposition for the purchase was signed, "John Peck for himself and others;" and this was ratified by the others, by their joining in the notes and completing the contract in pursuance of that proposition. As at the first, so throughout to the last, Peck acted as the ostensible manager, without the appearance, from anything that is disclosed in the evidence, of any objection or interference on the part of the other defendants. It is obvious that it would be quite inconvenient, in a joint concern of such a nature, for all to take part personally in the correspondence, or to sign every letter and paper that passed, or for notices, accounts current, and other necessary communications, to be sent to and answered by all. It is usual in such cases to commit the transaction of the business and the charge of the correspondence to some particular one, and have it done by and through him for all. And where it is done by and through one professedly for and in behalf of all, for a series of years, as in this case, without objection, all residing in the same neighborhood, and having daily intercourse and communication with each other, the assent of the others, they having adopted the first act, is to be presumed from their silence and acquiescence.

§ 1192. *Where plaintiff's bill of particulars is a promissory note only, he cannot recover on a pre-existing debt or original consideration.*

4. The bill of particulars filed by the plaintiffs having stated their claim to be two promissory notes particularly described, it is made a question, and it becomes necessary to decide, whether it was competent for them to give evidence of and recover upon the pre-existing debt or original consideration. According to the general rule of practice as established by the authorities, it seems that the particulars are considered and treated as incorporated with the declaration, and the plaintiff is not allowed to give any evidence out of them. Thus it has been held that where the particular of the plaintiff's demand was a promissory note only, and on being produced it appeared to be improperly stamped, so that it could not be given in evidence, the plaintiff, though he might otherwise have gone into the consideration of the note, was precluded therefrom by his particular. *Wade v. Beasley*, 4 Esp., 7; *Brown v. Watts*, 1

Taunt., 353; 1 Tidd's Prac., 537. On these authorities, which are obviously directly in point, the plaintiffs in the present case were confined, by the terms of their bill of particulars, to the two notes specified, and were not at liberty to proceed upon the original consideration or cause of action.

§ 1193. *Bank cannot sue in its own name upon note payable to its cashier.*

5. The note first specified in the bill of particulars, and first given in evidence, if the plaintiffs could maintain an action upon it in any form, was undoubtedly admissible under either count in the declaration — not only under the count for money had and received, but also, being a liquidated debt, under the count on an account stated. To the admission of the note, however, an objection was made, arising upon the face of the instrument, which presents the principal and most important question in the case. The note is signed by the defendants, and is in this form: "We jointly and severally promise to pay to Samuel Jaudon, Esqr., cashier, or order, etc." On the one side it is insisted that Jaudon is the payee of the note; that the legal interest and right of action are in him; and that the plaintiffs, the note not being indorsed by Jaudon, can neither maintain an action directly upon it in their own name nor an action in any form in their own name to recover the money due upon it. On the other side, it is urged that, as it appears from the evidence in the case, that the note was given for a debt due the plaintiffs, and that Jaudon was their cashier, acting merely as their agent in taking the note, having no personal interest whatever in it, the plaintiffs are to be regarded as the real payee of the note, and, as such, may sue and recover the money in their own name. Upon this question I might content myself with a general statement of the conclusion at which I have arrived, with a summary reference to authorities and reasons; but the nature and importance of the question seem to entitle it to more full and particular consideration. It seems now to be settled in England, whatever difference of opinion there may have formerly been in regard to it, that parol evidence is admissible to show that a person not named in a written simple agreement is the real party to it, either for the purpose of charging him upon it or enabling him to take the benefit of it, as the case may be; but not, however, to discharge a party who has contracted in his own name. Thus the real principal or a partner from or to whom the consideration has moved may sue or be sued upon a written simple agreement, though he do not appear upon its face to be a party to it. This was so decided in the court of exchequer, in the case of *Beckham v. Drake*, 9 Mees. & W., 79, afterwards affirmed in the exchequer chamber, in *Drake v. Beckham* in error, 11 Mees. & W., 315. But however clear, undoubted and now well established this doctrine may be as to mere written simple agreements, the question is, is it applicable to negotiable instruments?

In a very early case, *Evans v. Cramlington*, Carth., 5, affirmed in the exchequer chamber, in *Cramlington v. Evans* in error, 2 Vent., 307, it was determined that where a bill is payable to *A. for the use of B.* the right of action and of transfer is only in *A.*, he having the legal interest, and *B.* only the equitable or beneficial interest. This decides that the person named as the payee in a bill, and not the person for whose use or benefit it is made payable, is the party entitled to sue upon it. If this be so where the trust is expressed and declared upon the face of the bill, the case must be much clearer and stronger where neither the trust nor the name of the party having the beneficial interest appears at all upon the instrument. The observations of Buller, J., in *Fenn v. Harrison*, 3 Term R., 757, show very plainly that in his opinion

no person could be considered as a party to a bill unless his name, or the name of his firm, if a partner, appeared upon it. In *Siffkin v. Walker*, 2 Camp., 308, where a person not appearing to be a party to a promissory note was joined as a defendant in an action upon it, Lord Ellenborough said that a note made and signed by one in his own name could not be treated as the note of him and another person neither mentioned nor referred to. And in *Emly v. Lye*, 15 East, 7, the same eminent judge, with the concurrence of all his learned associates, held that on a bill of exchange drawn by one only, it could not be allowed to supply by intendment the names of others in order to charge them, and that the plaintiff, if he would rest his claim on the bill, must confine it to the party who signed the instrument. In the case of *Beckham v. Drake*, to which I have before referred as settling the general rule as to written simple agreements, Lord Abinger said: "Cases of bills of exchange are quite different in principle from those which ought to govern this case. By the law merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. That is a class of cases quite distinct in its nature from the present." And Parke, B., said that where a contract in writing, not under seal, was made in another name than that of the real principal, the real principal could sue and be sued. "But," he added, "the case of bills of exchange is an exception, which stands upon the law merchant, and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument by their name or firm be made liable to an action upon it." Thus it appears that negotiable instruments, according to these authorities, are exceptions to the rule which governs written simple agreements in general, and that this, for supposed good and sound reasons, is the established doctrine in England.

The same doctrine, I may safely say, prevails in general in this country, though there may have been, now and then, an occasional departure from it. There can be little doubt, I think, when we refer to the case of *Van Ness v. Forrest*, 8 Cranch, 30, how the rule of law on the subject is understood in the national court. There a note was executed to Joseph Forrest, president of the Commercial Company, for merchandise belonging to and sold as the property of the company. On the question whether an action could be maintained upon the note in the name of Forrest, Marshall, Ch. J., said: "The suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable on the note itself. Such suit can be brought only in the name of Joseph Forrest. It can no more be brought in the name of the company than if it had been given to a person, not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money in his own name as a trustee for the company."

To notice particularly all the decisions in the various state courts having a bearing upon the question one way or the other, would not only take up much time, but be assuming an unnecessary task. I have looked, however, into a very considerable number of these local decisions, and it will be sufficient for every useful purpose, without going further, to state the purport of such as have been made in the courts of some of the older and more commercial states. The decisions in the courts to which I refer present three classes of cases. The first is, where a promissory note is expressed to be payable, for instance, to *A.*

B., agent of C. D., both agent and principal being named in the note. In such case it is decided that the principal cannot sue though named. It is held that a note payable to a person by name, though he is described therein as the agent of another, is a note payable to the person so described as agent, and that a suit upon it must be in his name, or in the name of his indorsee. The second class is where a promissory note is made payable to the *cashier* of a particular bank, giving the name of the bank without the name of the cashier. In such case it is determined, and very rightly, as I think, that the interest and right of action are in the principal who is named, rather than in the agent who is not named. The third class is where a bill or note is made payable to or is signed by a person designated as agent generally, as *A. B., agent*, without naming the principal. In such case it is held that the simple addition of *agent*, and of course the simple addition of *cashier*, without any specification whatever of the name of the principal, will not authorize the admission of parol testimony to show who the principal is, and make him a party to the instrument. There may be, and indeed are, decisions in some of the state courts, not entirely reconcilable with the doctrine of the authorities which have been cited and referred to; but however much such local decisions may be entitled to consideration and respect on account of the source from which they proceed, they can have no influence upon the question before us, so far as they are at variance with the general prevailing rule of commercial law. In suits in the courts of the United States, as is laid down in *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*), the true interpretation and effect of contracts and other instruments of a commercial nature are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

Upon the whole it appears to me that the true rule of law as deducible from the adjudged cases, American as well as English, is, that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note unless he appears upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty by its own proper force. Being assignable and passing by mere indorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities and on these considerations that it is distinguished from written simple contracts in general and made subject to a different rule. The note in question here is a perfect instrument without ambiguity in form or purpose, and must have operation and effect according to the terms in which it is expressed. It is made payable to "Samuel Jaudon, Esq., cashier, or order." The promise therefore is to pay him, or the person to whom he shall order it to be paid, and it would be repugnant to the terms of the instrument to allow the Bank of the United States or any one else without his order to demand and enforce payment of it by suit. The bank is not named in the note at all, either as principal or otherwise; nor can it be inferred from anything contained in the note, that it was made even in trust for or for the benefit of the bank, or that the bank has any interest whatever in it. To let in parol evidence to show that the bank is the real principal, and hold that it may sue upon the note as such, would be to subject negotiable paper to the very uncertainty the law intended to avoid. It would be putting promissory notes on the footing of other written simple contracts, and prostrate entirely the distinction which sound policy as well as the nature and purpose of negotiable securities

demands should be kept up between the two classes of cases. As the plaintiffs cannot be regarded as the payee of the note, it is almost superfluous to say that the note is neither evidence of money had and received to their use, nor evidence of an account stated with them. The note creates no privity whatever between them and the defendants, and we have already seen that by the bill of particulars they are limited to the note, and cannot go upon the antecedent cause of action, supposing they might otherwise do so under the declaration.

It is insisted, however, that there is evidence, aside from the note, of an actual stated account, showing the balance due, and that that, with the note, is sufficient to enable the plaintiffs to recover under either count. This might be so if the plaintiffs, though not the payees, were the real owners of the note, and there had been an actual accounting with them, personally or through their agents. But it appears that the accounting, whatever there was, was with Robertson and others, to whom the beneficial interest of the bank in the note, with the other effects of the bank, had been assigned in trust for certain purposes, and who, for aught that appears, are still owners of the property in the note. There is no evidence that the account of April, 1840, which was prior to the assignment, was ever delivered or sent to the defendants; and as to the accounts of April, 1842, and November, 1843, each is stated and rendered by the assignees, and each states the balance as due to them. The letter to Peck inclosing the account of April, 1842, is signed "Herman Cope, agent for J. Robertson *et al.*, trustees," and states the account to be an account with them. The letter to Peck of May, 1844, is signed in the same way, and speaks of the account of November, 1843, as an account with the same persons. The accounts being stated and rendered as accounts with the assignees, to whom the property in the note belonged, I do not well see how the accounts can be treated as stated accounts of money due and owing upon the note to the plaintiffs, or as evidence of indebtedness to them. Even viewed as implying a promise which would follow the right of action on the note, or simply as evidence of indebtedness on the note generally, it would not help the plaintiffs; for, as we have already seen, they are not the payees of the note and have no right of action upon it.

If there had been an account stated by the defendants directly with the plaintiffs while owners of the note, recognizing their right to be accounted with for the note, or such an admission of their title to the money due upon it as would amount or be equivalent to an express promise to pay them, so that a cause of action might be considered as having accrued to and vested in the plaintiffs before the assignment, I do not mean to say that, in such case, the assignees might not sue and recover upon such cause of action in the name of the plaintiffs. How that might be it is unnecessary to inquire, because the evidence presented, in any just view of it, falls short, as it appears to me, of making out any such case.

§ 1194. *Waiver of notice by part payment, or subsequent promise to pay.*

6. The other note given in evidence is the promissory note specified in the bill of particulars, executed by Lyman & Cole to the defendants, and by them indorsed to the plaintiffs. The plaintiffs being indorsees, and the defendants indorsers, the note was unquestionably admissible in evidence under the count for money had and received, if not under the other count. But the defendants can be chargeable only *as indorsers*; and this would be so, without any reference to the limited terms of the bill of particulars, whether the transaction be treated as a discount, and therefore a purchase of the note, or as a loan of

money, taking the note in payment, or even as a taking of the note in payment of an antecedent debt. Viewed in either light, due presentment for payment and due notice of non-payment were indispensable to create any liability on the part of the defendants. There is proof sufficient of due presentment of the note for payment, but there is no direct proof of notice of non-payment. The only question, therefore, is whether there is evidence from which notice may be inferred. It has been often held that part payment, a promise to pay, or an acknowledgment of liability by the indorser after the note becomes due, is *prima facie* evidence, not only of notice, but of presentment. Now, what are the facts in relation to the note in question? We have already seen that there is sufficient presumptive evidence that Peck was the agent of the defendants, acting for himself and the others, and that his acts and admissions, relating to the joint interest, within the scope of his presumed authority, which of course extended to this note as a part of the joint concern, are to be considered as the acts and admissions of all. It appears that, after the note became due, several payments were made upon it; but as it does not appear but that these payments were made by the makers of the note, they will be passed by. What is material to be noticed is, that after the note had been duly protested for non-payment, it was charged and kept in a separate account, and that Peck, on a proposal to him to have it transferred to the general account, requested that it might continue, for the sake of convenience, to remain charged and kept, as it had been, in a separate account. In May, 1842, an account of this note, together with an account of the other note, separately stated, was rendered to Peck. He acknowledged the receipt of both accounts in June following, making no objection whatever to the account of this note, nor indeed any objection to the account of the other note, except that credit was not given the defendants for certain demands, called the Truesdell and Burrows notes, for which they claimed an allowance. Now, is not the request to have this note remain charged and kept, as it had been in a separate account, coupled with the fact of an account so charged and stated being rendered, received, and retained without objection, an acknowledgment of liability to pay the note, and can it be at all material whether the acknowledgment was before or after the assignment, or whether to the plaintiffs or the assignees?

I have said that no objection was made to the account of this note; and such, I think, is the just inference from the letter of Peck. But if the objection was intended to apply to the account of this note as well as to the account of the other note, it was not an objection to the justness or correctness of any item in either account, but merely to the amount of the balance claimed. The objection was that a certain credit had not been given, thereby impliedly admitting that the note was a proper item in the account. In *Campbell v. Webster*, 2 Mann., G. & S., 258, where the defendant, in answer to an account sent him by the plaintiff, admitted it to be all correct, except that the plaintiff had not credited him for a certain claim he had, and said he would pay the bill mentioned in the account if the plaintiff would allow that claim, it was held that this amounted to an admission of liability to pay the bill, a counterclaim being made the only objection to paying; and that an admission of liability amounted to an admission that all had been done which was requisite to constitute such liability. This is decisive that the setting up, in the present case, of a claim for a credit as the only objection, with total silence as to the want of notice, is an acknowledgment of liability to pay the note in question, and thereby an admission that notice had been given.

§ 1195. *Evidence as to purchase and discharge of notes considered.*

7. The only remaining question in the case arises upon the claim set up by the defendants on account of certain demands, called the Truesdell and Burrows notes, alleged to have been included in the purchase from the plaintiffs, and to have been controlled or discharged by them. The circumstances attending the Truesdell debt appear to be these. On the 10th of January, 1835, resolutions were passed by the directors of the branch bank, recommending a compromise of the debt, and an acceptance of an offer which had been made by the Truesdells to pay fifty per cent. as a composition. The resolutions were transmitted the same day to the parent bank, and the compromise so recommended was approved of by the parent bank on the 16th of the same month. The return made by the branch to the parent bank on the 1st of June thereafter, contains the debt in the list of the suspended debt, marked as "desperate," that is, of little or no value. The same return states that the compromise had been carried into effect. So it appears that the debt had not only been marked and returned as bad and hopeless, as early at least as the 1st of June, 1835, but had in fact then been compounded, and was so stated in the return, by the payment of fifty per cent. The debt, notwithstanding, still continued on the books of the branch bank, through some inadvertence or negligence, in the list of suspended debts, up to the 2d of March, 1836, to which time the contract of purchase had relation; the debt never having been transferred, as it is said it should have been, to the general loss account. The inference from all this is, that though the debt stood on the books apparently as a subsisting debt for a balance of fifty per cent., it was not in fact a subsisting debt, but had been canceled and discharged. If this fact was known to the defendants at the time of the purchase, the circumstance of the debt continuing on the books in the list of suspended debts can be of no real importance. It appears that two of the defendants, Peck and Lyman, acted as directors of the branch, from some time in 1834 to September, 1835, when the branch office closed. This of course included the time when the resolutions referred to were passed, and the compromise in pursuance of them was carried into effect. These two defendants, therefore, one of them being, as we have seen, the agent in making the purchase, must be presumed to have had knowledge of the facts in relation to the debt; and if so, it would seem to be very clear that the defendants, especially as the purchase of the suspended debt was in the lump on an estimate of its value in gross, and at a great discount on that estimate, cannot make the debt in question the foundation of a claim.

The other debt, the Burrows debt, consisting of two notes, also stood on the books of the branch, in the list of suspended debts, apparently a debt due at the time of the contract of purchase. It appears that a compromise of this debt had been agreed upon by and between the parent bank and Burrows, and that the compromise was carried into effect on the 1st of May, 1835, by giving up the two notes to Burrows, and taking his note for thirty-three and a third per cent. of the amount. Burrows failed to pay the note so given by him, and the compromise, by its own terms, became null and void; but the two notes which had been given up were retained by him. In the return made by the branch to the parent bank on the 1st of June, 1835, before spoken of, this debt is mentioned in a memorandum at the bottom as having been compromised at thirty-three and a third per cent., which memorandum is signed by Mr. Lyman, one of the defendants, as director. The defendants, therefore, are to be taken as having full knowledge of the condition and circumstances of the debt at the

time of the purchase. They purchased the claim, whatever it was, in the state in which it then existed, as they purchased the other claims composing the lump of the suspended debt. For anything that appears, the claim exists in the same state now as it did then. The plaintiffs have not discharged it, interfered with it in any way, or done anything to deprive the defendants of any right or benefit they could claim in or out of it under the purchase. The plaintiffs sold the debt as it was, as they sold the rest of the suspended debt, without any guaranty or representation whatever on their part; and the appearance of it, as presented by the books, could not have deceived or misled the defendants, two of them having officiated as directors of the branch at the time the compromise was effected. It must be presumed that these two defendants, one of whom, as before remarked, was the agent in making the purchase, knew the terms of the compromise, and all that had been done in pursuance of it. I am obliged, therefore, to say that I see no legal grounds on which this claim, any more than the other, can be sustained.

Having thus disposed of all the questions raised in the case, I have only to say, in conclusion, that the result from the whole is that, for the reasons given on some of the points reserved, the verdict, in my opinion, ought to be set aside and a new trial granted.

§ 1196. *Bank cannot sue in its own name upon note payable to its cashier.*

Opinion by NELSON, J.

The plaintiffs cannot recover the amount of the large note made by the defendants on the 1st of April, 1836, and payable to Samuel Jaudon, four years after date, because they do not show a legal title to the same. That is in Jaudon. The addition of "cashier" is but a description of the person. I find no authority which will authorize the admission of parol evidence for the purpose of showing that the note arose out of a transaction between the parties to this suit, in which Jaudon acted as agent, and took the note in his own name for the benefit of the bank. The parties to the note must appear upon its face. If the name of the principal appears there, that will be sufficient, though the note is taken in the name of his agent. It is then, in contemplation of law, taken in the name of the principal, and he is the payee. Any other rule would very much embarrass the negotiability of this species of commercial paper.

§ 1197. — *nor is such note evidence in favor of bank under money counts.*

2. The legal interest in the note being in Jaudon as payee, the note is evidence under the money counts only of money had and received by the defendants from him, and not from the plaintiffs, and is not available to sustain the count for money had and received. If the declaration had embraced a count founded on the original consideration, it may be that on canceling the note the plaintiffs could have sustained the suit. It is a note given to Jaudon for property sold and delivered by the plaintiffs to the defendants, and I do not see but that upon surrendering it the plaintiffs might have gone on the original consideration the same as if the note had been given to themselves.

§ 1198. *Account stated.*

3. The plaintiffs cannot recover on the count for an account stated. The accounts were rendered to Robertson and others, assignees and owners of the demands by virtue of the assignment of the 4th of September, 1840. The accounts were stated between them and the defendants, and any promise, express or implied, arising therefrom, or to be predicated upon the rendering of such accounts, is a promise to Robertson and others, not to the plaintiffs. No four-

dation is laid for implying a promise to the latter. Robertson and others were not their agents. They were owners, acting for themselves, as trustees for the creditors. The plaintiffs are neither the legal nor beneficial owners of the note.

4. The plaintiffs are entitled to recover in their name the balance due on the small note of \$5,000, made by Lyman & Cole, and indorsed by the defendants. The proofs in the case are full to show that John Peck acted as the agent of the other defendants throughout the transaction, both in negotiating the purchase, and in conducting and arranging the payments subsequently. This being so, his acts and admissions afford satisfactory evidence that all the defendants were properly charged as indorsers of the note. Payments were made and arrangements entered into, wholly irreconcilable with the idea that they or any of them had become discharged from their obligation by the laches of the holder or otherwise. The rendition of the accounts, also, including this note, and the claiming of a balance without any objection being made to this item, lead to the same conclusion.

5. The debt of Truesdell & Son was compromised conditionally at the branch office at Burlington for fifty per cent. on the 10th of January, 1845; the transaction was approved by the parent bank on the 16th of January, and the amount was paid before the purchase of the assets of the branch, all which was known to some, if not all, of the defendants at the time. The S. E. Burrows debt of \$2,766.57, including interest, was compromised on the 11th of April, 1845, for thirty-three and one-third per cent., and his note was taken for that amount, \$922.19, on the 1st of May thereafter, and the original paper given up. This was the Burlington debt, and the transaction was well known at the branch office. The compromise, as it regarded other debts due the parent bank, was afterwards annulled on account of the failure of Burrows to carry it into effect, and another was then effected with the bank, but it had nothing to do with the Burlington debt. That remained as it stood at the time of the purchase by the defendants. The defendants, or some of them, must have been fully acquainted with the situation of these debts at the time of the negotiation for the purchase, and the bank has not interfered or changed the condition or character of them since. There was no guaranty of the amounts due, and as the demands had accrued at the Burlington office, where two of the defendants were directors, they, it is to be presumed, knew more about them in every respect than the officers of the parent bank.

6. The proof is sufficient to show that the purchase was made by the defendants from the bank chartered by the state of Pennsylvania, and not from the old bank. For these reasons, I think, there should be a new trial, with costs, to abide the event.

New trial granted.

BANK OF NEWBURY v. BALDWIN.

(Circuit Court for Massachusetts: 1 Clifford, 519-524. 1860.)

Opinion by CLIFFORD, J.

STATEMENT OF FACTS.—This case was in some respects similar to the preceding, being an action of *assumpsit* upon a promissory note signed by James W. Baldwin. The note was in the following terms:

"\$3,500. Five months after date I promise to pay to the order of O. C. Hale, Esq., cashier, thirty-five hundred dollars at either bank in Boston, value received."

The plaintiff bank was a corporation of Vermont, and the defendant, at the time of making the note and when the suit was brought, was a citizen of Massachusetts. As stated in the previous case, the defendant had, before the commencement of the suit, obtained a certificate of discharge from his debts in the insolvency court of Massachusetts, but the plaintiff in this case took no part in the insolvent proceedings. Defendant pleaded the general issue, and also the certificate of discharge in bar of the suit. It was agreed that O. C. Hale was the cashier of the Bank of Newbury at the time of the making of the note. The court said: "Two questions are presented for decision, but one of them is the same as that decided in the preceding case, and must be ruled in the same way;" and it was held, "first, that the power given to the United States to pass bankrupt laws is not exclusive; second, that the fair and ordinary exercise of that power by states does not necessarily involve a violation of the obligation of contracts; third, but where in the exercise of that power the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states. *Ogden v. Saunders*, 12 Wheat., 213, 271; *Boyle v. Zacharie*, 6 Pet., 635."

§ 1199. *Parol evidence admissible to show note to cashier belonged to bank.*

Another question, however, is presented in this case which deserves to be very carefully considered. It is insisted by the defendant that, inasmuch as the promise is expressed to O. C. Hale, cashier, without any designation of the plaintiff corporation, that the law applicable to negotiable paper deems the promise to be made to O. C. Hale as the payee of the note, and that no one else can have the legal title without indorsement; and consequently it is immaterial in whom the equitable interest may be. Mere abstract propositions are of little utility in the determination of a case, unless they are based upon the actual facts, as proved or admitted by the parties. Hale was in fact the cashier of the plaintiff bank at the time the note was given, and that fact appears by the unconditional admission of the parties; and the defendant also admits, if the evidence is admissible, that in taking the note he was acting as the cashier and agent of the plaintiff corporation. It is clear, therefore, that the only question presented is, whether the corporation plaintiffs can be permitted to introduce evidence to show that the person named in the note in taking it acted on their account, and not in his private capacity. Under recent decisions in this country it cannot be doubted that if the payee had been described in the note as cashier of the Newbury Bank, the suit in this case would have been well brought in the name of the corporation. Assuming the fact to be so, the case would then fall directly within the decision in the case of the *Commercial Bank v. French*, 21 Pick., 486, and several other cases therein cited. Now it seems to me that the agreement made by the parties supplies the omission in the note, and brings the case within the principle of that decision.

Reference is made by the defendant to the case of the *Bank of United States v. Lyman*, 20 Vt., 666, (a) as asserting a contrary doctrine. But it should be observed that there was no agreement in that case showing that the person named as payee in the note was the cashier of the plaintiff corporation. On the face of the note in this case it appears that O. C. Hall was cashier, and with the agreement superadded to what is written, I am of the opinion that

(a) 1 Blatchford, 297. See §§ 1189-1198, *supra*.

the case must be viewed precisely as it would be if the words "cashier of the Bank of Newbury" had been written in the note, and on that state of the case no doubt is entertained that it would be competent for the plaintiffs to prove by parol evidence that the cashier, in taking the note, was acting as cashier and agent of the corporation. Banking corporations necessarily act by some agent, and according to the uniform usage the principal portion of their business is transacted through their cashier. There is some conflict in the authorities applicable to the particular question under consideration, and it may well be admitted that it is not easy to reconcile them, or to deduce from them a rule of universal application. Between the original parties to a note or bill of exchange, the general rule appears to be that the facts are open to inquiry, and consequently that an agent is not liable to be sued upon contracts made by him in behalf of his principal if the name of the principal is disclosed and made known to the person contracted with, at the time of entering into the contract. Accordingly it was held, in the case of *Watervliet Bank v. White*, 1 Denio, 608, that the indorsement of a note to "E. Olcott, Esq., cashier, or order," made upon it at the time of the purchase of the note by the bank of which the indorsee was the cashier, had the effect to transfer the same to the corporation, it appearing from the pleadings and proof that such was the design of the transaction. *Folger v. Chase*, 18 Pick., 63; *Hartford Bank v. Barry*, 17 Mass., 94. Where individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, although they add a description of the character in which the note is given; but it was held in the case of *Brockway v. Allen*, 17 Wend., 40, that such presumption of liability might be rebutted by proof that the note was in fact given by the makers as the agent of the corporation for a debt of the corporation due to the payee, and that they were duly authorized to make such a note as the agents of the corporation; and the court say that such facts may be pleaded in bar of an action against the makers averring knowledge on the part of the payee. Numerous other cases have been decided, in this and other states, which must have proceeded upon the same ground as that last cited, else the principle on which they rest cannot be sustained. *Long v. Colburn*, 11 Mass., 97; *Mann v. Chandler*, 9 Mass., 335; *Episcopal Soc. of Dedham v. Episcopal Church*, 1 Pick., 372; *Emerson v. Prov. Hat Man. Co.*, 12 Mass., 237; *Ballou v. Talbot*, 16 Mass., 461; *Rice v. Gove*, 22 Pick., 158; *Shaw v. Nudd*, 8 Pick., 9; *New Eng. Mut. Ins. Co. v. Dewolf*, 8 Pick., 56; *Medway Cotton M. Co. v. Adams*, 10 Mass., 360; *Thacher v. Winslow*, 5 Mason, 58; *Taunton & So. Boston Turnpike v. Whiting*, 10 Mass., 327; *Gilmore v. Pope*, 5 Mass., 491; *Inhabitants of Garland v. Reynolds*, 20 Me., 45; *Varner v. Nobleborough*, 2 Me., 121; *Irish v. Webster*, 5 Me., 171.

Morton, J., says in *Commercial Bank v. French*, 21 Pick., 490: "The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation, whether a right or wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation. Where the instrument appears to be executed in the name of the principal, the form of the words is not material." *Wilks v. Back*, 2 East, 142; *Spittle v. Lavender*, 5 Moore, 270; *Pigott v. Thompson*, 3 Bos. & Pull., 147; *Combe's Case*, 9 Coke, 77a; *Frontin v. Small*, 2 L. Raym., 1418; *Taylor v. Dobbins*, 1 Strange, 399; *Mott v. Hicks*, 1 Cow., 513. So, also, where a check was

drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or private act, parol evidence was held to be admissible to show that it was an official act. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat., 326. That case is a much stronger one than the case at bar, because the promisor had signed his name to the check without any designation of his official character, and in disposing of the case Mr. Justice Johnson says, it is by no means true, as was contended in argument, that the acts of agents derived their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed; but in the diversified duties of a general agent the liability of the principal depends upon the facts that the act was done in the exercise and within the limits of the powers delegated. These facts, says the learned judge, are necessarily inquirable into by a court and jury. See, also, *Hodgson v. Dexter*, 1 Cranch, 345. Although it is stated that the defendant objects to the admission of the note in evidence, still it is evident that the question is not broadly presented for decision independently of the agreed statement, because the admitted fact that the payee of the note was the cashier of the Bank of Newbury at the time of the making of the note is as much a part of the agreed case as the note itself; so that in determining the question, that fact must be superadded to the note, else the decision of the court would turn upon something less than the whole case; and, indeed, the agreed statement proceeds throughout upon the ground that nothing is wanting to make out the plaintiff's case under the general issue, except proof of the fact that, in taking the note, O. C. Hall was acting as cashier and agent of the plaintiff corporation; whether that evidence is admissible or not is the question submitted to the determination of the court, and nothing else is submitted under the plea of the general issue. Under the special circumstances of this case, I am of the opinion that the evidence is admissible, and, according to the agreement of the parties, the defendant must be defaulted.

FULLERTON v. BANK OF UNITED STATES.

(1 Peters, 604-619. 1828.)

The act of Ohio, referred to in the opinion, permitted a joint action by banks or bankers against the drawers and indorsers of bills and notes, saving to each defendant all separate defenses.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This cause comes up from the circuit court of Ohio on a writ of error. The record exhibits a judgment recovered by the defendants here against the plaintiffs, in an action for money lent and advanced. The plea was *non-assumpsit*, with notice of a discount and a verdict for plaintiff below.

The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words: "The plaintiff, in support of his action, offered in evidence the following promissory note drawn by Isaac Cook, and indorsed by Humphrey Fullerton, John Waddle and John Carlisle."

"\$4,000.

CINCINNATI, February 1, 1820.

"Sixty days after date I promise to pay John Carlisle or order, at the office of discount and deposit of the Bank of the United States at Cincinnati, \$4,000, for value received.

(Signed)

"ISAAC COOK."

Indorsed — "John Carlisle, John Waddle, Humphrey Fullerton."

"To the introduction of this evidence the defendant, by his counsel, objected, as evidence of a several contract of the drawer and each of the indorsers on the note, and not of any joint undertaking or liability of the defendants; which objection was overruled by the court, and the note permitted to be read in evidence under the act of the general assembly of Ohio, entitled 'An act to regulate judicial proceedings where banks and bankers are parties, and to prohibit the issuing of bank bills of certain descriptions,' passed 18th of February, 1820, to which decision the counsel excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants. In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark that the state of Ohio was not received into the Union until 1802, so that the Process Act of 1792 (1 Stats. at Large, 275), which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state. But the district court of the United States established in the state in 1803 was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction with power to create a practice for its own government.

§ 1200. *United States courts may adopt state practice as to bringing joint action against drawers and indorsers.*

The district court of Ohio, it appears, did not create a system for itself, but finding one established in the state in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, or in effect adopted by a single rule the state system of practice in the same mode in which this court at an early period adopted the practice of the king's bench in England. So that when the seventh circuit was established in the year 1807, the judge of this court who was assigned to that circuit found the practice of the state courts adopted in fact into the circuit court of the United States. It has not been deemed necessary to make any material alterations since; but as far as it was found practicable and convenient, the state practice has, by a uniform understanding, been pursued by that court without having passed any positive rules upon the subject. The act of the 18th of February, 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses. Its salutary effects produced its immediate adoption into the practice of the circuit court of the United States; and from that time to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice (properly so called) produced by the operation of this act was very inconsiderable, since it only requires notice to be given of the cause of action by indorsing it on the writ and filing it with the declaration, after which the defendants were at liberty to manage their defense as if the note had been formally declared upon in the usual manner. It is not contended that a practice, as such, can only be sus-

tained by written rules; such must be the extent to which the argument goes, or certainly it would not be supposed that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the court, through the course of eight years, is now to be surprised and turned out of court, upon a ground which has no bearing upon the merits.

But we are decidedly of opinion the objection cannot be maintained. Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a court by long acquiescence has established it to be the law of that court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such, we understand, has been the course of the United States court in Ohio for twenty-five years past. The practice may have begun and probably did begin in a mistaken construction of the process act, and then it partakes of the authority of adjudication. But there was a higher motive for adopting the provisions of this law into the practice of that court; and this bill of exceptions brings up one of those difficult questions, which must often occur in a court in which the remedy is prescribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose the state of Ohio had declared that the undertaking of the drawer and indorser of a note shall be joint and not several, or contingent, and that such note shall be good evidence to maintain an action for money lent and advanced: would not this become a law of the contract? Where then would be the objection to its being acted upon in the courts of the United States? Would it have been prudent or respectful, or even legal, to have excluded from all operation in the courts of the United States an act which had so important a bearing upon the law of contracts as that now under consideration? An act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the state courts, would not have been called upon otherwise than as a law of the particular contract; a law which, as to promissory notes, introduced an exception into the law of evidence and of actions. It is true, the act in some of its provisions has inseparably connected the mode of proceeding with the right of recovery. But what is the course of prudence and duty where these cases of difficult distribution, as to power and right, present themselves? It is to yield rather than encroach; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principle and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but, until then, it is administering justice in the true spirit of the constitution and laws of the United States to conform, as nearly as practicable, to the administration of justice in the courts of the state. In the present instance, the act was conceived in the true spirit of distributive justice; violated no principle; was easily introduced into the practice of the courts of the United States; has been there acted upon through a period of eight years, and has been properly treated as a part of the law of that court. But it is contended that it was improperly applied to the present

case, because the note bears date prior to the passage of the law; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts.

§ 1201. *An act modifying the remedy on contracts of a certain class is not inapplicable where the contract was made before its passage.*

But what right is violated, what hardship or injury produced by the operation of this act? It was passed for the relief of the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the costs of a single suit, if he should elect to bring several actions against drawer and indorser. Nor does it subject the defendants to any inconvenience from a joint action, since it secures to each defendant every privilege of pleading and defense of which he could avail himself if severally sued. The circuit court has incorporated the action, with all its incidents, into its course of practice; and having full power by law to adopt it, we see no legal objection to its doing so in the prosecution of that system upon which it has always acted. It cannot be contended that the liabilities of the defendants under their contract have been increased, or even varied; and as to change in the mere form of the remedy, the doctrine cannot be maintained that this is forbidden to the legislative power or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be so called, of the prayers asked of the court by the defendant's counsel; the whole making out this case. It appears that in December, 1817, Isaac Cook's note, with these indorsers upon it, was discounted at the Bank of Cincinnati, and renewed every sixty days down to February 1, 1820. It commenced at \$6,000, and in September, 1818, was reduced to \$4,000, for which amount it was renewed uniformly down to the last date. In its origin, one M'Laughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last indorser, until March, 1819, when Cook was uniformly the last indorser down to the date of the present note. The proceeds of the successive renewals were, of course, credited to him, and passed to the payment of the preceding note. But on this note Fullerton stands as the last indorser, and the proceeds were credited to him, and Cook's note of the preceding date was charged to Fullerton's account without his check, thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was, of course, not protested, and thus Fullerton and his co-indorsers escaped payment of that note; and now they propose to escape the payment of this by insisting that without a check from Fullerton, authorizing the application of the proceeds as credited to him to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defense, and one which no court of justice can feel disposed to sustain. To repel it the plaintiffs introduced witnesses to prove that this note was expressly discounted in order that the proceeds might be applied to the previous note, and would not have been discounted otherwise; and contend that the bank, having the fund in hand to pay itself, had a right so to apply it without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition that Fullerton, as last indorser, was entitled to credit for the proceeds of this note, and is still entitled if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit, the thirteenth, fourteenth and fifteenth, raise a question on the sufficiency of the demand on the drawer, and of the notice of non-payment to the indorser, and the proof introduced to establish both facts. The entry in the record on the subject of the charge to the jury is in these terms: "But the court, instead of the foregoing instructions as asked, charged and instructed the jury that to enable the plaintiffs to recover, the jury ought to be satisfied from the evidence that the note had been discounted by and become the property of the bank; that it was in the bank and not paid when it came to maturity; that due notice of the protest and non-payment had been given to the parties, and that such notice had been put into the postoffice the day after the last day of grace in time to go by the succeeding mail; that every note discounted in bank was *prima facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds, of the note should be carried to the credit of the last indorser and paid to his check; that the printed and published rules of the bank ought, in the absence of other testimony, to be considered as regulating the course of business of the bank; but that if the jury were satisfied from the evidence that a practice and course of business in the office of discount and deposit in Cincinnati had prevailed and was known to defendants, and that the note in question had been discounted and treated in all respects according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note contrary to the understanding and directions of the last indorser, or to any other use than the use of the last indorser without his consent; but that if the jury were satisfied from the evidence that, according to the custom and practice of the bank, in the case when a new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last indorser was sometimes required and sometimes dispensed with, and that in the latter case it was the practice to file away the old note as a check, and that if the note sued upon had been discounted and treated in the latter manner with the consent of the parties to it, the plaintiffs had a right to recover, and that such consent may be inferred and found by the jury from the facts and circumstances given in evidence, without direct or positive proof, if, in the opinion of the jury, the facts and circumstances proved warrant such inference. That if the jury find the note was not discounted the plaintiff cannot recover, or if they find that it was discounted but the proceeds remain in the bank carried to the credit of the last indorser, and not drawn or applied with his consent to any other purpose, the money may and ought to be set off against the note; but if they find that the note sued on was put into bank for the purpose of renewing a former note or loan, and for no other purpose, and with the understanding of all the parties that, if discounted, the proceeds could and would, by the course of business in the bank, be applied solely to the discharge of the former note, and that they had been so applied, and the old note retained and written off as a check by the bank, that the plaintiffs ought to recover."

§ 1202. *Demand where note is held by the bank where it is payable.*

The exception taken is to refusing to give the instructions as asked and to giving them in the form in which they were propounded to the jury. And the question is whether the instructions given covered the whole ground of the instructions prayed for and were legally correct in the form in which they were rendered. We are of opinion they cover the whole ground taken by the de-

fendants, or at least as far as they had a right to require. This will be obvious from a simple analysis of the charge. The propositions which it imports will be examined in their order. The first is upon the sufficiency of the demand, and the law laid down on this point is "that on a note made payable at a particular bank it is sufficient to show that the note had been discounted and become the property of the bank, and that it was in the bank not paid at maturity." Nothing more than this could have been required of the court, for the positive proof that the bill was not paid will certainly imply that there were no funds of the drawer there to pay it. The fact could not have been made more positive by inspection of the books. The charge is, perhaps, too favorable to the defendants, since modern decisions go to establish that if the note be at the place on the day it is payable, this throws the *onus* of proof of payment upon the defendant. 4 Johns., 188. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

§ 1203. *Notice should be mailed so as to go by the first mail leaving after the opening of business hours of the day succeeding the last day of grace.*

The next instruction is, in the language of the court, "that notice of the non-payment and protest should have been given to the indorser through the medium of the postoffice the day after the last day of grace, in time to go by the succeeding mail." The defendant's counsel, in arguing on this part of the instruction, insisted much on the obligation on the plaintiff to establish definitively and positively that the notice given was in time to go by the next mail, but has not adverted to his own omission in not putting into the case evidence that there was a mail established from Cincinnati to the place of the defendant's residence. Yet, if the jury might be left on this point to take that fact upon notoriety or personal knowledge, it would be difficult to maintain that they might not, on the same grounds, find the minor fact that the notice deposited in any part of the business hours of that day would be in time for the mail ensuing the third day of grace. It is argued that the language used by the court on this point is equivocal, and may have led the jury to suppose that sending the notice by the mail which succeeded the day after the last day of grace was sufficient. But we think the construction is forced. The words are: "the day after the last day of grace, in time to go by the succeeding mail." Succeeding what? Obviously the last day of grace; otherwise there might be no necessity for putting it in the office until the second day after the last day of grace, whereas the necessity of putting it in on the first day after is expressed in the charge. With this signification it was rather more favorable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days.

§ 1204. *Where one note is discounted in renewal of another the bank may charge the old note to the last indorser and credit him with the proceeds of the new one.*

The residue of the charge relates to the application of the proceeds of this note to the previous note without the check of the last indorser, and this also, we think, embraces all the defendants asked, and is as favorable as the law would sanction. It admits that this should be regarded as a business note; that the proceeds should have been passed to the credit of the last indorser, and should not have been applied otherwise than by his assent; but it then goes on to assert what surely could not be controverted, that with the assent of the last indorser the money, instead of being passed to his credit, might be oth-

erwise applied; that, with his consent, it might be applied to the satisfaction of another note, for which he was indorser, without his checking for the amount, and that his consent may be implied from circumstances as all other facts may be. The jury have found, then, that with his consent it was so applied, and the evidence fully bore them out in their finding; if competent, it was all the law requires.

It may be proper to observe that every discount is in the nature of a cross-action, and if the discount filed in this case were thrown into the form of an action, it would be for money had and received to defendant's use. The merits of this defense need only be tested by the law which governs that action to make it clear that the evidence would not sustain it. It goes, in fact, to show that, in what are called renewals of bank loans, the lending is qualified, and not absolute; that, when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch as, although it admits the note to be a business note, as it is called, and therefore to be passed to the credit of the last indorser, it permits it to be treated as an accommodation note in allowing it to be passed to the credit of the drawer. But if this were strictly the fact, what defense does it afford to the action if such were the agreement and the real understanding of the parties? In strictness, however, it was not passed to the credit of the drawer alone; for, in the progress of the ruinous system of loans which prevails over the country, the note discounted as the renewal of an accommodation note cannot be called a business note, nor can it, in correctness, be predicated of such a note that it is passed to the credit of the drawer alone, when the last indorser has, in effect, an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note under the rules of the bank, because not secured by a deposit of stock. No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here to suppose that he intended to raise it.

Judgment affirmed, with costs.

HOWE MACHINE COMPANY v. HADDEN.

(Circuit Court for Indiana: 8 Bissell, 208-210. 1873.)

STATEMENT OF FACTS.—Action on promissory notes executed by Hadden, payable to Good, who indorsed them to Fisher, who reindorsed them to Good, who indorsed them to plaintiff. Suit was brought against Hadden, Good and Fisher. Fisher demurred to the declaration.

§ 1205. *Indorsee who reindorses note to his indorser not liable upon it.*

Opinion by GRESHAM, J.

It is clear that Good could not maintain an action against Fisher on the latter's indorsements. The law presumes from Good's possession of the notes, after their reindorsement to him by Fisher, that they were paid by Good as the

first indorser. And further, if Good could sue Fisher on the latter's indorsement, Fisher could turn round and sue Good on his prior indorsement. To prevent this circuitry or multiplicity of actions, the law in such cases allows the liability of the first indorser to extinguish the liability of the second. Byles on Bills, 154; *Bishop v. Hayward*, 4 Term R., 470. Fisher's liability being extinguished as between him and Good, can the plaintiff, Good's indorsee, recover from Fisher? In reason it would seem not unfair to say that the indorsement and possession of Good, the payee, was *prima facie* evidence that he had got the notes back by payment or purchase. But if the indorsements on these notes were in blank, there is authority for saying the presumption would be that Fisher had signed for the accommodation of Good. If a bill or commercial note be bought from the maker or some prior indorser before maturity, in good faith, the indorsement being in the usual form, in blank, the presumption is that the subsequent indorsements were made for the accommodation of the maker or prior indorser. *Palmer v. Whitney*, 21 Ind., 58; *Runyan v. Ræd*, 6 Am. L. Reg. (O. S.), 305; *Maulden v. Branch Bank*, 2 Ala., 502. The third note in suit was past due some time before any of the indorsements were made on it; as to it there is no ground for presuming that Fisher indorsed for Good's accommodation. The indorsements on the first, second and fourth notes are without date, and the presumption is that they were made before maturity. But it will be observed that all the indorsements are special. Good, Fisher and the plaintiff are the only persons who have held the notes. Good, the payee, indorsed to Fisher, who reindorsed to Good, who then indorsed to the plaintiff. The plaintiff had no right to infer that Fisher had indorsed for the accommodation of Good. In fact, the special indorsements were notice to the plaintiff to the contrary, and informed it that Good had come into possession of the notes by payment or purchase. Knowing this, the plaintiff had no more right to buy the notes from Good, expecting to hold Fisher liable, than if it had known that Good had released Fisher for a consideration. It will not do for the plaintiff to insist that Fisher must be held to have indorsed for accommodation of Good, when in each paragraph of the complaint it is alleged that "said Good indorsed the same (note) to the defendant Fisher, who in course of trade indorsed the same to said Good, who, in like manner, indorsed the same to this plaintiff."

Demurrer sustained.

§ 1206. When cause of action accrues.—Where bills are made payable at a particular place, the right of action accrues on demand at such place, and the statute of limitations runs from the time of such demand. *Picquet v. Curtis*,* 1 Sumn., 480. See § 1163.

§ 1207. If a note be made payable when a certain party shall settle his accounts with the maker, it is the latter's duty to procure a settlement of such accounts within a reasonable time; and after the lapse of a year a cause of action was held to accrue to the payee. *Scull v. Roane*, Hemp., 103.

§ 1208. The custom of merchants as to days of grace does not apply to maker and payee. *McLain v. Rutherford*,* Hemp., 47. See §§ 284, 719-728, 841, 1074.

§ 1209. Who may sue.—The payee may sue on a note where there are subsequent indorsements, without proving a new assignment to himself. *Cox v. Simms*,* 1 Cr. C. C., 233. See § 1173.

§ 1210. The owner and holder of negotiable paper may sue upon it in his own name notwithstanding there are indorsements upon it subsequent to the indorsement to him, made for the purpose of transmitting and collecting the paper. On his becoming revested with the title to and interest in the bill these indorsements become mere matters of form and may be stricken out at the trial or disregarded. *Cassel v. Dows*, 1 Blatch., 335 (§§ 151-153).

§ 1211. Where the payee is obliged to take up the note on his own indorsement, he may recover against the maker on a special count. *Reintzel v. Morgan*,* 2 Cr. C. C., 20.

§ 1212. If a note is made payable to either of several payees, any one of them may sue in

his own name, without reference to the others and without setting out the note in full. *Spaulding v. Evans*, 2 McL., 139.

§ 1213. A., B. and C. executed a joint and several note payable to D. and E. or order. E. indorsed and delivered it to D. *Held*, that D. might sue upon it in his own name, being the only party in interest. *Regan v. Jones*,* 1 Wyom. T'y., 210.

§ 1214. The United States may sue in their own name upon a note payable to Levi Woodbury, secretary of the United States treasury, or to his successors in office; the United States being in fact owners of the note. *United States v. Boice*,* 2 McL., 332; *Dugan v. United States*,* 3 Wheat., 172.

§ 1215. The United States may sue and declare in their own name on a bill indorsed to their treasurer. *United States v. Barker*, 2 Paine, 340 (§ 1011).

§ 1216. — accommodation paper; holder may sue.— A note was indorsed by a third person without restriction for the benefit of the makers, and was applied by them in payment of another note for the same amount. *Held*, that the holders could sue the indorser upon such note, notwithstanding it was accommodation paper and the fact was known to the holder's agent at the time he received and applied it, especially as it was applied in payment of a note on which the third person was also an indorser. *Pugh v. Durfee*,* 1 Blatch., 412. See §§ 5, 278, 304, 498, 626, 701.

§ 1217. An accommodation indorser who pays a protested bill may sue the acceptor. *Robinson v. Kilbreth*,* 1 Bond, 592.

§ 1218. A note paid by an accommodation maker is the basis of a valid claim against the estate in bankruptcy of the person accommodated. *In re Brown*, 2 Story, 502.

§ 1219. — holder; subsequent indorsements.— The possession of a bill by an indorsee who had indorsed it over to another is, unless the contrary appear, evidence that he is the *bona fide* holder and proprietor of such bill, and he may recover thereon, notwithstanding there may be on it one or more indorsements in full, subsequent to the indorsement to him, without producing any receipt or indorsement back from either of the subsequent indorsers, whose names he may strike out or not as he thinks proper. *Conant v. Wills*,* 1 McL., 427. See §§ 1173, 1209.

§ 1220. — bank check; trustee; cashier.— The holder and payee of a bank check, received by him for the use of an unincorporated banking company of which he was cashier, may sue upon it in his own name. *O'Brien v. Smith*,* 1 Black, 99. See §§ 47, 48, 200, 335, 358, 483, 816, 839, 861.

§ 1221. — president of unincorporated company.— A., a member of a commercial company, gave his note for a debt due the company by him to the president of the company. *Held*, that the president of the company might sue upon the note as trustee. *Van Ness v. Forest*, 8 Cr., 30.

§ 1222. — assumpsit; assignee against remote indorser.— In Virginia *assumpsit* will not lie by an assignee against a remote indorser. There is no privity between them. *Mandeville v. Riddle*,* 1 Cr., 290.

§ 1223. — assignee of indorsee.— Where the indorser takes up the note, he cannot assign his right of action so as to enable the assignee to sue in his own name. *Swann v. Scholfield*,* 2 Cr. C. C., 140.

§ 1224. — assignee of lease; federal courts.— An assignee of a lease cannot sue in the federal courts if his assignor could not sue there. *Bradley v. Rhines*, 8 Wall., 393. See §§ 11, 64.

§ 1225. — indorser; assumpsit against maker.— An indorser who has paid a note may sustain *assumpsit* upon such payment against the maker. *Morgan v. Rientzel*,* 7 Cr., 273.

§ 1226. — bond for title; note; indorsee.— A note was given for a bond for title, the obligor having no title, and it was held that an indorsee, who held the title, might sue the maker, without tendering title. *Lane v. Dyer*,* 2 Cr. C. C., 349.

§ 1227. — assignee who is not an indorsee may not sue.— A plaintiff who is not an indorsee of a note sued on cannot maintain the suit by striking out a special indorsement, so as to make it an indorsement in blank; nor by obtaining the indorsement of the last indorsee pending the suit. *The Bank v. Moore*,* 3 Cr. C. C., 330.

§ 1228. — indorser against acceptor.— An indorser may take up a draft, cancel the names of prior indorsers, and recover against the acceptor. *Deale v. Kraft*,* 4 Cr. C. C., 448.

§ 1229. Debt lies by an indorsee or payee against an acceptor. *Raborg v. Peyton*, 2 Wheat., 385 (§§ 163-166).

§ 1230. A note not payable to order, but made negotiable at a certain bank, may be sued upon by an indorsee. *Muir v. Jenkins*,* 2 Cr. C. C., 18.

§ 1231. — equitable owner; money counts.— Where a party pays money on a draft indorsed to him, believing that he is buying it, and the money goes to the use of the indorser,

but, by reason of the restrictive words of the indorsement, the indorsee acquires no title to the draft, he may recover under the money counts. *White v. National Bank*, 12 Otto, 658.

§ 1232. — **holder; filling blank indorsement.**—The holder of a note indorsed in blank may sue the indorser in his own name, and may fill up the indorsement at or before the trial. *Davison v. Larned*, 6 McL., 496. See § 629.

§ 1233. — **indorsee against remote indorser.**—An indorsee may sue a remote indorser under a count for money had and received. *Riddle v. Mandeville*, 1 Cr. C. C., 95.

§ 1234. — **indorsee against drawer; debt; striking out indorsements.**—An indorsee may sue the drawer of a bill of exchange in an action of debt. He may strike out intermediate indorsements. *Home v. Semple*, * 8 McL., 150.

§ 1235. — **indorsee against indorser; bankruptcy of maker.**—An indorsee may sue an indorser, although the maker is in bankruptcy, and his estate will pay fifty per cent. of the claims against it. The indorser cannot sue the maker, neither is he obliged to proceed against the maker's estate. The case is not parallel with that of a maker who is deceased, and the indorser is obliged to proceed against his estate. *National Bank of Commerce v. Booth*, * 5 Biss., 129.

§ 1236. — **assignee of insolvent.**—An insolvent appointed assignee of his own estate may recover on notes due him before insolvency. *Randon v. Tobey*, 11 How., 498.

§ 1237. While an instrument under seal transferring to an assignee a vast number of bills, bonds, notes and accounts, constituting all the debts owned by the assignor, will operate to pass to the assignee an equitable interest in a bill of exchange, it is not such an assignment of it as will authorize the assignee to sue the drawer in his own name. Suit must be brought in the name of the assignor, and the assignee is not even a necessary party. *Hopkirk v. Page*, 2 Marsh, 20 (§§ 1018-1026).

§ 1238. — **assignees of United States Bank.**—Assignees of the United States Bank held capable of suing in equity upon notes given to the bank. *Lenox v. Roberts*, * 2 Wheat., 873.

§ 1239. — **assignee of bank.**—Where a bank makes an assignment of all its property, including notes, to a trustee, and its charter has expired so that suit cannot be brought upon them in its name, the trustee may sue in equity. *Ibid.*

§ 1240. — **receiver.**—The receiver of a bank who in his official capacity comes into possession of a note payable to the bank or bearer cannot sue upon it in his own name, nor in a federal court, unless his assignor could sue there. *Bradford v. Jenks*, 2 McL., 130.

§ 1241. — **executor in another state.**—An executor who finds, among the assets of his decedent, a promissory note made by the vendee of land in another state may go into such other state, and, as executor, and without taking out new letters testamentary in such state, bring suit upon the note against the maker resident there. *Giddings v. Green*, 4 Hughes, 446.

§ 1242. — **acceptor without funds.**—One who accepts a bill of exchange without funds cannot recover against the drawer without showing that he has paid the bill, or has done something equivalent thereto, e. g., been imprisoned for not paying it. *Parker v. United States*, Pet. C. C., 262.

§ 1243. — **holder not obliged to sue.**—The holder of an unpaid bill of exchange need not sue any of the parties to it, in order to strengthen his claim on his indorser. *Brown v. Jackson*, * 2 Wash., 24.

§ 1244. — **agent cannot sue.**—A mere agent cannot maintain an action in his own name on a negotiable note in his hands, although it be with the consent of his principal. He must be the owner of the note or have some substantial interest in it or sue in the name of the real owner. *Prima facie*, the possession of a negotiable note is evidence of the party's being a holder for a valuable consideration, and, unless the note has been previously stolen or received by him under suspicious circumstances, he is not bound to prove by other evidence that he is such a *bona fide* holder. But if it is admitted or proved *aliunde* that he is but a mere agent and holds the note as such, he is not competent to recover judgment upon it in his own name. *Thatcher v. Winslow*, * 5 Mason, 58. See, also, *Gunn v. Cantine*, 10 Johns., 387; *Gilmore v. Pope*, 5 Mass., 491.

§ 1245. An agent may, with the consent of his principal, sue in his own name upon a note given him for his principal. *Irwin v. Bailey*, 8 Biss., 523 (§§ 310-312).

§ 1246. — **indorsee of non-negotiable note cannot sue.**—Where a note is indorsed by the payee to a particular person only, a subsequent holder cannot sue at law, in his own name, either the maker of the note or the payee who indorsed it. *Shuford v. Cain*, 1 Abb., 302.

§ 1247. — **no action on void assignment.**—A. assigned notes to B. On one of the assignments "P. City Savings Institution" was named, but B. was not designated as acting for that institution. The notes were discounted by that institution, and assigned to B., its secretary and cashier. *Held*, that the assignment was void under an act forbidding unincorporated banking institutions from doing business which an incorporated bank might do; and *held*, that B. could not sue upon such assignment, even in Indiana. Where, by the laws of a state,

an assignment made therein is void, the assignee cannot sue the maker in a sister state where the note was originally made. *McClintick v. Cummins*, * 3 McL., 158.

§ 1248. — **note payable to bearer; assignee may sue.**— One who holds a note payable to A. or bearer may sue upon it in his own name, although his assignor could not have sued upon it in a federal court, and although there were other joint assignees interested in the note beside the holder. Possession of the note by such holder is evidence of ownership and right to sue. *Halsted v. Lyon*, * 2 McL., 236.

§ 1249. — **action by one partner against sureties.**— Where sureties sign a note payable to "M." and "F." M. cannot alone sue them on the ground that F. was by error made the payee, unless it be alleged and proved that the sureties understood and agreed to sign and secure the note simply as the obligation of F. *McMicken v. Webb*, * 6 How., 292.

§ 1250. — **liability of assignor by deed.**— The liability of one who by deed assigns an overdue note depends exclusively upon the covenants in the deed. *Richards v. Holmes*, 18 How., 143.

§ 1251. — **accommodation indorsers.**— A note being offered for discount, the bank demanded a town-indorser, and the plaintiff indorsed it, and subsequently paid it; *held*, that he could recover the full amount paid by him from either of two accommodation indorsers. *Mason v. Mason*, * 3 Cr. C. C., 648.

§ 1252. An indorser who is obliged to take up a note may recover the whole amount from either of two prior accommodation indorsers. *Mason v. Mason*, * 4 Cr. C. C., 401.

§ 1253. A drawer who pays a bill for the benefit of the acceptor may sue the acceptor upon it in the name of the payee. *Davis v. McConnell*, * 3 McL., 331.

§ 1254. — **money had and received.**— An action for money had and received will not lie against one shown to have been a mere accommodation indorser. Such indorser is chargeable only on a special count on the note. *Page v. Alexandria*, * 7 Wheat., 35.

§ 1255. — **against acceptor.**— An action for money had and received lies against the acceptor of a bill of exchange payable to plaintiff out of a particular fund, where the fund is afterwards received but paid to the holder of a subsequent draft. *Grommer v. Carroll*, 4 Cr. C. C., 400.

§ 1256. — **agent; liability of.**— An agent is personally liable on his indorsement. *M'Murtrie v. Jones*, * 3 Wash., 206.

§ 1257. — **assigner against acceptor.**— Where a non-negotiable order, payable to A. or bearer, is accepted by the drawee and subsequently assigned, the assignee may maintain an action for money had and received against the acceptor, the latter having had notice of the assignment. *Weston v. Penniman*, 1 Mason, 806.

§ 1258. — **renewal; change in order of accommodation indorsers.**— In an action upon a series of promissory notes indorsed for the accommodation of the maker, it appeared that the notes were given in renewal of other notes, on which the defendant was second indorser and the plaintiff first indorser; but when the notes sued upon were given in renewal of the prior notes, the name of the defendant was used as payee and first indorser, and that of plaintiff as second indorser. There was no agreement or understanding that this change in the order of names was to change the liability of the parties. *Held*, that the defendant was liable to the plaintiff upon the notes for the amount the plaintiff had advanced upon them. *Pomeroy v. Clark*, * 1 MacArth., 606.

§ 1259. — **drawee against drawer of bill chargeable to third person.**— The drawer of a bill of exchange which directs the drawee to charge the amount of it to a third person is not liable to the drawee who pays it, it not being shown that the drawer was the agent of the third person to whom it was directed to be charged. *Bell v. Davidson*, 3 Wash., 329.

§ 1260. — **administrator of partner of drawee.**— *Ryder & Co.* drew a bill of exchange on *Varrin*, payable to *Reel, Barnes & Co.* or order. *Varrin* was a member of the firm of *Varrin & Reel*. *Reel* died, leaving *Barnes* as his administrator, who proceeded to settle *Reel's* estate, including the affairs of *Varrin & Reel*. In doing so, he came into possession of a large partnership fund, \$30,000, one-half of which he turned over to the executor of *Varrin*, who had also died, without paying the bill upon which *Barnes* subsequently brought suit. *Held*, that *Barnes* was not obligated to pay, out of the portion of partnership funds in his hands belonging to *Varrin's* estate, the bill drawn upon *Varrin*. These funds he held as administrator of *Reel*, and it was not his duty to pay the debts of *Reel's* partner, *Varrin*, even though they were debts owing to himself or his firm. *Barnes v. Ryder*, * 3 McL., 374.

§ 1261. — **executors of deceased partner may be sued; surviving partners.**— Payment of a bill of exchange will be enforced in equity against executors of a deceased partner, where the survivors have become insolvent. The court will not enter a decree against the survivors, but against the executors for the full amount. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 1262. — **officer of corporation; who liable.**— Where a note is signed "A., General Manag. & Supt. St. L. Co.," A.'s personal liability is not absolutely presumed, but evidence

is admissible to prove that he acted for and as the agent of the company, and that at the time the note was given it was agreed he should not be bound personally. *Gerber v. Stuart*,* 1 Mont. T'y, 172.

§ 1263. Right to sue in federal courts.—The *bona fide* holder of a note may sue in the federal courts upon it, although the indorser indorsed it for the purpose of enabling the indorsee to sue in a federal court. *Lanning v. Lockett*, 10 Fed. R., 451. See § 1104.

§ 1264. In an action upon a negotiable promissory note it was proved that the plaintiff was to account to a bank for the note, as agent; that the note was never actually delivered to him, and that the assignment was made to him as a citizen of a foreign jurisdiction for the sole purpose of enabling the bank, through him, to bring suit in the federal court. *Held*, that he could not, as indorsee, maintain an action on the note in the federal court. *Welles v. Newberry*, 4 McL., 226.

§ 1265. The fact that a note sued upon in a federal court is the property of a citizen of the state in which the defendant is also a citizen, and that it is not, in truth, the property of the plaintiff, may be pleaded in defense to such action. Such a plea is in bar, and not to the jurisdiction; and the local law of the state cannot be applied so as to cut off this defense. *Lanning v. Lockett*, 10 Fed. R., 451.

§ 1266. The eleventh section of the judiciary act of 1789, relative to the jurisdiction of federal courts as to suits by assignees of *choses in action*, has no application to a suit by such an assignee to recover possession of the thing in specie, or damages for its wrongful caption or detention. It only applies to suits brought to recover the contents of the *chose*, or to enforce the contract contained in the instrument assigned. *Deshler v. Dodge*, 16 How., 622.

§ 1267. — removal of payee to another state; assignee.—Where both maker and payee of a promissory note are citizens of the same state, and the payee afterwards becomes a citizen of another state, he may sue upon the note in the federal courts, as may also one to whom he assigns the note after becoming a citizen of another state, where the assignee is himself a citizen of a different state from that of the maker. *Kirkman v. Hamilton*,* 6 Pet., 20.

§ 1268. — check; indorsee against indorser.—An indorsee of a check may sue his immediate indorser in a federal court if they are citizens of different states, although a suit could not be maintained there against the drawer. *Coffee v. Planters' Bank*, 13 How., 183.

§ 1269. — notes payable to bearer.—The judiciary act of 1789 does not apply to notes payable to bearer. The parties to an action upon such a note being citizens of different states may maintain the action in a federal court. So held in an action on a note payable to A., or bearer; and it need not be shown that A. is a fictitious person, or a resident of a different state from the plaintiff. *Bullard v. Bell*, 1 Mason, 243; *Varner v. West*, 1 Woods, 493.

§ 1270. — indorsement to bearer.—An indorsement to bearer makes a contract with the bearer, who may sue in a federal court, regardless of the citizenship of the payee. *Codman v. V. & C. R. Co.*, 17 Blatch., 1.

§ 1271. — indorsee against indorser.—The indorsee of a note may sue the indorser in a United States court, they being citizens of different states, although the payee and maker were citizens of the same state. *Dennison v. Larned*, 6 McL., 493; *Gaylord v. Johnson*, 5 McL., 448; *Campbell v. Jordan*, Hemp., 534; *Young v. Bryan*, 6 Wheat., 146.

§ 1272. An indorsee, resident in one state, may sue his immediate indorser in a federal court in another state, where such indorser resides, even though the maker resides there also. But if the suit is against a remote indorser, plaintiff must show that his intermediate indorser could have sued in the federal court. *Mollan v. Torrance*, 9 Wheat., 537.

§ 1273. — alien against county.—The federal courts have jurisdiction of an action on a negotiable county order, brought by the holder, a citizen of Great Britain, against the county supervisors. *Lyell v. Supervisors of Lapeer Co.*, 6 McL., 446.

§ 1274. — joint makers.—A suit against joint makers, one of whom was a citizen of Michigan (on whom process was served) and the other (not served and not appearing) was a citizen of New York, as was also the plaintiff, was held within the jurisdiction of the United States court. *Doremas v. Bennett*, 4 McL., 224.

§ 1275. — executors against executors.—In an action on a note by the payee's executors against the drawer's executors, it is not necessary to entitle the United States court to jurisdiction to show that the parties to the note were citizens of different states. If the executors were citizens of the different states it is sufficient. *Childress v. Emory*, 8 Wheat., 642.

§ 1276. — assignee of bank.—The assignee of a bank may sue another bank in a United States court for damages for negligence in collecting drafts, although neither bank could have sued the other in such court. *Barney v. Globe Bank*, 5 Blatch., 107.

§ 1277. — joint makers; Alabama statute.—Under a statute providing that a joint note shall be considered as a joint and several contract, any one of the makers may be sued in a federal court, although the law would not permit the other to be sued there. *Smith v. Clapp*, 15 Pet., 125.

§ 1278. By the statutes of Alabama, promissory notes may be assigned by indorsement and the assignee may maintain an action in his own name on such notes. By the act of 1833, the same rights are given to the holder of notes given to a certain person or bearer, or to a fictitious person or bearer only; and the assignment of such notes by delivery only authorizes a suit by the holder in his own name. The holder of a note payable to A. B. or bearer may avail himself of these provisions of law, call himself an assignee of the note from A. B.; but the holder of such a note payable to bearer is not an assignee within the provisions of the judiciary act of 1789. *Ibid.*

§ 1279. — concurrent remedies; bankruptcy.— Where an indorsee of a protested bill of exchange brought suit against the drawers, who were also payees and indorsers of the bill, in a state court of Louisiana, and the suit was, by order of the court, transferred to another court of the state, and cumulated with the proceedings in bankruptcy which were pending against the drawers of the bill in the last named court, and the plaintiff performed no act to make himself a party to the proceedings in insolvency, and the plaintiff also being a citizen of New York, *held*, that these proceedings did not disable the plaintiff from maintaining an action on the bill in the circuit court of the United States. *Hyde v. Stone*, 20 How., 170.

§ 1280. — indorsee against maker.— An indorsee cannot sue the maker in a federal court where the indorser and maker resided in the same state at the time of the indorsement and making of the note. And it matters not that the indorsement was for the accommodation of the maker. *Small v. King*, 5 McL., 147; *Shuford v. Cain*, 1 Abb., 302; *Gregg v. Weston*, 7 Biss., 860.

§ 1281. — maker and indorser; suing jointly.— The maker and the indorser of a note cannot be sued jointly in a United States court. They must be proceeded against separately, even where the statutes of the state where the court is held provide that they may be sued jointly. *Shuford v. Cain*, 1 Abb., 303.

§ 1282. An action was brought by a citizen of Tennessee in a United States court, as indorsee of a check, against the drawer and indorsers, citizens of Mississippi. The declaration contained a count tracing the indorsee's title through prior indorsers, and also the money counts. *Held*, that under the first count the court had no jurisdiction, but that the indorsee could recover against his immediate indorser under the money counts. *Coffee v. Planters' Bank*, 13 How., 183.

§ 1283. — aliens.— United States courts have no jurisdiction of actions upon promissory notes the parties to which are aliens. Nor can a suit be maintained on such paper in such courts by a subsequent holder who is a citizen of the United States. *Montalet v. Murray*, 4 Cr., 46.

§ 1284. Assumpsit; evidence.— *Assumpsit* may be maintained on a promissory note, and also on a count for the money for which the note was given. If the note is valid it is admissible evidence under either count; if void, it may be laid out of view entirely, and the case decided upon the evidence introduced under the money counts. Evidence of an original loan by a bank to J., M. and P., on their joint and several note, followed by several renewals of such note, is sufficient to sustain the count for money advanced. *Moore v. Bank of Metropolis*,* 13 Pet., 311.

§ 1285. The owner of a bill of exchange may sue the sub agent of a bank to which it is sent for collection in *assumpsit* for the proceeds. *First Nat. Bank v. Reno County Bank*, 1 McC., 491 (§§ 233, 234).

§ 1286. An indorsee may sue his indorser in *assumpsit*. *Campbell v. Jordan*, Hemp., 534; *Morgan v. Reintzel*,* 7 Cr., 273.

§ 1287. Debt; indorsee against acceptor.— Debt lies by an indorsee against an acceptor of an inland bill. *Vowell v. Alexander*,* 1 Cr. C. C., 38; *Raborg v. Peyton*, 2 Wheat., 385.

§ 1288. Debt lies in North Carolina and Tennessee upon a promissory note in the hands of an assignee. *Kirkman v. Hamilton*,* 6 Pet., 20.

§ 1289. Debt lies upon a note against executors. *Childress v. Emory*, 8 Wheat., 642.

§ 1290. Debt lies upon a promissory note. *Gardner v. Lindo*, 1 Cr. C. C., 78. *Contra* in Maryland. *Lindo v. Gardner*, 1 Cr., 344.

§ 1291. Debt lies against the drawer of a bill by an indorsee, the intermediate indorsements first being stricken out. *Home v. Semple*,* 3 McL., 150.

§ 1292. In Virginia, debt upon a promissory note lies against a secret partner who has not signed it, and a creditor of the firm is a competent witness to prove the partnership, although the partner who signed the note has been discharged under an insolvent act. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 575.

§ 1293. Debt lies against the maker of a note for \$214, reduced by payments indorsed upon it, and which reduce it to \$3.94. *Hays v. Bell*, 1 Cr. C. C., 440.

§ 1294. Several suits; consolidation.— The court will not order a number of actions of debt upon promissory notes due at different times, consolidated, although the parties were—

the same in all, and each note was payable before any of the suits were brought. *Bank of Alexandria v. Young*, 1 Cr. C. C., 458.

§ 1293. Debt against stockholders.—Where the charter of a bank provided that, in case of default in paying its notes, the stockholders should be personally liable, *held*, that an action of debt would lie by a holder of such notes against a stockholder. *Bullard v. Bell*, 1 Mason, 243.

§ 1296. In equity; remote indorser.—In Virginia, an indorsee can sue a remote indorser only in equity. *Harris v. Johnston*, 3 Cr., 311.

§ 1297. A. made a note to B., an insurance company, by whose officers it was fraudulently transferred to C. C. presented it to A., who paid it. Subsequently the insurance company, by its receiver, sued A. for the note, alleging that he paid it with notice of the fraudulent transfer. *Held*, that C. was an indispensable party to the action, even though he is outside the jurisdiction of the court. *Alexander v. Horner*, 1 McC., 684 (§§ 1467-71).

§ 1298. The indorsee of a promissory note may, in Virginia, recover the amount from a remote indorser by suit in equity, but not at law, and especially after the insolvency of the maker. *Riddle v. Mandeville*,* 5 Cr., 323.

§ 1299. A holder of a note or bill in Kentucky cannot sue a remote indorser at law, but may in equity. *Bank of the United States v. Weisiger*,* 2 Pet., 331.

§ 1300. Although a holder may not have a remedy at law upon a note against a remote indorser, this fact is not *per se* sufficient to give him relief in equity. *Dean v. Marsteller*,* 2 Cr. C. C., 121.

§ 1301. Covenant.—Covenant will not lie on a note. *United States Bank v. Dounally*, 8 Pet., 373.

§ 1302. Accommodation party; money had and received.—Where the evidence shows the defendant was an accommodation indorser, a recovery cannot be had against him under a count for money had and received, etc., the money having in fact been received by the maker. This is true, although the indorser frequently promised payment of the note after it became due. *Page v. Bank of Alexandria*,* 7 Wheat., 85.

§ 1303. Vendor's duty as to returning note of third person to vendee.—If the purchaser of goods indorses the note of a third person to the vendor, it is not necessary for the latter to return the note to the purchaser in order to sue him for the goods sold. *Clark v. Young*, 1 Cr., 181.

§ 1304. But if the vendor has disposed of the note, he cannot maintain an action against the vendee for goods sold and delivered, without putting himself in a position to return the note to the vendee if desired to do so. *Harris v. Johnston*, 3 Cr., 311.

§ 1305. Action on original demand.—An action may be sustained on the original account, notwithstanding a bill of exchange has been drawn to pay it. Taking a bill of exchange is only *prima facie* evidence of absolute payment; it is not conclusive where other circumstances qualify or repel the presumption. *Wallace v. Agry*, 4 Mason, 336 (§§ 778-776).

§ 1306. Goods bought; bills against purchaser; money paid for drawer's use.—A. bought goods for B. at his written request, and B. directed A. to draw on him for the amount. A. drew bills on B. for the amount in favor of third parties, whereupon B. refused to accept them, and A. then paid them, together with damages and costs. *Held*, that he might recover from B. the amount so paid by him under a count for money paid for B.'s use; and *held*, also, that A. might sell the goods purchased for B., without rendering an account of the sales. *Riggs v. Lindsey*, 7 Cr., 500.

§ 1307. False representations.—If A., upon the representations of B. as to the solidity of a firm, made in ignorance of the fact that the firm was in fact unsafe, indorse a draft for the firm and is afterwards obliged to pay it, he cannot, in consequence thereof, maintain an action against B. *Russell v. Clarke*, 7 Cr., 69.

§ 1308. Indorsement without recourse.—There can be no recovery upon an indorsement without recourse. *Welch v. Lindo*,* 7 Cr., 159.

§ 1309. Indorser.—A prior indorser is liable to one who has received a bill after its dishonor from a subsequent indorsee who has paid it. *McCarty v. Roots*,* 21 How., 432.

§ 1310. Suspension of action by accepting draft; attachment.—A., a citizen of Louisiana, sold a cargo of sugar on account of B., a citizen of another state. B. then drew for the proceeds of the sale upon A., and A. accepted the draft, which was then negotiated to third parties. *Held*, that the right of action in B. was suspended until the draft became due and should be dishonored, and B. could not maintain attachment against A. *Black v. Zacharie*, 3 How., 483.

§ 1311. Discontinuance.—Where the drawers and indorser were sued on a bill and severed in their pleas, the suit may be discontinued as against the drawers. Their liability was distinct from that of the indorser. In no respect could the indorser be prejudiced by the discontinuance. As a matter of course, it could be permitted at the cost of plaintiffs. *McAfee v. Doremus*,* 5 How., 53.

IX. DEFENSES.

1. *Illegality.*

SUMMARY — *Option contracts*, § 1812. — *Bills in aid of an illegal enterprise*, § 1813.

§ 1812. A note given for a balance due on an "option deal" is not enforceable as between the original parties, nor even in favor of an innocent indorsee for value. *Third Nat. Bank v. Harrison*, §§ 1814-1818. See § 1831.

§ 1813. Bills given in aid of an illegal banking institution cannot be enforced between parties to them cognizant of the illegality. *Davidson v. Lanier*, §§ 1819-1824. See § 1833.

[NOTES. — See §§ 1825-1858.]

THIRD NATIONAL BANK v. HARRISON.

(Circuit Court for Missouri: 3 McCrary, 816-831. 1882.)

Opinion by TREAT, D. J.

STATEMENT OF FACTS. — These causes of action were based on promissory notes executed by Harrison, to the order of Alexander, payable at the Third National Bank. Alexander indorsed and delivered said notes to said bank as collateral to secure a demand note by him to the bank. The indorsement and delivery of said Harrison notes were contemporaneous with the execution, delivery and discount of the Alexander note under the following agreement:

"\$5,000.

ST. LOUIS, MISSOURI, October 4, 1878.

"On demand, after date, I promise to pay to the order of Third National Bank of St. Louis \$5,000, for value received; negotiable and payable, without defalcation or discount, at the Third National Bank of St. Louis, with interest at the rate of ten per cent. per annum after maturity; having deposited in said bank as collateral security for this and other loans—

One note, J. W. Harrison, one year, August 28, 1878.....	\$1,188 29
" " two years, August 28, 1878.....	1,188 29
" " three years, August 28, 1878.....	1,188 29
" N. F. Coffey, sixty days, September 10, 1878.....	1,072 35
" N. F. & J. H. C., sixty days, September 11, 1878.....	1,050 71

Which — — hereby authorized said bank, or its president or cashier, to sell without notice at the Merchants' Exchange, in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes, or evidence of debt held by said bank, including interest, and accounting to — — for the surplus, if any. In case of deficiency — — promises to pay to said bank the amount thereof forthwith, after such sale, with interest as above specified. The present cash market value of the above collateral security is — dollars; and it is understood and agreed, should there be any depreciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by — — as will be satisfactory to said Third National Bank; and should such additional security not be furnished within twenty-four hours after demand on — — so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

[Signed]

"CRAIG ALEXANDER."

This agreement represented the transaction between the plaintiff and Alexander in regard to this loan then made. The debt of Craig Alexander to the

plaintiff (secured by this agreement) is yet due; only \$500 has been paid on it. Alexander has paid the interest on this loan semi-annually. The Coffey notes mentioned in this agreement have been renewed from time to time, and renewal notes for that part of the collateral (except \$500 which was paid thereon, and which was the credit mentioned as given Alexander in the main \$5,000 note) are yet current, in possession of the bank, not matured. These renewals of Coffey notes were all made through Alexander; the bank did not see Coffey in the transaction. Alexander would bring in the renewal note and the bank would take it and give up the old note to Alexander. Demand has never been made of Alexander for the payment of the \$5,000 loan. Craig Alexander has been director in plaintiff's bank during the period covered by the dealings mentioned in this case, and is yet such. In the bank it is customary, if a director wants a discount, to have him retire while his paper is being passed on. A memorandum is kept among the bank's papers, for the use of the bank, as receipt of the cashier to the discount clerk. This is numbered 3,470:

"No. 3,470.

THIRD NATIONAL BANK OF ST. LOUIS,

"ST. LOUIS, 10 — 5 — 1878.

"Craig Alexander has deposited in this bank package containing collat. D. L. \$5,000, subject to —— order or instruction.

[Signed]

"T. A. STODDARD, Cashier."

The bank had no notice of the transaction out of which the notes grew. Alexander had a large running account at the bank during this time, and was at various times indebted to the bank on general account. Plaintiff offered in evidence the notes sued on in these cases. Defendant Harrison objected because same are incompetent and irrelevant, and because the pleadings do not deny execution of the notes, and because the notes are void under the Missouri statutes touching gaming and gambling devices. Objections were overruled by the court, to which ruling said defendant excepted at the time. Said notes were then read in evidence as follows:

[Note No. 1.]

"\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

"One year after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON."

[Indorsed:] "W. G. Harrison, Craig Alexander."

[Note No. 2.]

"\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

"Two years after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON."

[Indorsed:] "W. Q. Harrison, Craig Alexander."

[Note No. 3.]

“\$1,188.29.

AULLVILLE, MISSOURI, August 28, 1878.

“Three years after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum. Payable at Third National Bank of St. Louis.

J. W. HARRISON.”

[Indorsed:] “W. Q. Harrison, Craig Alexander.

“I hereby waive protest, demand and notice of protest.

“August 31, 1881.

CRAIG ALEXANDER.”

For the purpose of this case it was then announced by counsel that the following facts were to be considered as agreed upon by the parties thereto, and received by court and jury as proved herein, viz.: That the plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since October 4, 1878, more than the sum of \$6,000; and that plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since the institution of this suit, more than the sum of \$6,000. The plaintiff then rested. The defendant Harrison then requested the court to charge the jury as follows: “The court instructs the jury that on the pleadings and evidence herein the plaintiff is not entitled to recover.” But the court refused so to charge, to which ruling said defendant then and there excepted. Defendant Harrison then offered to prove the following distinct facts, to wit: (1) That each and all of the notes sued on in these cases were originally executed between the maker and the payee, Alexander, for the sole consideration of money won by said Alexander and lost by said defendant Harrison at a game and gambling device known popularly as “option deals.” (2) Said defendant also offered to prove all and singular the facts set up as defenses, and recited in the answer of defendant Harrison on file in these causes.

But the court refused to admit such evidence, and rejected both said offers of proof as separately made, and to such ruling as to each of said offers the said defendant then and there duly excepted. The defendant then rested. The court then directed a verdict for the plaintiff in manner and form as found by the jury, to which direction and charge said defendant Harrison excepted at the time. The foregoing was all the evidence given and offered and proceedings had at said trial.

On the foregoing statement it is contended that there was error because the bank, even if a *bona fide* holder for value, could not exclude from the consideration of the jury the original transactions between the maker and payee of the notes as void under the “gaming laws of Missouri.” It may be admitted that, as all the parties to these notes are, for legal purposes, resident in Missouri, the contracts are Missouri contracts, and subject to the laws of this state. Said gaming statute is in the following words: “Sec. 5722. All judgments by confession, conveyances, bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device, shall be void, and may be set aside and vacated by any court of competent jurisdiction upon suit brought for that purpose by the person so confessing, giving, entering into or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein. Sec. 5723. The assignment of any bond, bill, note, judgment, conveyance or other security shall not affect the defense of the person executing or confessing the same.”

§ 1314. *Gaming; authorities cited.*

This act came under review at an early day by the supreme court of the state of Missouri, when the distinction was sharply drawn between gaming and gambling devices and mere betting on uncertain events. Under the statute 9 Anne, c. 14, § 1, it was held (*Bowyer v. Bampton*, 2 Strange, 1155) that notes given for money lost at gambling were void, even in the hands of innocent indorsees for value. To the same effect are *Lowe v. Waller*, 2 Doug., 716; *Lloyd v. Scott*, 4 Pet., 222; *Thompson v. Bowie*, 4 Wall., 463. We have been referred to the following authorities as shedding light on the question: *Chitty, Bills*, 95; *Daniel, Neg. Inst.*, § 197; *Ackland v. Pearce*, 2 Camp., 599; *Shillits v. Snee*, 7 Bing., 405; *Henderson v. Benson*, 8 Price, 281; *Chapin v. Dake*, 57 Ill., 296; *Manning v. Manning*, 8 Ala., 138; *Hatch v. Burroughs*, 1 Woods, 439; *Unger v. Boas*, 13 Pa., 601; *Mordecai v. Dawkins*, 9 Rich. (S. C.), 262; *Vallett v. Parker*, 6 Wend., 615; *Weith v. Wilmington*, 68 N. C., 24; *Jordan v. Locke*, Minor (Ala.), 254; *Stone v. Mitchell*, 7 Ark., 91; *Eagle v. Kohn*, 84 Ill., 292; *Thompson v. Bowie*, 4 Wall., 463. The principle may be considered well established that when a statute pronounces a gaming or usurious contract absolutely void no recovery can be had thereon. The gaming statute of Missouri destroys the negotiable character of a note or other obligation given for a gaming consideration within the terms of that statute. The doctrine that void transactions cannot acquire validity by transfer of paper obligations based thereon finds full sanction, not only in authorities (*supra*), but in the many bond cases before the United States supreme court. 4 Wall., 463; 102 U. S., 625, 278; 103 U. S., 580; 94 U. S., 429. The broad distinction remains between contracts void *ab origine*, by force of statutes whereby assignees and indorsees are unprotected, and contracts *contra bonos mores*, which cannot be enforced between the original parties thereto, but are held enforceable when, being negotiable in form, they have passed to innocent holders for value.

§ 1315. *A note for a balance on an option deal cannot be enforced by a bona fide holder.*

The notes in question were, it must be held for the purposes of this motion, given for balances on an "option deal," an illegal contract, being, as alleged, a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made. If the allegations of the answer are true Alexander could not recover on the notes in suit; and the court was in doubt whether the position the bank occupies should not be considered as exceptional, and thus open the equities between the original parties. It is evident that the bank could, at divers times, have collected Alexander's demand note and turned over to him the collaterals, and it seemed that defendants' position had great force, viz., that the transfer of Harrison's notes as collateral to the bank, under the circumstances, was merely for the purpose of excluding the equities between the original parties. Still the stubborn fact remained that the bank is a *bona fide* holder for value within the rules laid down by the United States supreme court in *Swift v. Tyson* (§§ 382-386, *supra*) and *Goodman v. Simonds* (§§ 420-425, *supra*), no evidence being given that the bank had notice of the infirmity of the paper. The court holds that the transaction in question is not within the terms of the gaming laws of Missouri, but if it was an option deal, as charged, would be unenforceable between the original parties, and even in the hands of an innocent indorsee for value.

§ 1316. *Law and authorities as to "options."*

The distinction is so clearly drawn and the doctrine so exhaustively consid-

ered by Judge Thayer, of the St. Louis circuit court (with whose manuscript opinion in the Tinsley case I have been favored), that it would be a mere repetition of what has been thus so ably done, to attempt to travel over the same ground, and hence I quote largely from his opinion as follows: "The law is now well settled, in all of the states where the question has arisen, that there can be no recovery had upon a contract or sale of personalty where the parties to such contract do not intend an actual delivery of the articles bargained for, but merely intend to settle differences at some future day between the price agreed to be paid for the commodity and the *then* market price. Such contracts are universally held to be invalid, as against public policy, and in some instances they have been held to be in violation of statutes relative to gaming and wagers. *Lyon v. Culbertson*, 83 Ill., 33; *Sampson v. Shaw*, 101 Mass., 145; *Kirkpatrick v. Bonsall*, 72 Pa., 155; *Gregory v. Wendell*, 39 Mich., 337; *Rumsey v. Berry*, 65 Me., 570; *Williams v. Tiedemann*, 6 Mo. App., 269. But there is an apparent conflict of opinion touching the question whether a broker, factor or commission merchant, who has been employed by his principal to make contracts of this character with some third party, and has done so in his own name, but for his principal's benefit, may maintain an action against his principal to recover money expended for his principal at his principal's request in the settlement of losses accruing under such contracts. This precise question was considered in the Case of *Green*, 15 N. B. R., 201 (U. S. Dist. Court, W. D. Wis.), and it was there held that the *broker could not recover* from his principal for moneys thus expended in the settlement of losses on such illegal ventures. But it is to be observed that the court, in the case last cited, based its decision mainly on a statute of Wisconsin, which declared all 'notes and agreements void that had been given for repaying any money knowingly advanced for any betting and gaming at the time of such betting or gaming.' And the evidence in the case cited showed that the broker not only made the illegal contracts in question, but that he advanced the money for the venture. The court accordingly held that the case fell within the statute, and that the broker could not recover money thus knowingly advanced in furtherance of a gambling transaction. There are other cases, arising between factors and brokers and their principals, which the courts have apparently treated as though the action was between the principals to the illegal transaction. But the different relation existing between the agent and his principal, in actions by the former to recover moneys expended for his principal in the settlement of losses on wager contracts, was apparently not called to the attention of the court. *Vide Gregory v. Wendell, supra; Williams v. Tiedemann, supra.* On the other hand, the law is well settled in England that if a broker be employed to make wager contracts, such as are voidable under 8 & 9 Vict., c. 109, § 18, and at the request of his principal the broker pays the amount due under such contract, *he can recover the amount so paid from his principal*, and the illegal nature of the contract with reference to which the money is paid is no defense to an action founded on such claim. *Warren v. Billings*, 33 Law Jour. (1864), 55, N. S. Common Law, Michaelmas term, 1863; *Pidgeon v. Burslem*, 3 Exch., 465; *Jessopp v. Surtoryche*, 10 Exch., 614.

"In this country the same doctrine has been held substantially in the following cases: *Lehman v. Strassberger*, 2 Woods, 554; *Warren v. Hewitt*, 45 Ga., 501; *Clark v. Foss*, 10 Ch. Leg. N., 213. In the case of *Marshall v. Thurston* the court says: 'We understand the charge of the lower court to be, in substance, that if the broker knowingly assisted the defendant by an advance of

money and active agency, though not as principal, to gamble in the rise and fall of bonds, no recovery can be had; but if the broker merely acted as his agent in effecting contracts between him and third parties for the purchase or sale of bonds on time, the defendant and third parties intending to speculate in the rise and fall of prices, and defendant suffered losses which were paid by the broker at defendant's request, or were paid and the payments subsequently ratified by the defendant by executing notes therefor, a recovery can be had. In this view the charge is supported by the authorities.' The rule which has the support of the great weight of authority (whatever may be thought of the policy and morality of the rule) seems to be as follows: If a factor, broker or commission merchant be employed by his principal to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys or sells in his own name, but on his principal's account, and subsequently, after losses have occurred in such transactions, the agent advances money at his principal's request to pay such losses; or if the agent pay such losses and the principal afterwards executes notes in the agent's favor to cover the amounts so advanced, the agent may recover against his principal the advances so made at his request, or upon the notes so executed, notwithstanding the illegal character of the original venture. The promise implied in the one instance and expressed in the other is neither void for want of consideration nor tainted with illegality. It was even held in the case of the *Planters' Bank v. Union Bank* that where the defendant, in violation of law, had sold bonds for the plaintiff and received the proceeds, the plaintiff might recover the amount from the defendant, and that the illegal character of the transaction out of which the fund arose was no defense. But, on the other hand, if a broker or factor supply his principal with funds for the express purpose of enabling him to engage in illegal transactions, and if he (the agent) conducts the illegal venture in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purpose, nor will it enforce securities taken therefor.

"The facts proven in the case at bar seem to bring the case within the principles last stated. The original notes involved in this controversy, of which those in suit were mere renewals, were not given after the various contracts had been settled, to cover losses which the agent had paid for his principal. The notes seem to have been drawn by the principal in favor of his agent at the inception of the alleged illegal ventures, or within a few days thereafter, while the transactions were still pending and the result undetermined. They were either given to secure moneys advanced by the broker to his principal, to enable the latter to prosecute the ventures, or they were given as an indemnity to the broker, to shield him from losses that he might sustain while carrying out the alleged illegal ventures in his own name, but on his principal's account. In either event, it would follow that the agent could not recover on these notes as against his principal, the maker of the notes, if the contracts or 'deals,' as they are termed, were mere wagers on the fluctuations in the market price of grain, and for that reason unlawful. Obligations thus intimately connected with an illegal transaction, and furnishing an inducement to the same, could not be supported as between the original parties, nor could they be enforced by the present plaintiff if it took the same with knowledge of this infirmity. I have no difficulty whatever in finding from the evidence that the parties, both principal and agent, had in view mere *wager contracts* upon the price of grain, and that the losses which the agent or broker eventually paid were paid

on contracts which, as between the broker and the parties with whom he dealt, were mere bets upon the future market price of wheat, no delivery having been made or contemplated. To find otherwise on the evidence before me would involve a degree of credulity which the court does not possess. The case is thus narrowed to the single inquiry whether the plaintiff bought this paper with knowledge that it was not enforceable as between the maker and payee.

"The defendant would charge the plaintiff with knowledge because the payee of the note was one of plaintiff's directors, and *ex officio* a member of the board of discount. The evidence shows, however, that the bank (the plaintiff in this action) had no regular discount committee. The president was authorized to pass upon paper without the advice of the directory. If the directors were present, they gave advice on paper offered for discount. But in the present instance it appears that the originals of the notes now in suit were accepted in the absence of the director. The director states that when he had paper of his own to offer for discount he stayed away from the board, and that he did so in this instance. Upon this state of facts I am clearly of the opinion that the bank cannot be charged with knowledge of facts possessed by the particular director who was not present and did not act as member of the board when the paper was accepted. The director was himself the payee, and was offering this paper for discount. Whatever contract the bank made in accepting the paper and passing it to the director's credit was made with the director. He not only *did not assume* to act as agent of the bank in this particular transaction, but he could not lawfully act in that capacity had he so attempted. *Washington Bank v. Lewis*, 22 Pick., 31. The present case is widely different from the case of *Bank v. Thomas*, 2 Mo. App., 367, cited for the defendants; for in that case the paper was tendered by a *third party*, and the director, whose knowledge was held to affect the bank, was present at the meeting of the committee on discount, and voted upon the paper in the discharge of his regular duties as a bank officer. In the present case the bank cannot be charged with notice of any infirmity in the paper by any sound rule of law with which I am acquainted. Neither does the court concur in the view that the notes in suit are void in the plaintiff's hands, regardless of the question of notice, by virtue of the provisions of the act respecting gaming. Rev. Stat. 1879, c. 109. In the case of *Hickerson v. Benson*, 8 Mo., 8, it was held in this state that a wager on the result of an election was not within the terms of the statute respecting gaming, although such wagers were against public policy and sound morality, and void on that ground. And such seems to be the correct view with respect to immoral and fictitious sales of grain and other commodities, where *no delivery is intended* by the parties. Such contracts are simply *contra bonos mores*, and the courts will not enforce them, and would not enforce them in the absence of any statute on the subject of gaming. The result is that judgment must be entered on the notes against both of the defendants for the principal and accrued interest."

The petitions aver that the notes were assigned to the plaintiff; and defendant Harrison contends that therefore the equities were open. The difference between indorsement and mere assignment is one well known, and the point is well taken, if not cured by what occurred at the trial and the verdict. See *Daniel*, Neg. Inst., §§ 745, 729, 741; *Hedger v. Lesby*, 9 Barb., 214; *Calder v. Billington*, 15 Me., 398; *Hadden v. Rodkey*, 17 Kan., 429. The usual form of pleading is, when such is the fact, that the notes were indorsed to plaintiff; for the rights springing therefrom are quite different from those arising from an

ordinary assignment. Hence the defendants' position in that respect is technically correct; but as the notes produced and the evidence showed an indorsement to plaintiff, an amendment would have been allowed if attention had been called to the defect. Consequently, the verdict, under the rulings and proofs, must be held to cure that technical error; or, if need be, permission given to make the pleadings correspond to the evidence and verdict.

§ 1317. *Director's knowledge of illegality of note held not imputable to bank.*

As Alexander was a director in the bank, it is contended that the bank is, in law, charged with knowledge of what was known to him, and the following cases are referred to in support thereof: *Lemoine v. Bank*, 3 Dill., 49 (§§ 428-431, *supra*); *Bank v. Davis*, 2 Hill (N. Y.), 451; *Bank v. Thomas*, 2 Mo. App. 367; *Bank v. Campbell*, 4 Humph., 394; *Toll Bridge Co. v. Betsworth*, 30 Conn., 380. While the general doctrine is recognized that what an agent knows his principal is charged with notice of, in transactions where said agent is acting for the principal, yet a bank director, in asking for a discount of his own paper, is not an agent of the bank, but acting as the adverse contracting party. Were this held otherwise, no bank could discount paper to which a director is a party without losing the position of an innocent indorsee for value under the law merchant. Hence no bank could have dealings in commercial paper with any of its directors on ordinary business principles. The opinion of Judge Thayer states the legal aspect of this question very clearly.

§ 1318. *Maker not released by failure of bank holding his note to pay it with his funds on deposit with it.*

It is further contended that inasmuch as Alexander had frequently on deposit, both before and after this suit brought, a sufficient sum of money to pay his demand note, it was the legal duty of the bank to demand payment thereof, and apply his deposits accordingly, thus leaving the collateral discharged of all interest therein by the bank. On this point the court has no difficulty, so far as the legal right of the bank to pursue the collaterals is concerned; yet it would seem that a failure by the bank to take pay for the demand note, and then sue Alexander as indorser of the collaterals, and Harrison, the maker, indicated other than a purpose to collect its demand against Alexander, who was its principal debtor. It had a prompt recourse against him; indeed, had funds in its own hands sufficient to discharge the indebtedness. Why, then, sue him and Harrison, unless its object was, under the formal position of an innocent indorsee for value, to enable Alexander thus to cause a contract to be enforced in his favor which the law would not permit him to enforce in his own name? It would be easy for the Missouri legislature to destroy, by statute, the negotiability of such paper, but until it has done so the courts must apply the law merchant to its transfer. To what extent inquiry is permissible into the position of parties, as in the case at bar, may be doubtful. The bank can elect its own course by proceeding against Alexander alone on his demand notes, or by enforcing its rights against the collaterals, or possibly by appropriating his deposits to the payment of his indebtedness. While courts should lend no encouragement to betting contracts, yet, so far as the law requires the protection of innocent indorsees of commercial paper, the rules pertaining thereto must be observed. It is obvious that the law may be evaded by giving negotiable notes and having them indorsed to innocent parties; but the remedy is with the legislature. It is said the contract indorsing the collaterals to the bank gave it only the power to sell the same, and not to collect them by ordinary process of law. As indorsee, the right to sue was complete, and the power to

sell was an additional advantage which it might or might not exercise. But the question still remains, viz., should not the court have permitted the exact relationship of the parties to these notes to have been developed, to the end that no merely technical screen should be interposed to prevent the defeat of illegal transactions?

The testimony produced, and uncontradicted, proved that the ordinary course had been pursued as to the transfer of the collaterals, without notice of any defect therein, or of any outstanding equities between maker and payee. Any testimony contradictory thereof, whereby the legal relationship of the parties could be varied, would have been proper; but the contention was that, despite the direct testimony of the cashier, the facts and circumstances indicated that the bank was aiding Alexander to shut out the equities by holding the collaterals, notwithstanding it could have collected the principal or demand note at any time, and thus have released the collaterals. But it was for the bank to continue the demand loan or call it in, as it might determine. It was satisfied with the interest-bearing arrangement, and to take the course which it has done, and which it had the legal right to do. However suspicious the relations of the bank with Alexander may appear as to this point, they cannot overcome the direct and express testimony of the cashier as to the *bona fides* of the indorsements and the consideration therefor. The motions are overruled.

DAVIDSON v. LANIER.

(4 Wallace, 447-458. 1863.)

ERROR to U. S. District Court, Northern District of Mississippi.

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—A statute of Tennessee, enacted in 1827, and entitled "An act to suppress private banking," made it penal to erect, establish, institute, or put in operation, or to issue any bills or notes for the purpose of erecting, establishing or putting in operation any banking institution, association or concern. In January, 1856, this act being in force, several persons, of whom one Richard M. Kirby seems to have been the principal, undertook to establish a banking association or company in Memphis, Tennessee, under cover of a charter granted by the state of Arkansas for a corporation styled "The Cincinnati and Little Rock Slate Company." Their object was to issue bills for circulation as money, and use them in the cotton trade. About the time of the organization of the company, Kirby visited McMahon, of whose estate the defendant in error is curator, at New Orleans, and exhibited the charter and explained the views of the company, whereupon McMahon agreed to act as its treasurer and financial agent. In pursuance of this arrangement, circulating notes of the company, to the amount of \$12,000, were sent to McMahon, who used them, as far as he could, for currency. He also made advances to the company by accepting and paying bills drawn on him; and, in the result, became its creditor in a sum somewhat exceeding \$11,000. At the time of the arrangement with McMahon, Davidson, the plaintiff in error, and one J. B. Ellis, were members of the company, but afterwards withdrew. Subsequently, however, upon the request of Kirby, Davidson, with two others, consented to sign, and Ellis consented to indorse, several bills of exchange in blank, and among them that on which the suit below was brought. All the bills seem to have been addressed to McMahon as drawee. Shortly before, or very soon after, this

transaction, H. M. True, the secretary and treasurer of the company at Memphis, absconded, taking with him all the cash in his possession.

There was some obscurity, and, perhaps, some contradiction of evidence, in the record as to the time and purpose of signing and indorsing the blank bills of exchange. Kirby stated that they were signed and indorsed before the absconding of True, to enable himself to protect the circulation of the company. Another witness said that they were signed and indorsed after that event, at the suggestion of Kirby, to relieve McMahon from the consequences of True's theft; but this witness said, also, that he only knew the object of the bills from a statement by Kirby, made when the other parties were not present, and was not confident as to the time of signing and indorsement. However these things may have been, it was certain that the bills were sent by Kirby to McMahon in July, 1856, and were filled up some months later, after vain attempts to obtain payment of the balance due him. All the bills, when they went into McMahon's hands, seem to have had engraved on their face the formal parts of a bill of exchange, with the name of the place of date, "Memphis, Tenn.," and the direction to the drawer, "John J. McMahon, New Orleans;" and all but one seemed to have borne the words, "Exchange for \$1,000," in the upper left hand corner. In other respects, as to the time of date, amount to be paid and time of payment, they were left blank. The one now in controversy was filled up with the date, "July 15, 1856;" with the time of payment, "eight months after date;" with the sum to be paid, "eight thousand nine hundred and ninety-two dollars and forty-four cents;" and with a stipulation for "eight per cent. interest, from maturity until paid." Thus filled up, the bill sued on read as follows:

"Exchange for \$8,992.44.

MEMPHIS, TENN., July 15, 1856.

"Eight months after date of this, our first of exchange (second unpaid), pay to the order of J. B. Ellis eight thousand nine hundred and ninety-two dollars and forty-four cents, value received, and charge the same to account of your obedient servants, with eight per cent. interest from maturity until paid.

"JAS. R. FERGUSON,

"J. LOCKE,

"THOMAS J. DAVIDSON.

"To John J. McMahon, New Orleans."

Indorsed: "J. B. Ellis, Ripley, Miss.; Richard M. Kirby."

Upon the trial, the court charged the jury that, if McMahon's object in advancing his money was to enable the company to put into operation a banking company in violation of the laws of Tennessee, the jury must find for the defendant; and, also, that if McMahon agreed with Kirby to redeem the circulation, intending thereby to enable the company to go into operation, and the company did go into operation, issuing bank notes in pursuance of that agreement, then the transaction was illegal, and the plaintiff could not recover. But the following instructions, numbered in the record 5th, 6th and 7th, were also given by the court: 5. "If, at the time the bills were given, the holder, McMahon, knew that the money would be used for the purpose of carrying on a banking company contrary to the laws of Tennessee, and if the banking company was then in operation, then the consideration of the bills is not affected by the use made of the proceeds of the bill, and the plaintiff is entitled to recover, unless the defense is sustained on some other ground." 6. "The signing of a bill of exchange in blank is the giving of the holder an unlimited authority to fill it up at pleasure, and the party so drawing or indorsing is

bound by the act of the party filling up the same." 7. "If the bills sued on were signed in blank, and delivered to Kirby to be sent in blank to McMahon, that would authorize him, McMahon, to fill up the bills and insert any rate of interest that was lawful, and the jury should find for the plaintiff, unless the defense is made out and sustained on some other ground."

It was upon these instructions, considered in connection with the evidence, that the questions to be decided in this case arose. Before arguing the merits, a motion to dismiss the writ of error was made. The judgment of the district court for \$11,312.42 was rendered on the 6th of June, 1860. On the 7th a writ of error was sued out, and a copy was lodged with the clerk of the court on the same day, and bond for *supersedeas* given in double the amount of the judgment. A citation was also issued, dated 16th April, which was served on the 14th September, 1860, and the record, with the writ of error and the citation, was returned to the next term of this court. Another citation and apparently another writ of error, were issued on the 7th of June. Of the last-mentioned writ and citation there seemed to have been no service.

§ 1319. *Writ of error not dismissed because not allowed by any judge.*

Before proceeding to consider the questions arising on the instructions regarded in connection with the evidence, a motion to dismiss the writ of error must be disposed of. It is objected to the writ of error that it was not allowed by any judge; but this is not required. It is enough that it was issued and served by copy lodged with the clerk of the court to which it was directed.

§ 1320. *A clerical error in date of the citation is no ground of dismissal.*

It is objected to the citation that it was dated 16th April, which was before the date of the judgment; but it is clear, from the number which it bears, taken in connection with the judgment it describes, that it was issued after the rendition on the 6th of June. The date must have been a mere clerical error, and the service on the 14th of September was regular and sufficient. The fact that another writ of error and another citation, not served, were issued, cannot prejudice the writ and citation which were duly issued and served.

§ 1321. *Approval of appeal bond.*

It is also urged that the appeal bond was not approved by the judge. But it is a fair inference, from the acts of the judge, in signing the citation, and in witnessing the appeal bond, that he approved of the security. The judiciary act does not, in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given. This court will take care, on application, that the rights of the defendant in error be not prejudiced by the omission, but will not dismiss the writ except on failure to comply with such terms as it may impose. *Martin v. Hunter*, 1 Wheat., 361 (APPEALS, §§ 682-729); *Catlett v. Brodie*, 9 id., 553 (APPEALS, § 1536). The motion to dismiss in this case must be denied.

§ 1322. *Act to suppress private banking construed.*

The first question upon the merits arises upon the fourth and fifth instructions. The court had already charged in substance that a contract in consideration of aid to be given in putting in operation an illegal banking company in Tennessee was void. From the fifth instruction, taken in connection with those which preceded, and with the evidence, the jury must have understood that in the judgment of the court a contract in consideration of aid in promoting the objects and effecting the purposes of an illegal banking company, when once in operation, was valid. We think this construction of the statute of Tennessee too narrow. The intention of the act was declared by its title. It

was an act to suppress private banking. Its object was the protection of the people against the evils of an unauthorized currency — than which hardly any object of legislation is more important. The currency measures all values, and is the medium, directly or indirectly, of all exchanges. To keep it sound, and to guard it as far as possible from fluctuation, are among the most imperative duties and among the most difficult problems of government. In the construction of this act it was the duty of the court below, as it is ours here, to give effect to its obvious intention, if that can be done without disregarding settled rules of interpretation. What, then, is the true sense of the prohibition to erect, establish, institute, or put in operation any banking company, or to issue any bills or notes with intent or purpose to do so? What is meant by putting in operation or establishing a banking company? We think that this language has a much wider import than mere commencement of business. To establish a company for any business means complete and permanent provision for carrying on that business, and putting a company in operation may well include its continued as well as its first or original operation. This construction is supported by the prohibition to issue bills or notes. Taking the act of establishment and putting in operation, in the restricted sense of the instructions, the issue of circulation could not precede but must follow those acts. The prohibition of such issues, therefore, must be taken as proof that the legislature did not use the words in that sense. The emission and circulation of unauthorized notes and bills as money was the main object and business of the company, and it was precisely this object and business which the legislature intended to defeat and prohibit. We must construe the act, therefore, as covering with its penal prohibition the whole range of devices by which illegitimate currency is imposed on the community. It prohibits the use of such currency during the whole period of the establishment of an illegal company, and applied as completely to the last as to the first step of its operations. Any other construction would frustrate the legislative intent and leave the great mischief, which the statute was made to prevent, wholly without restraint or check.

§ 1823. *Bills issued in aid of an illegal enterprise not enforceable inter partes.*

It was quite clear, upon the evidence, that McMahon entered into the transaction, which resulted in the bill sued on, in the expectation of profit from aiding the operation of the prohibited banking company. He was engaged with its officers and stockholders in the scheme of imposing upon the community a prohibited and fraudulent currency. His name was upon its circulating bills, and his credit promoted their circulation. His curator cannot look to the law for remedies against his associates in this illegal undertaking. With this view of the statute and of the evidence we cannot distinguish this case from that of *Brown v. Tarkington*, 3 Wall., 377, decided at the last term. In that case we held that notes given for a balance found due on a settlement of accounts with an illegal banking company, and for advances to redeem its circulation, could not be enforced in favor of a payee who had been participant in the illegal business. The bill in this case, in our judgment, is of the same character. It was urged in argument that the contract we have been considering was made in Louisiana, and not invalid by the laws of that state. But this is not so. The bill of exchange was made in Tennessee. It bears date at Memphis, and was signed there; and the contract of the defendant below was to be performed there. We by no means say that it would be valid if made in Louisiana. It is

not necessary to consider that question; the laws of Tennessee determine the question of its validity, and we think that according to those laws it was invalid. In our judgment, therefore, the fifth instruction was erroneous.

§ 1324. *Authority to fill blank bill or indorsement must be pursued.*

The sixth and seventh instructions remain to be considered. The sixth announced, without qualification, the proposition that the holder of a bill of exchange, signed and indorsed in blank, has unlimited authority to fill it up at pleasure and bind the signer and indorser by his act. This instruction cannot be sustained. The delivery of a bill of exchange signed and indorsed in blank only authorizes the receiver, as between himself and the drawer and indorser, to fill it up in conformity with the authority given him. If there has been no agreement, the authority is general; if there has, it must be pursued. The burden of proof that there was an agreement, and that its terms have been violated, is, in such a case, upon the defendant; but if he can make the proof it will avail him. No person, unless authorized, either directly or by just inference from the nature of the transaction, can fill up a blank bill for his own benefit, nor can such a bill be enforced against the drawer and indorser in favor of any one who takes it in bad faith; that is, with knowledge that it has been filled up without authority or in fraud. 3 Kent's Com., 119; 10 Smedes & M., 590. It is highly probable that the court below intended that its instruction should be taken with this limitation; but it was too general in its terms, and was, we think, calculated to mislead the jury.

The seventh instruction directed the jury in substance to find for the plaintiff if satisfied that the bill was signed in blank and delivered to Kirby to be sent to McMahon. It asserted that McMahon had the right in the case supposed to fill up the bill with any amount due him, and make the drawers and indorsers liable on the bill to himself. It is doubtless true that, subject to the limitations just stated, the delivery of a signature in blank is in general an authority to the holder to fill it up as he thinks proper. This rule, in its application to negotiable instruments, was very clearly stated by Mr. Justice Clifford in *The Bank of Pittsburgh v. Neal*, 22 How., 107 (§§ 405-407, *supra*), as follows: "Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody; or, in other words, it is the act of the principal, and he is bound by it." But the instruction before us went much further. It asserted the right of a drawee to fill up a blank bill and hold the drawers and indorsers, and this without any other authority than such as is implied in the fact that the bill was sent to him by the last indorser with the consent of the other indorser and of the drawers. Now it is quite clear that this fact implies no such authority. The only inference to be drawn from the circumstances that the bill was sent to McMahon in blank is that it was sent to him for acceptance. The structure of the paper excludes any other hypothesis. If, having received the bill in blank, he had accepted it and negotiated it to a third person, without notice of facts impeaching its validity between the antecedent parties, those parties would have been bound to the holder. But he, as drawee, could not transfer the bill to anybody without previous

acceptance, and still less could he treat it as an obligation to himself. We think there was error in these instructions as well as in the fifth.

The judgment of the district court must, therefore, be reversed and the cause remanded for new trial in conformity with this opinion.

§ 1325. *Gambling*.—Upon *non-assumpsit* defendant may without notice prove that the note was given for money won at play. *Watson v. Bayley*, 2 Cr. C. C., 67.

§ 1326. *Lottery tickets*.—A note given for the purchase of lottery tickets is void. *Thompson v. Milligan*, 2 Cr. C. C., 207; *Hawkins v. Cox*, 2 Cr. C. C., 173.

§ 1327. A due-bill given for money due on the sale of lottery tickets is void in Tennessee. *Lanham v. Patterson*,* 13 Int. Rev. Rec., 142.

§ 1328. A note given for lottery tickets, which it was unlawful to sell, is void. *Thompson v. Milligan*, 2 Cr. C. C., 207.

§ 1329. *Bet on completion of railway*.—A written instrument provided that A. should pay B. a certain sum of money, if a railroad reached a given point at a given time. If the point was not reached within such time the instrument was to be null and void. *Held*, not enforceable. *Eldred v. Mallory*,* 2 Colo. T'y, 320.

§ 1330. *Election bet*.—In an action on a promissory note upon a wager that Andrew Jackson would not obtain the electoral vote of Kentucky for the office of president of the United States, *held*, that, although the parties were not qualified electors, the contract was void, as being against public policy, and because intended to draw in question in a judicial tribunal the validity of an election of president of the United States. *Denny v. Elkins*, 4 Cr. C. C., 161.

§ 1331. *Options*.—A note given a factor for money advanced by him to pay the maker's losses on a contract for the purchase or sale of cotton for future delivery is valid, although the contract was not to be performed by the actual delivery of cotton, but was to be settled merely by payment of difference in prices. *Lehman v. Strassberger*, 2 Woods, 554. See § 1312.

§ 1332. Contracts of sale that do not contemplate the actual *bona fide* delivery of the property by the seller, nor payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are gambling contracts, and a broker stands in no better condition than the seller to recover differences; and a note given therefor is void for want of consideration. *In re Green*, 7 Biss., 338.

§ 1333. *Illegal bank notes*.—Notes issued by a bank in violation of law are void even in the hands of an innocent holder. *Root v. Godard*, 3 McL., 102. See § 1313.

§ 1334. *Safety fund act*.—The safety fund act of March, 1833, providing that "no monied corporation subject to this act shall issue any bill or note of the said corporation unless the same shall be made payable on demand and without interest," applies to a bank established by an act passed the same day as the safety fund act. And notes issued in violation of such act are void. *Weed v. Snow*, 3 McL., 263; *Root v. Godard*, 3 McL., 102.

§ 1335. Notes issued in contravention of the safety fund act are void *ab initio* even against indorsees suing on the contract of indorsement, all of whom are chargeable with notice of the statute. Nor can an indorsee of such a note recover under the common counts and the contract of indorsement independent of the note. The note being void, its contents cannot be received in evidence to support an action upon it. *Root v. Wallace*,* 4 McL., 8.

§ 1336. *Bond; acceptance contrary to statute*.—A bond, executed in Michigan, but relating to and securing the acceptance of drafts in New York, contrary to a New York statute, is void. *Hayden v. Davis*, 3 McL., 276.

§ 1337. *For apprentice's time*.—A promissory note given in consideration of the assignment of the time of an apprentice is void, the consideration being illegal. *Walker v. Johnson*, 2 Cr. C. C., 203.

§ 1338. *Note for stock below par*.—The directors of a company have no power to receive subscriptions for stock at a less price per share than is fixed in the charter; and consequently, a note given for stock so obtained cannot be enforced. *Sturges v. Stetson*,* 3 Phil., 304.

§ 1339. *Illegal bank draft*.—A draft issued by a bank in express violation of law is void, and cannot be considered as payment. *Davis v. Bank of River Raisin*, 4 McL., 387.

§ 1340. *Illegal issue of bank notes*.—Notes given to redeem bank notes illegally issued cannot be collected. They are tainted with the illegality of the original bank notes. *Brown v. Tarkington*, 3 Wall., 378.

§ 1341. Bank notes issued *ultra vires* are void, even in the hands of an innocent holder. *Root v. Godard*, 3 McL., 102.

§ 1342. *Notes for forfeited stock resold*.—If a company becomes the owner of its stock by purchase or forfeiture, it may resell such stock, and notes taken for it are valid. *State Bank of Ohio v. Fox*, 3 Blatch., 431.

§ 1343. *Illegal canal notes.*—A canal company issued bonds which it agreed should have the preference over all debts which might subsequently be created by the company, and in default of payment of principal or interest the holder might, after a receiver should be appointed, enter into the receipt of the tolls and water rents. *Held*, that notes subsequently issued by the company and receivable by it in payment of tolls and water rents were void as against holders of the bonds. *Vallette v. Whitewater Valley C. Co.*, 4 McL., 192.

§ 1344. *Confederate notes.*—Notes issued by the Confederate government were not "bills of credit" within the meaning of the constitution, and were illegal. *Bailey v. Milner*, 35 Ga., 330; 1 Abb., 261.

§ 1345. A promissory note given by the borrower to the lender of Confederate notes is void. *Ibid.*

§ 1346. *In aid of rebellion.*—Notes issued by the state of Mississippi, after the opening of the civil war, in a form suitable for currency, and secured by cotton, to be sold for their redemption, held issued in aid of rebellion and void. *Taylor v. Thomas*, 23 Wall., 479.

§ 1347. Negotiable paper issued in aid of the rebellion is void. *National Bank of Washington v. Texas*,* 20 Wall., 72.

§ 1348. During the rebellion the city of Richmond issued certain notes contrary to the law of Virginia. Before the close of the war, the legislature passed an act legalizing the action of the city, and authorizing further issues. *Held*, in aid of rebellion, and void. *Evans v. City of Richmond*, Chase's Dec., 551.

§ 1349. A due bill or promissory note given for goods sold in aid of the rebellion is void. *Hanauer v. Doane*, 12 Wall., 343.

§ 1350. *Note sent across army lines.*—A bill drawn by a person within the Confederate lines upon a person within the Union lines during the rebellion is void, although the payee did not know the drawee was within the Union lines; but the sum paid for the draft may be recovered under a count for money had and received. *Williams v. Mobile Savings Bank*, 2 Woods, 501.

§ 1351. A promissory note was indorsed in Alabama, during the war, and transmitted across the lines by messenger to the indorsee. *Held*, that the indorsement was void, and the indorsee could not sue upon it in his own name. *Russell v. Russell*,* 1 MacArth., 263.

§ 1352. Any draft, bill or note drawn in the Confederate States, or in any state under the proclamation of the president declared in insurrection, or in any part of them (except such as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the federal lines, is void as to maker and all other parties thereto, and is not to be received in payment of any debt when due to a citizen of any state adhering to the government. The question as to whether the place where the draft was drawn was within the Confederate lines is for the jury. The jury must be satisfied that the plaintiff accepted such draft in satisfaction of the debt due him, in order to give verdict for defendant. *Moore v. Foster*, Chase's Dec., 222.

§ 1353. *Rebellion; bona fide holder of notes.*—No matter how illegal or immoral the consideration of a note or bill, it is valid in the hands of a *bona fide* holder for value unless made absolutely void by statute. Bank bills or other securities issued in aid of the rebellion are valid in the hands of a *bona fide* holder for value. *Hatch v. Burroughs*, 1 Woods, 439.

§ 1354. *Note for slave.*—A note for the price of a slave, given at a time when slavery was not unlawful, is valid, and is not impaired by a subsequent law making contracts for sale of persons void. *White v. Hart*, 13 Wall., 646; *Boyce v. Tabb*, 18 Wall., 546.

§ 1355. The payee of a note given for a slave cannot recover upon it from the maker, although it was made before slavery was abolished. *Osborne v. Nicholson*, 1 Dill., 219. The abolition of slavery by the thirteenth amendment rendered promissory notes given for slaves, before it was adopted, void. *Buckner v. Street*, 1 Dill., 243.

§ 1356. *For emancipation, valid.*—A promissory note given by an emancipated slave to his master after, and in consideration of, emancipation is valid. *Smith v. Parker*, 3 Cr. C. C., 654.

§ 1357. *Negro imported contrary to statute.*—The fact that the negroes for whom a note was given were taken to a state contrary to the laws of that state does not make the note void for failure of consideration, if the vendor did not take them there. *Randon v. Tobey*, 11 How., 393.

§ 1358. A brought slaves into Mississippi contrary to the statute of that state regulating their importation. He sold them to B., taking B.'s note for the purchase price. In an action by an indorsee against B., *held*, that the contract was not void, and that the indorsee might recover. *Harris v. Runnells*, 12 How., 79.

2. *Payment.*SUMMARY — *Accommodation acceptor; bona fide holder, § 1359.*

§ 1359. The drawer and indorsee of a draft executed a contract for the satisfaction of it. *Held*, a good defense in favor of an accommodation acceptor against the indorsee. But such contract would not affect the rights of one not privy to it, with whom the draft was deposited as collateral security until such holder surrender the draft to the indorsee, upon which the satisfaction agreed upon between the drawer and indorsee attaches and extinguishes the draft. Where one form of security is surrendered for another, the creditor cannot hold both. He loses his right to the security surrendered. *Farmers' Bank v. Groves*, §§ 1360-1362.

[NOTES.— See §§ 1363-1402.]

FARMERS' BANK OF VIRGINIA *v.* GROVES.

(12 Howard, 51-59. 1851.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This case comes up on an appeal from a decree of the circuit court of the United States for the district of Louisiana. The case is somewhat complicated and confused, and it will be necessary to state the material facts to be found in it in order to present clearly the legal questions involved, and upon which the decision must depend.

On the 13th March, 1837, Thompson L. King drew two drafts, amounting, in the aggregate, to \$15,497, in favor of John E. Hunter, upon Moses Groves, who duly accepted the same. The liability of Groves upon these drafts to the bank constitutes the main point in the controversy. The drafts were subsequently, but before maturity, indorsed by Hunter to Lewis A. Collier, and by him passed to the Farmers' Bank of Virginia, the appellants, as collateral security for an indebtedness to the bank. Groves was an accommodation acceptor for the benefit of King, the drawer. The bank recovered judgment against Groves for the amount of the drafts in the Madison district court of Louisiana, December 1, 1840, and which was recorded in the office of the parish judge on the same day, in the parish of Madison, where the defendant resided, so as to operate as a judicial mortgage on his real estate and slaves. The bank recovered judgment also against King, the drawer, on one of the drafts; and, at the same time, held other judgments and demands against him, in which Collier was interested to the amount of some \$15,000. These judgments and demands had been pledged to the bank by Collier as collateral security for his indebtedness. On the 26th February, 1841, a written agreement was entered into between Collier and King, in which, after reciting the several judgments and demands above stated, and held by the bank against King, and in which Collier was interested; and also reciting and describing certain plantations and lands, belonging to the said King, containing in all about twenty-two hundred acres, and a large number of slaves on the same, it was agreed, among other things, that if the said Collier should be permitted to purchase the said property at sheriff's sale on any of the aforementioned judgments for his own account, or for the account of the bank, at a sum not exceeding the whole amount of the several judgments and demands, or for a less sum, that then, and in that case, the said property should be received by him in satisfaction and discharge of the same; and the evidences of the several debts and demands thus held by him and the bank should be delivered up to the persons entitled to the same; and full discharges given; and especially to Moses Groves for and on account of the judg-

ment obtained by the Farmers' Bank of Virginia against him. There are several other provisions and stipulations in said agreement; but, as they have no necessary bearing upon the material questions in the case, it is unimportant to notice them. Groves was a witness to this agreement. In pursuance of this arrangement, Collier became the purchaser of the property on the 13th of March, 1841, for the sum of \$32,515, and received a deed of the same from the sheriff on the 16th of the month thereafter.

On the 1st of December, 1841, the Farmers' Bank of Virginia proposed to Collier, through their authorized agent, an arrangement of his indebtedness to them, as follows: 1. The bank to give him a credit on the same of one, two and three years. 2. And surrender all the collateral securities which they had received from him. And Collier, on his part, 1. To pay all the expenses of prosecuting the collateral securities to the attorneys in whose hands they are. 2. To give a mortgage, which was to operate as a judicial mortgage in favor of the bank, on all the property which he held in Concordia parish. 3. To assign to the bank certain notes, as collateral security, which he held against Dix and Glascock, amounting to \$9,000. 4. To have all the mortgages that appear as incumbrances upon the property reduced by a discharge of record to an amount not exceeding thirty-five thousand dollars, besides those in favor of the Bank of Virginia, and Lancaster, Denby and Company. And, 5. To give three notes to the bank, one for \$11,764.68, payable in twelve months after date, one for \$12,470.57, payable two years after date, and one for \$13,218.80, payable three years after date, amounting, in the aggregate, to \$37,454.05. This is the substance of the proposition made by the agent, and which was intended as instructions to F. H. Farrar, his attorney, under whose direction the mortgage was to be prepared and executed.

On the 3d of December, 1841, the mortgage was duly executed by Collier, and delivered to Farrar, and accepted by him on behalf of the bank. It was recorded in the proper office, and a copy with the three notes transmitted by mail to the bank, agreeably to the instructions. On the 20th of April, 1843, the Farmers' Bank of Virginia applied to the judge of the circuit court of the United States, in the district of Louisiana, for an executor's process against the estate of Groves, he having died in December, 1841, praying that so much of his estate might be seized and sold as should be necessary to satisfy the judgment which had been obtained by the bank against him December 1, 1840, and which we have already referred to; and an order was granted accordingly; whereupon, Horace H. Groves, the son of the deceased, and administrator of the estate, filed the bill in this case in the circuit court of the United States, setting out, substantially, the facts already recited, and praying that the bank may be enjoined from proceeding to seize and sell any part of the estate, that the executory process may be set aside, and the bank decreed to enter satisfaction of the judgment of record.

The answer of the bank denies the authority of Collier to act for them in any settlement or discharge of the judgment, or for any purpose in connection therewith. They also deny that they ever gave their assent to the alleged discharge of the debt for which the judgment was rendered, or ever ratified or confirmed the acts and doings of Collier in relation thereto. They further alleged that Collier was indebted to them in the year 1837, in a large amount, and that he transferred to them the acceptances of Grove, mentioned in the bill, as far back as 1837 and before they reached maturity, as collateral security for his indebtedness. That they never intended to place the bills under the

control of Collier, but held them as their own, and prosecuted them to judgment. Nor did they ever allow him to take the charge and management of the judgment as their agent after it was recovered. They further allege that, being delayed in the collection of the collateral securities, and receiving no payments from Collier, they employed James W. Pegram, in November, 1841, as their agent, to call upon Collier, at his home, with instructions to obtain a more satisfactory arrangement of the debt against him. That it resulted in the extension of the time of payment on his giving the mortgage and notes referred to in the bill. They admit it was understood between their agent and Collier, that the negotiable paper which had been transferred as collateral security was to be surrendered up to him, the security furnished by the mortgage being, as represented by him, sufficient to secure his indebtedness, and relying on his punctuality in the payment of the notes as they became due. That two of the notes provided for by the mortgage are already past due, and nothing paid by the said Collier; that the property covered by the mortgage is discovered to be liable under previous incumbrances to a large amount, which may render it insufficient for the payment of their debt. That said Collier has long since waived the assignment of the said judgment, and consented that the bank might retain it as additional security.

The court below granted a preliminary injunction, and afterwards at the hearing on the pleadings and proofs, confirmed the same, and decreed that satisfaction of the judgment against Groves should be entered of record.

§ 1360. *Satisfaction, agreement as to, a defense for accommodation acceptor against indorsee.*

Upon consideration we are of opinion this decree is right, and should be affirmed. King, the drawer of the bills, was the principal debtor, as the acceptance by Groves was for his accommodation. He was, therefore, bound to provide for them, and keep Groves harmless; and this he did, so far as the interest of Collier was concerned, by the agreement of 26th February, 1841, and subsequent purchase by Collier of the plantation and slaves in pursuance of its stipulations. The purchase and title of the property under the sheriff's sale, it was agreed, should be made, and taken in satisfaction of this among other demands against King; and in order to complete the satisfaction, Collier bound himself to procure a discharge of the judgment which the bank had recovered upon the drafts, and then held. Groves was privy and consenting to this arrangement between King and Collier, and, as between the latter and him, when consummated, it constituted a valid defense to the drafts or judgment either in law or equity.

§ 1361. — *but not as against collateral holder not privy to it.*

It is true, as the bank was not privy and consenting to the arrangement, their interest in the drafts was unaffected by it, and they were still at liberty to enforce their judgment against Groves, if necessary to the payment of the debt for which the drafts had been pledged as security.

§ 1362. — *unless the collateral holder surrender the draft to the indorsee.*

But, on the 3d of December following, they entered into an arrangement with Collier by which it was agreed that, on the execution and delivery to them of three notes, payable in one, two and three years, covering the whole amount of his indebtedness to the bank, together with a mortgage upon a large plantation and slaves, besides other real estate, as security for the payment, all the collateral securities previously held for the indebtedness should be given up to him. The notes and mortgage were executed and delivered ac-

cordingly, and the collateral securities surrendered, and the interest in them again exclusively vested in Collier; and in this way becoming the owner of the drafts and judgment against Groves, for which he had already received satisfaction, and bound himself to procure a discharge from the bank, the agreement with King, the principal debtor, operated instantly as an extinguishment of the demand, and placed it beyond the power of either Collier or the bank, or both of them together, to revive it by any subsequent arrangement. The defense of Groves, arising out of the agreement of King with Collier, attached immediately on the bank reinvesting Collier with their interest in the drafts, and would adhere to them, into whosoever hands they might pass. They were not only bills overdue, but had become merged in judgment against Groves.

It has been argued, on behalf of the bank, that Collier failed to comply with all the conditions upon which they stipulated to accept the mortgage and surrender the previous collateral securities; and especially in one important particular, namely, the discharge of record of existing incumbrances upon the property, so as to reduce them to an amount not exceeding \$35,000. But there are several answers to this objection. In the first place, the weight of the proof is, that the agent, after an investigation and examination of these incumbrances, waived the discharge of record, being satisfied that they had been paid, from the representation of Collier. And in the second, no such ground of defense is set up in the answer, nor is there any allegation of imposition or fraud by Collier in the transaction. And, in the third, assuming that there was, the bank could not avail themselves of it for the purpose of avoiding their part of the arrangement, and at the same time hold on to the mortgage as a security for Collier's indebtedness. There has been no surrender of the mortgage, on the part of the bank, or offer to surrender and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier. It may be that if a fraud had been committed upon the bank, in the negotiation to substitute this mortgage for other collateral securities, upon a surrender of the mortgage and notes accompanying it to Collier, on a discovery of the fraud, claiming to vacate the arrangement on this ground, their right to and interest in the securities surrendered, in the absence of any prejudice to the rights of third persons acquired, in the mean time, might revive, and in this way the defense of Groves be overreached, the bank being thus remitted to their original rights. But, be this as it may, as no such step has been taken, nor even claim of fraud set up in the pleadings, we are bound to regard the arrangement as valid and binding upon both parties; and if any fraud or imposition has been committed to the prejudice of the bank, they must look to him personally for compensation and redress. The rights acquired by each party to the securities exchanged must be taken to be such as were intended by the terms of agreement; and, regarding the transaction in this light, it is clear, even conceding, as is alleged, that Collier has since waived the surrender of the collateral securities for which he had stipulated, or has since reassigned them to the bank, the defense of Groves is still complete. These drafts, and judgment upon them, became extinguished the moment the agreement between the bank and Collier was carried into execution. They then became the exclusive property of the latter, in which event his agreement with King, the principal debtor, worked an immediate satisfaction.

It has also been argued that King has failed to fulfil all the stipulations in his agreement with Collier, and hence that it is not available to Groves. But

this is a question exclusively between him and Collier, who, for aught that appears, is content with the agreement in the way it has been carried into execution. He purchased the property and took the sheriff's deed as is alleged, and not denied, went into the possession and enjoyment of the estate, and still holds it. And, if he has not acquired all the property stipulated for in his agreement, he must look to King, personally, for compensation and redress. He has chosen to accept the execution of the agreement, and must be deemed bound by its stipulations. In every view we have been able to take of the case, we are of opinion the decree of the court below is right, and should be affirmed.

§ 1363. When a payment; agreement; conditional payment.—A bill of exchange is not, in general, to be considered as a satisfaction of a precedent debt, unless it be paid, and accepted as such, or in case it be conditionally paid; unless it appear that an injury has resulted to the debtor, who pays the bill in consequence of the laches of the creditor, who receives it. *Gallagher v. Roberts*, * 2 Wash., 193; *Allen v. King*, 4 McL., 128; *Peter v. Beverly*, 10 Pet., 569; *Cooper v. Gibbs*, * 4 McL., 396; *Lyman v. Bank of United States*, 12 How., 225; *Weed v. Snow*, 3 McL., 265. See § 1375.

§ 1364. Whether or not there was an agreement to receive negotiable paper in satisfaction of a debt is a question for the jury. *Lyman v. Bank of United States*, 12 How., 225.

§ 1365. Bank notes credited as cash.—Where the notes of a bank were received by it for a balance due, and credited as cash, held, that the parties having treated the transaction as a cash deposit, must be deemed to have considered it as paid in money. *United States Bank v. Bank of Georgia*, 10 Wheat., 333.

§ 1366. Where one note is discounted in renewal of another, the bank may charge the old note to the indorser, and credit him with the new one. *Fullerton v. Bank of United States*, 1 Pet., 604 (§§ 1200-1204).

§ 1367. Crediting notes on account; presumption.—Notes credited on an account current are presumed to have been received in payment, and the fact that subsequently, after being protested, they were charged on the account, does not rebut this presumption. *Riley v. Anderson*, * 2 McL., 589.

§ 1368. Promissory notes do not extinguish an open account, unless given expressly in payment. But the object in giving a note may be implied from circumstances as well as from an express agreement. And the facts that the account was overdue, that a further credit was given on the execution of the notes, which were credited on the account, show a payment to have been intended. *Ibid.*

§ 1369. Debt discharged by note or bill.—A bill taken in payment as a discharge of a pre-existing debt, or in such a manner as imports an intention in the indorsee to take the risk of the bill upon himself, is a discharge of such debt. *Brown v. Jackson*, * 2 Wash., 24.

§ 1370. A promissory note given and received in payment of an open account is a bar to an action upon such account even though the note be not paid. *Sheehy v. Mandeville*, 6 Cr., 253 (§§ 1406, 1407).

§ 1371. Where a protested bill of exchange is taken up partly with cash and partly with the proceeds of a note discounted by the bank holding the bill, the latter is paid; and any action to recover back any part of it may then be brought. The statute of limitations as to such action runs from the date of payment of the bill. *Bank of United States v. Daniel*, 12 Pet., 32 (§§ 1633-38).

§ 1372. The note of a third person given and received in payment of the debt of another is a valid contract, and operates to extinguish or discharge the original debt; and a note given by a partner for a debt of the firm is, as to such debt, the note of a third person. *In re Parker*, 6 Saw., 250. Citing *Sheehy v. Mandeville*, 6 Cr., 264; *In re Ouimette*, 1 Saw., 53; *Cumber v. Wayne*, 1 Smith's Lead. Cas., 453.

§ 1373. Payment by note; onus.—To constitute an absolute payment of a pre-existing debt by a promissory note there must be an agreement to receive it as such, and the burden of proof is upon the party urging it as such. *Ibid.*

§ 1374. Payment by maker or surety; when a discharge.—Payment by a maker extinguishes a note; but payment by a surety does not necessarily have this effect; it may be a payment in favor of the surety and not a payment against him; the holder may still sue the maker of the note as trustee for the surety; or the surety may often sue the maker himself. *Ex parte Balch*, * 2 Low., 440.

§ 1375. Conditional payment.—An agreement to take notes as payment if they are or prove collectible implies an agreement to collect them so far as the same can be done by the use of ordinary diligence. *In re Ouimet*, 1 Saw., 47. See § 1333.

§ 1376. Where promissory notes are taken as conditional payment, *held*, that as between the holder and third parties the actual receipt of the contents of the notes relates back to the time of conditional payment and converts it into an absolute payment. *Ibid*.

§ 1377. Surety's note a payment.—The individual note of a surety was accepted in payment of the note on which he was contingently liable. *Held*, a satisfaction of the original contract within the requirements of section 19 of the bankrupt act. *In re Morrill*, 2 Saw., 836.

§ 1378. Adjustment of mutual debts.—B., a banker, held A.'s note for \$1,000, indorsed in blank by a third person. A. had a general deposit of \$772 in B.'s bank. B. being aware of A.'s bankruptcy, a short time before he was adjudged bankrupt, and upon the day when the note became due, requested A. to pay the amount of his deposit on the note, whereupon A. gave B. his check of \$772, which was credited on the note, and the balance, \$228, was paid a few days before A. was adjudicated bankrupt. *Held*, that the transaction with the \$772 was an adjustment of mutual debts. That the note was mature on the first day of grace; but that as to the \$228 the transaction was a payment, and as such a fraudulent preference. *Hough v. First Nat Bank*, 4 Biss., 349.

§ 1379. Payment by unaccepted draft; evidence.—In *assumpsit* for the balance of an account the defendant pleaded payment by a draft drawn upon him and offered the draft in evidence. The draft had never been accepted by the defendant. *Held*, that the *onus* was upon the defendant to prove payment; that the rule that a promissory note paid and taken up was evidence of payment did not apply, because, unlike a promissory note, the draft, not being accepted, was not a completed instrument, and its possession no evidence of payment. It did not bear upon its face any stamp or mark by the bank officers showing that it was paid, and the bank had no record on its books of having received the money upon it. *Hankin v. Squires*, * 5 Biss., 186.

§ 1380. Payments; value of.—When a payment is indorsed on a note in the same monetary terms that are used in the note itself, the presumption is that the payment was intended to be credited in the same scale of values. A contrary intention of the parties must be proved. *Stewart v. Salamon*, 4 Otto, 434.

§ 1381. Possession evidence of payment.—Possession of bills is evidence of having paid for them, although no receipt for the money has been indorsed upon them, and the bills were not indorsed in blank by the holders to whom the money was paid for them. *Palmer v. Blight*, * 2 Wash., 96.

§ 1382. Release of maker after assignment of note.—The assignment of a promissory note to a debtor of the maker, and a subsequent giving of a release to the maker, upon his surrendering his effects to a trustee for the benefit of his creditors, precludes the assignee from recovering upon the note, the maker not having had notice of the assignment until after the execution of the trust deed and release. *Gilston v. Adams*, 2 Cr. C. C., 440.

§ 1383. Payment by third person; right to security.—Promissory notes given for the payment of the purchase price, and secured by a trust deed of the property sold, were deposited in a bank for collection. The maker being unable to pay them when due, obtained a check from a third party for the amount of the notes, giving therefor his own note, and agreeing that the drawer of the check should hold the original notes and their security to secure him. The check was paid and the proceeds applied in payment of the notes. They were then taken out of the bank by the maker, and together with writings stipulating that they were secured by the deed of trust in the same manner as if the payees held them, were given to the drawer of the checks. All this was without the knowledge of the original payees. *Held*, that the notes not having been indorsed or assigned to a third party, but having been paid at maturity, ceased to be obligatory according to their tenor, and were no longer secured by the trust deed; and that the obligation of the maker of the notes to the drawer of the check arose upon the written stipulations as to the notes being secured by the deed of trust. *Dooley v. Fire & M. Ins. Co.*, 3 Hughes, 221. See, also, *Turnbull v. Thomas*, 1 Hughes, 172.

§ 1384. Payment by partner for copartner.—An agreement of one partner to pay a note against his copartner, by entering a credit on a note which he holds against the payee, and a charge is made on the books of the firm against the partner for whom payment is made, and he delivers to his partner other papers as payment, is a payment to the payee of the note, although a credit was not indorsed on the note to be credited, until after the lapse of some months. Should the payee be sued, after the agreement, on the note on which the credit was to be entered, he could set up the agreement in defense, and the agreement could also be set up in defense by the partner who owed the first note, although the note was assigned after due. *Gwathney v. M'Lane*, * 3 McL., 371.

§ 1385. *Of individual by firm note.*—Individual notes are extinguished by being taken up with notes of a firm, and a guaranty of the former will not continue as to the latter. *Russell v. Perkins*, 1 Mason, 368 (§§ 559, 560).

§ 1386. *Application of drawer's funds.*—Where at the maturity of a bill, indorsed by accommodation indorsers, the drawee has in his hands sufficient of the drawer's funds to enable him to pay it, he is bound to apply such funds for such purpose. He has no right to hold such funds to meet an unmatured bill of the drawer. *Brander v. Phillips*, 16 Pet., 121.

§ 1387. The fact that a man has on deposit in a bank that holds his demand note money enough to pay it, and that the bank does not apply this money to pay the note, although it might have done so, does not exonerate him from liability to pay it. *Third National Bank v. Harrison*, 3 McC., 316 (§§ 1814-18).

§ 1388. *Payment by directors of corporation to receiver thereof.*—In an action to subject directors of a bank to liability on its notes, a plea that it is in the hands of a receiver, before whom the notes have been proved as part of the indebtedness of the bank, but which does not aver payment by him of all or any part of the notes, is no defense. *White v. How*, 3 McL., 291.

§ 1389. *Voluntary payment of note.*—Where a note is lying in bank under protest, a person who pays the balance due on it cannot recover against an indorser, if the transaction was intended as a payment; otherwise if it was a sale or an assignment. *Patriotic Bank v. Wilson*, *4 Cr. C. C., 258.

§ 1390. *Bill returned by creditor.*—Where a bill of exchange was remitted to a creditor, who delayed presentment to the drawee, and notice of non-acceptance, and subsequently returned the bill before the insolvency of the drawer, and sued for his original debt, *held*, that he could not be defeated by a plea of payment. *Gallagher v. Roberts*, *2 Wash., 191.

§ 1391. The rule would be otherwise if the amount of the bill should be lost through the negligence of the creditor. *Ibid*.

§ 1392. *Payment of check is prima facie evidence that the bank has funds of the drawer.* *Bank of Alexandria v. McCrea*, 3 Cr. C. C., 649; *Bank of United States v. Washington*, 3 Cr. C. C., 295.

§ 1393. *Purchase of notes by trustee no payment of them.*—The City Mills became bankrupt with notes outstanding indorsed by the Eliot Mills. A project was started to enable W. to buy the City Mills by paying its debts. Money was raised for the purpose and placed in the hands of B., who bought two of the notes. Subsequently the project was abandoned, and B. sought to prove the notes against the estate of the Eliot Mills, indorsers, which had also become bankrupt. *Held*, that the purchase of the notes by B. was not a payment of them, neither B. nor his *cestui que trust*, W., being liable as principal or surety on such notes. *Ex parte Balch*, *2 Low., 440.

§ 1394. *Payment by holder of note as collateral.*—A promissory note given as collateral security for a note borrowed is not discharged by the borrower's paying the borrowed note with funds belonging to the lender. *Smith v. Johnson*, *2 Cr. C. C., 645.

§ 1395. *Certificate of deposit not a payment.*—A bank about to become insolvent procured a certificate of deposit of another bank for the amount due A., one of its depositors. It then informed A. that it had stopped payment, and asked where his funds should be deposited, and upon A.'s request placed the certificate of deposit in a certain bank. *Held*, that procuring the certificate was not a payment to A., and that his subsequent ratification did not relate back to the date of the certificate. *Strain v. Gourdin*, *11 N. B. R., 156. See §§ 37, 274, 337.

§ 1396. *Notes for charter money.*—The charterers of a vessel gave notes for a portion of the charter money. *Held*, there being no agreement to receive the notes as a payment, that they did not discharge the debt, but only extended the time for paying it until their maturity. *The Kimball*, 3 Wall., 37.

§ 1397. *Act of bankruptcy.*—Non-payment of a note fourteen days after maturity is an act of bankruptcy. *In re Curtis*, 3 Biss., 195.

§ 1398. *Settlement.*—The holder of a bill before dishonor is not affected by a settlement between drawer and payee. *Cox v. Simms*, *1 Cr. C. C., 238.

§ 1399. *Payment in notes of bank.*—Certain promissory notes secured by mortgage were assigned to a bank, which subsequently assigned both notes and security to a trustee for the benefit of its creditors. *Held*, that the trustee was not bound to receive the notes of the bank in payment of the paper held. *Dundas v. Bowler*, 3 McL., 397.

§ 1400. *Discharge under foreign insolvent law.*—A bill drawn in Pennsylvania by a citizen of that state upon a citizen of Massachusetts, and by him accepted there, cannot be discharged by a Massachusetts insolvent statute. State insolvent laws cannot affect rights of citizens of different states and contracts made between them. *Springer v. Foster*, 2 Story, 383; *Kimball v. Badger*, 1 McAl., 523.

§ 1401. *Presumption of payment from lapse of time.*—While payment of a bill of exchange will be presumed after the lapse of a long time, the presumption is not conclusive; it may be rebutted by facts, as where during a portion of the time war existed between the countries in which the holder and the maker respectively resided, and the maker was embarrassed and the accounts of his representatives did not show that payment ever was made. *Hopkirk v. Page*, 2 Marsh., 20 (§§ 1018-26).

§ 1402. *Payment by drawee supra protest.*—Drawees of a bill who refuse to honor it, although obligated to accept and pay it as drawees, cannot change their relation of drawees by paying the bill through an agent, *supra protest*. *Schimmelpennich v. Bayard*, 1 Pet., 264 (§§ 135-138).

3. Former Recovery.

SUMMARY—*Several suit no bar to joint suit*, § 1403.—*Judgment in favor of an indorsee with notice*, § 1404.—*Judgment an estoppel, when*, § 1405.

§ 1403. A several suit and judgment against one of two joint makers of a note is no bar to a joint action on the same note against both makers. *Sheehy v. Mandeville*, §§ 1406, 1407.

§ 1404. Plaintiffs filed a creditor's bill against the maker and payees of a note and thereby obtained a lien upon the note or the money secured by it. Subsequently the note was negotiated to Maynard, who took it with notice, brought suit upon it against the maker, and recovered a judgment against him, which he satisfied. This was in a state court. *Held*, that such judgment and satisfaction was no bar to an action on the note by the plaintiffs against the maker, he having, through the creditor's bill, notice of their rights when he paid the judgment recovered by Maynard. *Pratt v. Burr*, §§ 1408, 1409.

§ 1405. A indorsed a series of notes, agreeing at the same time in writing with B., the indorsee, that he should not be held liable as indorser, notwithstanding the indorsement. In a suit by B. against A. upon two of the notes, A. did not set up this agreement in defense, although he might have done so, but relied upon a defense that his liability as an indorser had not been fixed by due prosecution of the makers of the notes, as required by the laws of Illinois. Judgment was rendered against A. on these two notes. In a subsequent action by B. against A. upon other notes of the same series, *held*, that A. was not estopped by the judgment in the first action from pleading in the second action the agreement to release from liability as indorser, the notes being different in the two actions. When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. *Davis v. Brown*, §§ 1410-1415.

[NOTES.—See §§ 1416-1425.]

SHEEHY v. MANDEVILLE.

(6 Cranch, 253-267. 1810.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The plaintiff sold certain goods to Robert B. Jamesson, a merchant of Alexandria, and took his note for the amount, which he put in suit and prosecuted to a judgment. Afterwards, supposing the other defendant, Mandeville, to be a secret partner, he instituted a suit against Mandeville and Jamesson. The declaration contains three counts. The first is on the note, and charges it to have been made by the defendants under the name, firm and style of Robert B. Jamesson. The second and third counts are for goods, wares and merchandise sold and delivered to the defendants, trading under the firm of Robert B. Jamesson.

The defendant Mandeville pleads two pleas in bar. The first goes to the whole declaration and the second applies only to the first count. The first commences with the protestation that the goods, etc., in the declaration mentioned were not sold to the defendants jointly, and then pleads in bar the promissory

note which is averred to have been given and received for and in discharge of an account for sundry goods, wares and merchandise sold and delivered to the said Jamesson, and that the goods in the declaration mentioned are the same which were sold and delivered to the said Jamesson, and for which the said note was given. The plea also avers that a suit was instituted and judgment obtained on the note, and concludes in bar. The second plea pleads the judgment in bar of the action.

To the first plea the plaintiff demurs specially, and assigns for cause of demurrer: 1. That the defendant does not traverse the *assumpsit* laid in the declaration. 2. That he does not expressly confess or deny that the goods, etc., were sold and delivered to the defendants, trading under the firm of R. B. Jamesson, or that the note was given by the said firm. 3. Because an unsatisfied judgment against Jamesson is no bar to an action against Mandeville. 4. It is not averred that the judgment has been satisfied. 5. The defendant does not deny or admit that he assumed to pay for the goods, etc., in the declaration mentioned. 6. Because the plea is no answer to the declaration, or any count thereof, and is informal.

The defendant joins in demurrer. To the second plea the plaintiff also demurs specially, and assigns for cause of demurrer the same, in substance, which had been assigned to the first plea, and the defendant joins in the demurrer to this plea likewise. The other defendant, Jamesson, has put in no plea, nor are there any proceedings against him subsequent to the declaration. Although the first plea is not expressly limited to the second and third counts, yet it would seem from its terms to be intended to apply to them alone. It sets up a bar to an action on an *assumpsit* for goods, wares, and merchandise, sold and delivered, and no such *assumpsit* is laid in the first count. If, however, it be considered as pleaded to the first count, it is clearly ill on demurrer. For it does not deny or avoid the joint *assumpsit* laid in that count. It remains to inquire whether this plea contains a sufficient bar to the second and third counts.

§ 1406. *Open account merged in note taken in payment thereof.*

The plea is, that the note was given and received for, and in discharge of, an account or bill for goods, wares, and merchandise, sold and delivered by the plaintiff to Robert B. Jamesson, which are the same goods, etc., that are mentioned in the plaintiff's declaration. That a note, without a special contract, would not of itself discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm. Since then the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods. The special causes of demurrer which are assigned do not in any manner affect the case. Whether the promise was made by Mandeville, or not, ceases to be material if a note has been received in discharge of that promise, and the payment of the note need not be averred, since its non-payment cannot revive the extinguished *assumpsit*.

§ 1407. *Judgment against one joint maker no bar to a suit against all the joint makers.*

The next subject of consideration is the second plea, which applies singly to the first count. That count is on a note charged to have been made by Mandeville and Jamesson, trading under the firm of Robert B. Jamesson. This, not being denied, must be taken as true. The plea is, that a judgment was rendered on this note against Robert B. Jamesson. Were it admitted that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could be originally maintained against him, is the note, as to him, also merged in the judgment? Had the action, in which judgment was obtained against Jamesson, been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract. In point of real justice there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville; and it appears to the court that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of Jamesson individually. It is not necessary to decide whether this action could have been maintained against Mandeville singly with an averment that the note was made by Mandeville and Jamesson. The declaration being against both partners, that question does not arise. The declaration is clearly good in itself, and the plaintiff may recover under it, unless he be barred by a sufficient plea. Admitting, for the present, that a previous judgment against Jamesson would be a sufficient bar, as to him, had Jamesson and Mandeville joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of that bar could be extended to Mandeville. But they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against Jamesson, on his individual *assumpsit*, the court is not of opinion that Mandeville has so pleaded this matter as to bar the action. In this plea it was necessary to negative the averment of the declaration, that the note was made by Mandeville as well as Jamesson, or to show that the judgment was satisfied. The defendant has not done so. He has only stated affirmatively new matter in bar of the action, which new matter, as stated, does not furnish a sufficient bar. It is not certain that this plea would have been good on a general demurrer, but on a special demurrer it is clearly ill. The judgment, therefore, is to be reversed, and as no other plea is pleaded, judgment must be rendered on the first count, in favor of the plaintiff.

PRATT v. BURR.

(Circuit Court for Wisconsin: 5 Bissell, 50-55. 1857.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—The bill in this case was filed on the 7th of August, 1856. A subpoena was issued and an injunction was allowed. William D. Mead acknowledged in his answer that he gave promissory notes to Burr & Craig, in part for the consideration of their store goods sold him. Two of these notes passed from Burr & Craig to R. H. Maynard, and to which he, Maynard, under the circumstances, did not acquire title in the usual course of commercial business, and he was not a *bona fide* holder as settled in this court. These complainants had an equitable lien on the notes or the money secured by them in the hands of Mead by virtue of this creditor's bill. The only question submitted is, "Is Mead relieved of liability to these complainants by reason of the judgment against him in Rock county circuit court in favor of Maynard on the note, and by his subsequent payment of that judgment?"

§ 1408. *Payee who with notice pays a note, or a judgment thereon, to one not a bona fide holder, may be compelled to pay it a second time to the real owner.*

By inspection of the record it appears that Maynard commenced suit on the note against Mead by serving a declaration on the 14th of January, 1857, with a rule to plead. Afterwards Mead filed a plea of the general issue with notice of the issuing and service of the injunction in this case; and that it was known to Maynard when he purchased or received the note of Burr & Craig. On the 2d of July, 1857, the parties appeared in court by their counsel, and the cause came on to be tried before the court, the jury being waived, and the finding of the court and judgment were for the plaintiff for the amount of the note and interest. And on the 15th day of October, 1857, at Erie county, in the state of New York, the plaintiff executed a satisfaction piece of the judgment. It was stated at the argument that Mead's counsel several times spoke to complainants' counsel on the subject of that suit, and what was best to be done, and complainants' counsel concluded not to interfere in the suit. These complainants were not placed under any obligation to defend that suit either by a notice from Mead or by a bill of interpleader. They had no notice of the trial; nor are we informed by testimony what evidence was offered, admitted or rejected at the trial. If notice had been served on the complainants of the pendency of the suit, requiring them to appear and make defense, possibly they would be bound by that finding and judgment. In August last, that court decided that the two notes (of which the note in this suit is one) were transferred by Burr & Craig in fraud of these complainants and in contempt of this court, and that Maynard was not entitled to the money as a *bona fide* holder without notice. The first note was sued in this court, on which judgment was rendered against Mead, who paid the amount into court for distribution; the day after Maynard brought suit on the second note in the circuit court of Rock county. These plaintiffs were not parties to that suit in Rock county, and it is not in any way binding on them. So far as they have a lien on the money, and have a right to demand it in equity, they are not concluded. Judgments are only conclusive between parties and privies. At the trial of that case, these complainants had no notice nor opportunity to put in proof to show that Maynard was not a *bona fide* holder of the note. The trial was exclusively between Maynard and Mead. Maynard had a legal right to bring his suit against Mead in the state court, and to have it tried there; but Mead owed a duty to himself before that trial and plea filed,

to notify these complainants of the suit and to require them to make defense in his name and to furnish the evidence to defeat Maynard's recovery. Mead should have served the notice on these complainants or their attorneys and placed it on the files of that case before filing plea. Nothing short of this can conclude these complainants. They were not bound to appear, nor could they appear or interfere with the suit without Mead's consent or requirement.

This suit in equity was pending against Mead a considerable time before the suit in Rock county. This suit prevented Mead from paying the amount of the note until it was ascertained whether it was negotiated and in the hands of a *bona fide* holder. The answer of Mead that he gave the notes, but does not know whether they were negotiated or not, raised the question. If Mead had paid into this court the amount of the notes, Maynard might have appeared here and claimed this money, when his claim would have been disposed of by the court on evidence submitted, or upon an issue tried by a jury. Instead of doing that, Maynard took his suit out of this jurisdiction, where the question was pending, into another jurisdiction, where he and Mead had the matter tried in their own way without legal notice to these complainants. This creditors' bill is an attachment in equity of the money in the hands of Mead owing by him on a negotiable promissory note. An attachment is unavailable against a *bona fide* holder for value, of negotiable paper, who obtains it after attachment, before maturity, and without notice. *Keeffer v. Ebler*, 6 Harris (Penn.), 388, and cases cited. The only question, as I remarked before, to be tried here was, whether Maynard was a *bona fide* holder of the note.

§ 1409. *Priority of attachment; conflict of jurisdiction.*

In *Kennedy v. Brent*, 6 Cranch, 187, the service of a subpoena in chancery, in a case of chancery attachment, will make the garnishee liable if he pays the money after the notice of the subpoena. Such is the case in every attachment. An attachment in a state court, commenced after the institution of an action to recover a debt in a court of the United States, cannot be pleaded as a defense to the latter, either in whole or in part. *Wallace v. McConnell*, 13 Pet., 136, 151 (§§ 1539-43, *infra*). This decision is upon the reverse order to the state of the case here. The attachment here was the first. In the opinion in that case it is remarked: "The jurisdiction of the district court, . . . and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question;" and if such could be pleaded in bar, "the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt in such case in the hands of the defendant would fix it there in favor of the attaching creditor, and the defendant could not afterward pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt binding upon the defendant, which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; . . . the maxim *qui prior est tempore, potior est jure* must govern the case. This is the doctrine of this court in the case of *Renner v. Marshall*, 1 Wheat., 216, and also

in the case of *Beaston v. Farmers' Bank of Maryland*, 12 Pet., 102." In *Hacker v. Stevens*, 4 McL., 535, the money owing on a note was attached in the hands of the debtor. The note was indorsed or assigned, and the assignee brought suit against the maker, who pleaded in abatement the attachment, which plea was sustained, although the two suits were not in the name of the same parties. In that case the note was transferred to one of the firm to whom the note was payable. In this case the note was transferred to a brother-in-law of one of the payees, under very suspicious circumstances. There is no doubt but Raymond knew of the pendency of this suit in this court before he commenced his suit in the state court. He should have come here, and through Mead, as a defendant, have had his right to the money tried. From the situation of that case in the state court, as placed by Raymond and Mead by their pleadings, the court might have continued the trial, if asked by Mead, until a reasonable time for the trial of this case. This court would, in the exercise of its discretion, have done so, under like circumstances, but there is nothing in the record showing that such application was made, or that a plea in abatement was filed.

The satisfaction piece attached to the record of the judgment in Rock county is no evidence of payment, except as between the parties to the judgment. It satisfies the judgment, but it is not evidence affecting these complainants of the absolute *bona fide* payment of money. It is nothing more than a mere declaration of a party not under oath, as to the rights of these complainants. But from the view taken of this case, it makes no difference whether the judgment has been satisfied or not. Mead should have taken some of the means here pointed out to prevent the judgment being rendered against him in the circuit court of Rock county. The proof clearly showing that Maynard was not a *bona fide* holder of the note, and that the title still remains in Burr & Craig, reference will be made to a master to ascertain the amount due.

DAVIS v. BROWN.

(4 Otto, 423-429. 1876.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This was an action against the defendants as second indorsers upon ten promissory notes of one McOmber, made at Saratoga Springs, in the state of New York, in June, 1870, each for \$500, and payable to his order in from thirty-two to forty-one months after date. The defense set up to defeat the action was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were indorsed by the defendants as a mere matter of form, upon an agreement in writing of the bank that they should not be held liable on their indorsements, or be sued thereon. On the trial, Harvey Brown, one of the defendants, was called as a witness to prove the matters thus set up as a defense, and was permitted, against the objection of the plaintiff, to testify to the settlement of the note of the defendants, the transfer for that purpose to the Ocean National Bank of the McOmber notes, and their indorsement by the defendants under the agreement of the bank not to hold them liable as indorsers; and that this agreement was in writing, and was destroyed in the great fire at Chicago, in October, 1871. To meet and repel the defense founded upon this agreement, the plaintiff

produced and gave in evidence a record of a judgment, recovered by him against the same defendants upon two other notes of the same party, of like amount and date as those in suit, except that they became due at an earlier day, which were part of the series of notes transferred by the defendants to the bank, and indorsed by them, in settlement of their own note, as already mentioned, and were included in the agreement as part of the same transaction.

The questions presented for our determination relate to the competency of the witness Brown, and the admissibility of the evidence of the alleged agreement of the bank, and to the operation of the judgment mentioned as an estoppel against the defendants setting up any defense founded upon the agreement.

§ 1410. *Indorsee bound by agreement that indorser shall not be held liable as such; and indorser competent to prove it.*

The objection to the witness arose from his being a party to the notes, and as such it is contended that he was incompetent to impeach or discredit the same, or to show that his liability was not such as his indorsement imported. The case of *The Bank of United States v. Dunn*, reported in the 6th of Peters, is cited in support of this position. There the indorser of a note had been permitted by the court below to testify, against the objection of the plaintiff in the action, to a verbal understanding with the cashier and president of the bank which took the note that he was not to incur any responsibility, or at least would not be held liable on the note until the security pledged for its payment had been exhausted. The admission of the witness this court considered erroneous, holding that no one who was a party to a negotiable note could be permitted by his own testimony to invalidate it, which, in that case, meant that no one could be permitted to show that a note indorsed by him was void in its inception, or that his indorsement did not impose the liability which the law attached to it. The opinion which announces the decision proceeds upon two grounds: 1st. That the evidence would contradict the terms of the instrument or change their legal import; and 2d, that it would be against public policy, as tending to destroy the credit of commercial paper, to allow one who had given it the sanction of his name, and thus added value and currency to the instrument, to testify that it was executed or indorsed by him under such circumstances as to impair his obligation upon it. This last position was supported by reference to the celebrated case of *Walton v. Shelley*, 1 Term R., 296, decided in 1786, where the indorser of a promissory note was held by the king's bench to be inadmissible as a witness, on grounds of public policy, to prove the note void for usury in its inception; Lord Mansfield observing that it was "of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper and then afterwards giving testimony to invalidate it." Aside from the assumed estoppel of the parties from their position on the paper, the maxim of the Roman law, that no one alleging his own turpitude shall be heard (*nemo allegans suam turpitudinem est audiendus*), was cited to justify the decision. That maxim was plainly misapplied here by the great chief justice; for it is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is, that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character.

The doctrine of *Walton v. Shelley* maintained its position in the courts of England only for a few years. In 1798 it was by the same court overruled in the case of *Jordaine v. Lashbrook*, 7 id., 601, Lord Kenyon having succeeded Mansfield as chief justice. Since then the rule has prevailed in the courts of that country, that a party to any instrument, whether negotiable or not, if otherwise qualified, is competent to prove any fact affecting its validity; the objection to the witness, from his connection with the making or circulation of the instrument, only going to his credibility, and not to his competency. In this country there has been much diversity of opinion upon the point, some of the state courts following the rule of *Walton v. Shelley*, while others have adopted the later English rule. The general tendency of decisions here is to disregard all objections to the competency of witnesses, and to allow their position and character to affect only their credibility. This diversity of opinion could not have existed unless there were grave reasons for doubting the soundness of the original decision. Be that as it may, it has led those courts which, on considerations of commercial policy, adopted the rule of *Walton v. Shelley* to qualify the rule, so as to limit its application strictly to cases arising on negotiable bills and notes, and to cases where the transaction affecting the validity of the paper was not between the parties in suit. The holders of commercial paper who enter into agreements or transactions with the makers or indorsers, affecting its validity or negotiability, cannot invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts. Thus, in *Fox v. Whitney*, 16 Mass., 118, the supreme court of Massachusetts, which had previously recognized the rule in *Walton v. Shelley*, held that the rule applied only to a case where a man, by putting his name to a negotiable security, had given currency and credit to it, and did not apply to a case between original parties, where the paper had not been put into circulation, and each of the parties was cognizant of all the facts. This decision meets our concurrence, and, if it qualifies the decision in the case of *Bank v. Dunn*, we think the qualification a just and proper one.

§ 1411. *A receiver of a bank has no greater rights to enforce its contracts than the bank has.*

These considerations dispose of the objection to the competency of the witness Brown. The notes of McOmber were never put into circulation by the Ocean National Bank. No one, therefore, has been misled by the indorsement of the defendants; no false colors have been held out by them. No credit or currency has been given by their name. The receiver has, with reference to the notes, no greater right than the bank has: he stands in its shoes. If the bank could not have enforced a liability upon the defendants against its agreement that they should not be held liable, the receiver cannot enforce it. The agreement itself is not immoral nor illegal. The defendants by their act ran the risk of being charged upon the notes; they would have been liable had the notes been put into circulation. But beyond this risk they were protected by the agreement; upon that they could rely, so long as the bank held the notes.

§ 1412. *Effect of written agreement to release indorser.*

The objection that the agreement was inadmissible because it tended to vary and destroy the legal effect of the indorsement is not tenable. The agreement being in writing, is to be taken and considered in connection with the indorsement, and the two are to be construed together. So far as the bank was con-

cerned, the agreement made the indorsement equivalent to one without recourse to the indorsers.

§ 1413. *Agreement to release from liability on several notes not pleaded in one action, estoppel to plead it subsequently.*

The next question for determination relates to the operation of the judgment recovered by the plaintiff against the defendants, as an estoppel against their setting up the defense founded upon the agreement. The action in which that judgment was recovered was brought in the same court as the present action, against the defendants as second indorsers upon two notes, which were part of the series of McOmber notes, transferred to the bank of the defendants in settlement of their own note; and their indorsement was embraced in its agreement. The defendants pleaded the general issue; but the court finds that, by the advice of counsel learned in the law, they defended the action in good faith solely upon the ground that their liability had not been fixed as indorsers by due prosecution of the makers of the notes, as required by the laws of Illinois; and that this defense was not sustained, for the reason that it appeared that the makers of the notes resided in the state of New York, and that the indorsement was made there. The agreement of the bank not to hold them liable as indorsers was not pleaded nor relied upon; yet it is contended by counsel, that, inasmuch as it might have been thus pleaded and relied upon, therefore the judgment is an estoppel against the setting up of that agreement as a defense in a subsequent action between the same parties upon other notes, equally as if its validity and efficacy had been litigated and determined. In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position.

§ 1414. *Judgment operates as an estoppel, when.*

When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. We have recently had occasion, in the case of *Cromwell v. County of Sac*, 4 Otto, 351, to go over this ground and point out the distinction mentioned; and it is unnecessary to repeat what we there said. See *Bigelow on Estoppel*, note to the case of the *Duchess of Kingston*, in *Smith's Lead. Cas.*, and *Robinson's Practice*, vol. VII. The position of counsel is clearly untenable.

§ 1415. *Findings of fact not reviewable.*

As to the objection of want of authority in the president of the bank to make the agreement with the defendants, the finding of the court is conclusive. His authority was a fact to be determined by the court under the stipulation waiving a jury, and we do not sit in review of questions of fact.

Judgment affirmed.

MR. JUSTICE CLIFFORD dissented.

§ 1416. *Merger in judgment.*—A note is merged in a judgment obtained upon it. *Eldred v. Bank*, 17 Wall., 545.

§ 1417. *Pleading judgment in bar.*—Judgment on a note may be pleaded in bar of an action upon the note. *Ibid.*

§ 1418. *Former judgment; general issue; proof under.*—If a note in suit is merged in a judgment, an exemplification of the record thereof is admissible under the general issue. *Mason v. Eldred*, 6 Wall., 231.

§ 1419. *Judgment against partner; merger as to other partner.*—If a person who advances money upon a note, signed by one partner, not knowing that it was for the benefit of the firm, obtain judgment against the party who signed, his right of action upon the original consideration of the note is merged in such judgment, and he cannot maintain an action against the other partner. *In re Herrick*,* 18 N. B. R., 312.

§ 1420. *Judgment against one partner is a bar to a subsequent action against one or all the others.* *Woodworth v. Spofford*, 2 McL., 168.

§ 1421. *Onus; evidence.*—In an action on a bill of exchange wherein a former recovery thereon was claimed, a declaration in a former case describing precisely the bill in suit is sufficient evidence to throw the burden on the plaintiff of proving the bill in the second suit to be different from that in the first. *Lonsdale v. Brown*,* 4 Wash., 86.

§ 1422. *Where a purchaser of goods indorsed a note of a third party to the vendor as a conditional payment, held, that an action against the defendant as indorser, and an action against him for goods sold, are distinct causes of action, and that one cannot be pleaded in bar of the other.* *Clark v. Young*, 1 Cr., 181.

§ 1423. *Judgment against drawer; indorser.*—A judgment against the drawer, and a levy on goods which are not sold for want of buyers, does not discharge the indorser. *Hodgson v. Turner*,* 1 Cr. C. C., 74.

§ 1424. *Judgment against indorser; maker.*—In a suit in a state court against an indorser, it was held that under the decisions of the state courts the plaintiff could not recover. *Held*, that such judgment was not a bar to a subsequent suit against the maker. *National Bank of the Republic v. The Brooklyn, etc., R. Co.*,* 14 Blatch., 242.

§ 1425. *Action on note bars suit for the original cause of action.*—An action on a note by a bank in the name of the payee, but for its benefit, against the makers, is a bar to an action against the makers on the original cause of action—e. g., money lent. *York Bank v. Asbury*, 1 Biss., 230 (§§ 1492-96).

4. *Failure of Consideration.*

SUMMARY—*Defense against assignee*, § 1426.—*Partial failure*, §§ 1426, 1427.—*Accommodation maker*, § 1428.—*Bona fide purchaser*, § 1429.

§ 1426. In Alabama the obligor in a promissory note may show failure of consideration, partial or total, in bar of a suit on the note by an assignee. *Withers v. Greene*, §§ 1480-1484.

§ 1427. A note for the purchase price of six hundred barrels of fish was sued upon, and a partial failure of consideration, in that the fish were badly cured, was set up in defense. *Held*, that such a partial failure of consideration, the extent of which was uncertain, could not be set up in defense to an action at law upon the note, although it might be if the extent of the failure was agreed upon by the parties, or if it was a total failure of consideration. *Elminger v. Drew*, §§ 1435-1438.

§ 1428. It is no defense to an action by a *bona fide* holder against an accommodation maker to say that there was no consideration for making the notes. *Bank of British North America v. Ellis*, §§ 1439-1443. See §§ 5, 278, 364, 498, 626, 701, 1216.

§ 1429. Failure of the consideration—e. g., failure to build a railroad as agreed—is no defense to an action on a note by a *bona fide* purchaser. *Ibid.* See §§ 1, 7, 40, 117, 212, 220, 306, 328.

[NOTES.—See §§ 1444-1464.]

WITHERS v. GREENE.

(9 Howard, 213-235. 1849.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This cause, from the district court of the United States for the middle district of Alabama, is brought here under the act of congress of 8th August, 1846, c. 104 (9 Stats. at Large, 78).

The plaintiff in error was sued in the court below upon a single bill for the sum of \$3,000, executed by him on the 16th of February, 1839, payable on the 1st of January ensuing, to A. B. Newsom or order, and which was assigned by Newsom to May, the testator of the defendant. What were the grounds of defense first assumed by the defendant does not appear, and it is immaterial now to inquire. The pleas first filed were by consent of parties withdrawn, and by leave of court the defendant filed a special plea, averring that the note sued on was given by him for a part of the price of two fillies purchased by him of Newsom for \$4,000; that Newsom falsely and fraudulently represented to the defendant that these fillies were reared by himself; that they were sound and of a high pedigree (as is set forth in the plea); that the defendant desiring to possess these fillies for their blood and for the turf, and induced and deceived by the false representations of Newsom, paid him the sum of \$1,000 in cash, and executed the note in question for the residue of the purchase money; that the representations of Newsom as to the fillies having been reared by him, of their soundness, and of their pedigree, were all untrue, and all known to be untrue by Newsom at the time of the sale; that the defendant did not ascertain either the extent of the unsoundness of these fillies, or the falsehood of the pretended pedigree, until during the autumn and winter of the year 1839; that the said Newsom, at the time of the sale, resided, and has continued to reside, in a different state, and more than three hundred miles from the defendant; that from the time of discovery by the defendant of the unsoundness of the fillies and of the falsehood of their pedigree, up to the time of their death, which happened without any fault of the defendant or his servants, in the spring of 1840, he, the defendant, was willing and ready, and desirous of returning the fillies to the said Newsom, but never had an opportunity of so doing. The plea concludes with stating that the note or writing obligatory was obtained from him by Newsom by his false and fraudulent representations, and is therefore void; and with a prayer whether defendant should be charged with the debt. To this plea there was a demurrer by the plaintiff below, and the judgment of the court below sustaining the demurrer, brought hither by writ of error, this court is called on to examine. Although the legal principles and inquiries involved in this cause are to a great extent local in their character and operation, it will be found to embrace rules, both with respect to pleading and to the interpretation of contracts, extending in some respects beyond the influence of merely local jurisprudence. The contract in question having been made within the state of Alabama, and designed to be performed within that state, the *lex loci contractus* must justly be understood as entering into and controlling the effect of its stipulations, and having been sued upon within the same state, the *lex fori* must, in a great degree, regulate the mode of its enforcement.

§ 1430. *By statute in Alabama an instrument under seal may be impeached at law for failure of consideration, either partial or total, either in the hands of an obligee or an assignee.*

By a statute of Alabama (Aikin's Dig., p. 283, § 138), it is enacted "that, whensoever any suit is depending in any of the courts, founded on any writing under the seal of the person to be charged therewith, it shall be lawful for the defendant or defendants therein, by a special plea, to impeach or go into the consideration of such bond, in the same manner as if the said writing had not been sealed." By another statutory provision of the same state, it is declared (see Aikin's Dig., p. 328, § 6) "that all bonds, obligations, bills single, promissory

notes, and other writings, for the payment of money or any other thing, may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee or not; and the assignee may sue in his own name, and maintain any action which the obligee or payee might have maintained thereon previous to assignment, and in all actions to be commenced and sued upon any such assigned bond, obligation, bill single, promissory note, or other writing aforesaid, the defendant shall be allowed the benefit of all payments, discounts and set-offs, made, had, or possessed against the same, previous to notice of the assignment, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein." By the enactment herein first cited, it is obvious that specialties are divested of any force or solemnity at any time ascribed to them by reason of their having a seal annexed, and are placed, with respect to all inquiries which may be instituted into the validity of their consideration, precisely upon the footing of parol agreements. With respect to the construction of the second provision, section 6, of the statute above cited, the question has been suggested, whether the right conferred by the first enactment, to inquire into the consideration of contracts in contests between the original parties, is extended, by the correct meaning of the statute, to the defense allowed to obligors at the suit of assignees, or whether obligors in assigned bonds, notes, etc., are not restricted in their defense to transactions posterior in date to the writing itself, and forming no necessary part of the original consideration, the language of the statute, as already quoted, being this: "Shall be allowed the benefit of all payments, discounts and set-offs, made, had, or possessed against the same," i. e., against the bonds, "previous to notice of assignment, in the same manner as if the same had been sued and prosecuted by the obligee therein."

§ 1431. *In Alabama the obligor in a promissory note may show a failure of consideration, partial or total, in bar of a suit on the note by an assignee.*

In construing these provisions of the Alabama statute as being *in pari materia*, we cannot regard them as changing the rights of the parties arising out of the contract itself, nor as conferring new rights on others not inherent in such original obligations, but we regard them rather as securing those rights, except so far as they may have been legally and justly transferred. There could be no doubt of the right to impeach the consideration, or the right to claim the benefit of payments, set-offs, or discounts, on the part of the obligor as against his obligee. The statute was not designed to take from the obligor any of these rights, but merely to deny to him the claim to discharge his obligation by payments, etc., to the original obligee, after he knew the obligation to have been transferred to another. Neither did the statute create in the assignee any new right varying the character of the contract itself. It conferred on him merely the rights to take by assignment, and to sue in his own name,—in effect, the power to acquire, in the mode prescribed, an equitable title, and to prosecute that title in a court of law. Contracts at common law, to which this simple power of assignment is extended by statute, differ essentially from those which arise out of and are governed by the law merchant, or from such as are placed on the footing of the law merchant by express legislative enactment. We conclude, then, that, in a case like the present, the obligor would have the right to impeach the consideration for which the writing was given, or to show its discharge by payments or set-offs made or existing at any time before notice of assignment, or by discounts to prove either a

total or partial failure of the consideration for which the writing was executed, accordingly as the truth of the case would warrant either defense. This interpretation of the law we consider as accordant, not only with the language and the rational meaning of the statute, but as sustained by the decisions of the courts in the state whose peculiar policy we are discussing, and by decisions in other states upon statutes containing provisions similar to those in the statute of Alabama. Recurring to the latter statute itself, its terms declare that whensoever, that is, in every case, in which suits shall be instituted founded on any writing under seal, the person to be charged therewith, comprehending any and every person, whether he sustains a relation to an assignee or to any other person, may impeach the consideration of the bond or other writing (Aikin's Dig., p. 233, § 138), and then proceed with respect to the rights and powers of the assignee to provide that he may sue in his own name, and may maintain any action which the obligee or payee might have maintained thereon, previous to assignment (Aikin's Dig., p. 328, § 6); he has the same rights and remedies which pertained to the obligee or payee, and none other.

And first, with respect to the defense as against the assignee, founded on the total failure of consideration, it has been ruled under the statute of Alabama, in the case of *Clements v. Loggins*, 2 Ala., 514, that, when the payee of a note is inquired of by one wishing to purchase it, whether he has any defense against it, and answers that he has none, he does not thereby preclude himself from making any defense against the note growing out of the original transaction, of which he had no knowledge at the time. And it will be found that the example put by the court in this case (see p. 519) is one of total failure of consideration. Yet this defense could never be permitted if it is to be sought for within a narrow interpretation of the words payments, set-offs and discounts,—such a one as would not embrace the true character of the transaction. Again, in the case of *Wilson v. Jordan*, in 3 Stew. & P., it is said by the court on p. 98: "The decisions of this court have gone far to abolish the distinction with us between the effect of a partial and total failure of consideration;" and again, the court uses this language: "Nor do we feel the least dissatisfaction with our former decisions, so far as they tend to place partial and total failure of consideration on the same footing, instead of driving the parties to circuitry of action." The doctrines ruled by the supreme court of Alabama are closely coincident with those of the courts of other states, in the construction of statutes similar to that of the former state. Thus, in the case of *Clements v. Loggins*, 2 Ala., 514, as late as 1841, the court, by way of illustration, refer to the cases of *Buckner v. Stubblefield*, 1 Wash., 296, and of *Hoomes v. Smock*, id., 390, decided by the court of appeals upon the Virginia statute, a law more restrictive in its terms than is the Alabama statute, as the former speaks only of just discounts against the obligee, being silent as to payment and set-off (see 3 Stats. at Large, 379; 4 id., 275; 6 id., 87; 12 id., 358, and acts of 1795, and of January, 1820), and both the cases thus referred to are instances of entire want of consideration, the writings assigned having been void *ab initio*.

It seems proper in this place to advert to an opinion of the supreme court of Virginia, in one of the earlier cases before them under the statute, with respect to any change which that statute might have been supposed to produce in the relative situations of parties to contracts made assignable thereby. In the case of *Norton v. Rose*, in 1796, reported in 2 Wash., the law, on page 248, is thus expounded by Roane, justice, with the concurrence of the whole court: "It was

not intended to abridge the rights of the obligor, or to enlarge those of the assignee beyond that of suing in his own name; and since it is clear that, prior to this law, an original equity attached to the bond followed it into the hands of the assignee, this law does not expressly nor by implication destroy that principle." The same doctrine was ruled in Pennsylvania, as early as the year 1776, in the case of *Wheeler v. Hughes*, reported in 1 Dal., 27. In Pennsylvania, bonds, bills and promissory notes were by act of assembly made assignable, as promissory notes in England under the 3d and 4th of Anne, but as the statute of Pennsylvania omitted to declare that those writings "should be placed upon the footing of bills of exchange," it was therefore decided that the assignee of such writing stood in the same place as his obligee or payee, so as to let in every defalcation which the obligor had against him before notice of the assignment, and that the only intent of the act of assembly was to enable the assignee to sue in his own name, and to prevent the obligee from releasing after notice of assignment. This doctrine has been frequently reaffirmed in the same state, as will be seen in 2 Dal., 45; 6 Serg. & R., 175, and 16 id., 20.

Turning next to a class of cases founded on what has been denominated the partial failure of consideration, although involving bad faith, breach of warranty, false and deceitful warranties, false representations in the procuring of contracts, such as might in particular aspects extend to the entire rescission of contracts, it will be seen that the supreme court of Alabama have, in the construction of their statute, ruled that a defense founded on either or on all of the facts here enumerated shall be admissible in diminution of damages. And in allowing this mode of defense, which seems to fall more strictly within the import of the terms set-offs and discounts than objections aimed at the total abrogation of contracts can do, the courts of Alabama have acted in accordance with those of other states in construing statutes similar to their own, consistently, too, with the principles of reason and justice adopted by modern tribunals when acting apart from statutory provisions. The case of *Morehead v. Gayle*, reported in 2 Stew. & P., 224, was an action by the assignee against the maker of a promissory note, given for the price of a slave warranted sound. The defense set up was the unsoundness of the slave at the time of the contract, as evinced by his early death and by other circumstances. The court in this case say that if it had been necessary to offer to return the slave to permit this defense, yet by the early and sudden death of the slave the vendee would, under the circumstances, have been excused from making the offer; and in considering the right of the vendee to avail himself of the defense, either of a total or partial failure of consideration, the court are led to compare the principle enunciated in the case of *Thornton v. Wynn*, in 12 Wheat., 183 (§§ 1034-37, *supra*), with the doctrine as laid down in the state of Alabama under her laws, and with respect to the rule of *Thornton v. Wynn* remark as follows: "It was the most rigid that has anywhere prevailed against relief by way of defense to the action at law. It was doubtless adopted as a part of the system which has been exploded in this state and in many states of the Union, as well as in several of the English courts, that a partial failure of consideration is not a defense to an action at law, brought to recover the price of the article sold, but that in such cases the vendee must resort to his cross-action, which remedy, on account of its dilatory nature and circuitous form, is by this court, and many others of high authority, deemed inconsistent with justice and the more correct rules of modern practice."

§ 1432. *In Alabama in every case in which a defendant can maintain a cross action for damages, on warranty or otherwise, he may plead the defect of personal property bought in bar of the action against him.*

The earlier case of *Peden v. Moore*, reported in 1 Stew. & P., 71, furnishes a still more full exposition, by the supreme court of Alabama, of the rules of decision deducible from the law of that state. The action in *Peden v. Moore* was brought to recover the amount of a promissory note. The defense pleaded was failure of consideration, payment and set-off; whether total or partial failure of consideration does not appear in the form of the pleading, and it would seem that, so far as the form of pleading was involved, the fact of the failure being total or partial was deemed immaterial by the courts, and was a question of proof, inasmuch as the court below regarded as allowable, and even as indispensable, proof of total failure, whilst the supreme court decided that proof of partial failure was admissible, and that the exclusion of such proof in that case was error in the inferior court. The defendant below moved the court to instruct the jury, that if they believed the consideration had failed, except to the amount which had been paid, they should find a verdict for the defendant. This the court refused, but instructed the jury, that, unless a total failure of consideration was proved, they should find a verdict for the plaintiff. In reviewing the opinion of the court below, the supreme court of Alabama say: "It is our policy to avoid circuitry of action, that litigation may be stopped in the germ, before it is permitted to put forth its branches. This idea is most strikingly illustrated by our statutes providing for arbitration and set-off, as well as by the decisions of our courts. Now, to permit a defendant to allege in diminution of a sum sought to be recovered by breach of his contract, that the consideration which induced the contract on his part has partially failed, would have the effect of making one action subserve the purpose of two, and upon the score of convenience it must be unimportant to the plaintiff whether his recovery is diminished, or whether, after having recovered the entire sum, he is compelled to refund a portion of it; or, if important, the importance would consist in ending litigation, and avoiding the costs of the defendant's action. And surely it would be more compatible with justice, to permit a party to retain that which *ex equo et bono* cannot be demanded of him, and which by law he may recover back; and more especially, when none of the great principles of right or the landmarks of property would be disturbed. Perhaps it may be said that the inquiry is too complex for the determination of an ordinary jury. Not so. There would be no more difficulty in ascertaining the sum to be deducted from the defendant's indebtedness than in admeasuring the quantum of the damages sustained in an action for a false warranty, or for a deceit. In either case, the jury will naturally inquire the sum which was agreed to be paid, and to what extent the consideration is deficient; so that the obstacles to the achievement of justice will not be greater in the one instance than in the other. We are entirely aware of the decisions which inhibit the defense even of a total failure where there is a warranty on which the defendant may have his remedy. These decisions doubtless proceed upon the principle that the warranty is a subsisting contract, and the damages sustained by its breach unliquidated. We consider them, however, so far shaken, if not overruled, as to leave the question open for examination. Upon authority, both in point of respectability and numbers, it is clearly provable that, where fraud enters into the transaction, it is competent for the defendant, upon proof of it, to show a defect in the consideration in diminution of damages.

This qualified admission of the defense originated from the rule that fraud avoids the contract *ab initio*. In point of justice, we can discover no sufficient reason for permitting the defense to be set up where there is a fraud in the transaction, and in denying it when there is a false warranty unaccompanied by fraud. In either case, it is the duty of the jury to graduate the plaintiff's recovery by the injury which the defendant has sustained; for the old common law notion that fraud so vitiated every contract which partook of it as not to allow of a recovery, though it but partially impaired the benefit which the defendant expected to derive, has been exploded; more recent authority only allowing it to go in reduction of damages. The cases of *Poulton v. Lattimore*, 9 Barn. & Cress., 259; of *Germaine v. Burton*, 3 Starkie, 32, and *Miller v. Smith*, 1 Mason, 437, are cases in which the defendant had the plaintiff's warranty, yet this circumstance is not considered by the courts which decided them as interposing an obstacle to the defense!" The court, in conclusion, with respect to this defense, remark: "Believing, therefore, that the greater benefit would result from its toleration, we are of opinion that wherever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or of a non-compliance by the plaintiff with his part of the contract, he may, in defense to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained."

These copious extracts from the opinions of the supreme court of Alabama are thought to be warranted, not only on account of the intrinsic force of the reasoning they contain, but still more so, perhaps, from the fact that they present the best and most authoritative interpretation of the statutes they are meant to expound, as well as of the policy in which those statutes have had their origin. But beyond the influence and effect of these decisions as expositions of local law, they may be regarded as coincident with the doctrines promulgated by the highest tribunals of a portion at least of the states of the Union, and as not conflicting, in principle at least, with some of the later opinions of the English bench. By the earlier English decisions the following principles appear to have been inflexibly ruled, namely: That, whenever a contract was tainted by fraud, it never could, if this were shown, be made the foundation of a recovery to any extent, but must be set aside *in toto*. That in all instances wherein a party was injured, either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract, or of a warranty, the person so injured could not defend himself, in an action on the contract, by proving these facts, but could find redress only in a cross action against the plaintiff. These rules of the common law courts appear to have yielded materially to the influence of common sense and common convenience. An example of this may be perceived in the permission given in cases where a recovery is sought upon the principle of *quantum meruit* to set up as a defense that the plaintiff has unfairly, or injuriously, or imperfectly fulfilled his obligations towards the defendant, and that he should in such cases recover so far only as he could prove a meritorious performance; admitting, in these instances at least, the defense founded on discount, or on a partial failure of consideration, or a dishonest performance. See the cases of *Basten v. Butter*, 7 East, 479; of *Farnsworth v. Garrard*, 1 Camp., 38; of *Denew v. Daverell*, 3 Camp., 451; of *Poulton v. Lattimore*, 9 Barn. & Cress., 259. In the case of *King v. Boston*, 7 East, 481, on a note, the plaintiff had sold a horse to the defendant, warranted sound, for twelve guineas, of which the defendant had paid

three. In fact the horse was not sound, and the defendant refusing to pay more, this action was brought for the value of the horse to recover the difference. It was proved that the horse, at the time of the sale, was not worth more than £1 11s. 6d., and that the defendant had sold him for £1 10s. Lord Kenyon held that the plaintiff could only recover the value, and more having been paid him by the defendant, he non-suited the plaintiff. *Caswell v. Coare*, 1 Taunt., 566, was an action upon a warranty of a horse. It was ruled in this case that, if the horse is not returned, the measure of damage is the difference between his true value and the price given, which may be shown. Indeed, the ground on which the English judges have restricted this species of defense to cases of *quantum meruit* implies the admission that there is nothing in the character of the defense itself, with respect to express undertakings, that is inconsistent with justice or with the true obligations and duties of the contracting parties. The objection is this: that if in suits on contracts for specific undertakings, and for stipulated compensation, the defendant could, under the general issue, be let in to show either failure of consideration or non-performance, the plea not disclosing either ground, would effect a surprise upon the plaintiff; but that where, as on a *quantum meruit*, the plaintiff was to show a meritorious cause of recovery, he must come prepared to encounter any and all objections in conflict with the position he assumes and must maintain. With all the respect due to the learned men by whom this distinction is made, it may be permitted to doubt whether it is not perhaps more apparent and technical than real; for it may be asked whether, in cases of contracts for specific performances and for stipulated equivalents, the plaintiff is not equally bound to prove an honest performance — such a one as comes up to the equivalent promised by the defendant? Indeed, it would seem, so far as danger of surprise is to be apprehended, that where the rights and duties of parties were set forth in the contract, and in the pleadings founded upon the contract, there would be less danger of surprise than there possibly could be in instances where the forms of proceeding indicated neither, but where everything was left open to contest at the trial.

The remarks of some of the English judges appear to be peculiarly applicable to this view of the subject. Lawrence, J., in *Basten v. Butter*, 7 East, 484, speaking of the distinction attempted between a *quantum meruit* and other forms of action, says: "The rule laid down by Mr. Justice Buller may be a good one, if the plaintiff has had no notice of the kind of defense intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the work done, I think the defendant ought to be let in to his defense. For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he would have engaged to do, the doing of which would be the consideration for the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest; and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was properly done." And Le Blanc, J., remarked: "I think that in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defense, as well where the agreement is to do the work for

such a sum, as where it is general to do such work. If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to show that he had put together such a quantity of brick and timber in the shape of a house, if it could be shown that it fell down the next day, but that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed."

It would seem, then, to be fairly deducible from the reasoning of the English judges, from the case of *Basten v. Butter*, in 7 East, decided in 1806, to that of *Poulton v. Lattimore*, 9 Barn. & Cress., ruled in 1829, that this defense would by those judges themselves be deemed permissible, whenever it could be alleged without danger of surprise, and consistently with safety to the real rights of the parties; and it appears to be a deduction equally regular, that, where notice of the defense was given, either by pleading or by any other effectual proceeding, neither surprise nor any other invasion of the rights of the parties could occur, or be reasonably apprehended. But however the rule laid down by the courts in England should be understood, it has repeatedly been decided by learned and able judges in our own country, when acting, too, not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with the view of preventing litigation and expense, that where fraud has occurred in obtaining or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense by a party, when sued upon such contracts, and that he shall not be driven to assert them either for protection or as a ground for compensation in a cross action. Thus, in the case of *Runyan v. Nichols*, 11 Johns., 547, the supreme court of New York decide that in an action upon an attorney's bill, the defendant might give evidence of neglect of duty on the part of the plaintiff, if this defense was set up by plea, or after a notice to the same effect given to the plaintiff before the trial. In *Beecker v. Vrooman*, 13 Johns., 302, it was decided by the same court that in an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or, if the defect produce merely a partial diminution of the value, he may show that in mitigation of damages. In the case of *Sill v. Rood*, 15 Johns., 230, which was an action on a promissory note given for the price of a chattel, the defendant was allowed, under the general issue, to show deceit in the sale. And it was holden further, that a promissory note given for the price of a chattel represented to be valuable, when in truth it was of no value, is without consideration and void. In the case of *Grant v. Button*, 14 Johns., 377, the suit was for the price of work and labor, and it was ruled that the defendant, in order to reduce the amount of the plaintiff's claim, might show that the work was not done faithfully and in a workmanlike manner. This, too, was the case of a contract for an agreed price. In *Spalding v. Vandercook*, 2 Wend., 433, Chief Justice Savage, in delivering the opinion of the court, says: "In *Beecker v. Vrooman*, 13 Johns., 302, it is settled that deceit in a sale of a chattel may be shown in bar or in mitigation." The doctrine of the cases just cited, deduced from principles of justice and from the beneficial purpose of preventing circuity of action, would seem to apply with decisive influence to subjects falling within the range of a polity by which those doctrines were peculiarly and authoritatively commended. We cannot doubt, therefore, after a full examination of the questions on this record, that, under

the provisions of the statute of Alabama pleaded in this case, the plaintiff in error had the right to rely in his defense either upon a fraud practiced on him in the formation of his contract, or on a false or fraudulent warranty, or on a total or partial failure of the consideration on which the contract was entered into by him, or on any payments, discounts or set-offs, in the language of the statute, "made, had or possessed by him," provided that the last three grounds of defense shall have come into existence, and been justly belonging to the plaintiff in error, before he had notice of the assignment of his obligation.

§ 1433. *Averments to avoid a contract on the ground of fraud.*

A doubt has been suggested as to the power of the plaintiff in error to defend himself, by reason either of fraud or of failure of consideration,—a doubt arising, not from any want of verity of the facts in either of those averments, but from the form of the pleadings in the cause. Thus, it is said that, if he designed to avoid the contract for fraud, he should have averred his disclaimer immediately on a discovery of the fraud, and his proffer to restore the property to the defendant in error, which it is thought the plea has not done. Secondly, it has been supposed that, if a diminution of the price alone was intended, the plea should not have concluded with averring that the writing was procured by false and fraudulent representations, and was therefore void; or with a general prayer for judgment whether the defendant below should be charged, etc. With respect to pleas in bar, it may be premised that they are never construed with the severity which is applied in testing pleas that are merely dilatory. If by rational intendment they meet the cause of action, or, in the quaint phrase of the old writers, they are certain to a general intent, they are deemed sufficient. If their structure merely, and not their substance, is to be assailed, this must be done by a special demurrer, a proceeding by no means favored, as it has rarely any real relation to the merits of the controversy. The averments in this plea, with respect to the readiness to return the property, are these: First, that the defendant below resided at a greater distance than three hundred miles from the plaintiff, and in a different state. Secondly, that, from the time at which the defendant below discovered the unsoundness of the fillies, and the falsehood of their pedigree, he was ready and willing and desirous to return them, and would have returned them to the plaintiff if he had had an opportunity of so doing, which he had not. The law requires of no man that which is unreasonable or impracticable. *Lex neminem cogit ad vana seu impossibilia*. In this case the defendant below avers his want of power to rid himself of that which he also avers had been fraudulently imposed upon him, and the plaintiff by his demurrer admits the fact and the character of the fact, as set out in the plea. But it has been said that the defendant below might have tendered a return of the property by notice through the postoffice, and was therefore bound to do so. It may be inquired whether this position does not involve a *petitio principii*. Does not the averment of absolute destitution of the power to return the property imply the absence of all the means leading to that measure, and carry with it the necessary inference of ignorance of the locality of the plaintiff, or of his postoffice? A letter directed to the state of Tennessee, generally, or to some place more than three hundred miles from the defendant below, and in a different state, might, and probably would, have been as unavailable for any practical purpose as a letter addressed to the state of New Hampshire. The plaintiff in error has averred his inability to return the property, and the defendant in error admits the truth of the averment. But the objection to this issue in law is properly applicable

only to that aspect of the case which places the rights of the plaintiff below exclusively on the ground of a total rescission of the contract. If the purchaser chose to retain the property, and either to sue upon the warranty of pedigree and soundness, or to defend himself upon the ground of difference between the true and the pretended value of the property, he was bound neither to give immediate notice nor to tender a return of the property; he would be permitted to discount the difference between the real and the simulated value. But here the difficulty already mentioned is suggested, namely, that this defense is inconsistent with the conclusion of the plea, which says, "and said defendant saith that the said sealed note or writing obligatory was obtained from him by the said Newsom, by false and fraudulent representations as aforesaid, and is therefore fraudulent and void in law, wherefore said defendant prays judgment whether he ought to be charged with said debt," etc. This conclusion is said to call for an entire rescission of the contract, as founded in fraud, and cannot be reconciled with the facts previously stated as constituting a cause for partial relief.

§ 1434. *An error in the prayer of a plea in bar will not be held to defeat the rendition of a judgment appropriate to its merits.*

We have already said that pleas in bar are to receive, if not a liberal, certainly not a narrow and merely technical construction; and we will further observe that, if the difficulty suggested be sound, there never could be a defense in mitigation of damages where there should be alleged fraud in the inception of the contract, or where there should be a false or deceitful warranty, however willing the defendant might be to accept the difference between the real and the pretended value, and however circumstances might place it beyond his power to return the property. The injured party would in all cases be driven to repudiate the whole contract, or to go without compensation. This course, however, we have seen, is in contravention of the current of decisions which admit of the defense in mitigation of damages. But pleas in bar are always construed according to their entire subject matter, and will be sustained accordingly, as taken altogether, and will not be determined by a disjoining of their members, or by laying stress on what may be immaterial. It seems, moreover, that the prayer for judgment, or conclusion of such pleas, is not considered as essential to their validity. Thus it is stated by Chitty, vol. i, p. 558, speaking of pleas in bar, "that this prayer, before the recent rule" (alluding to the rules of pleading adopted in England in the 4th of William IV.), "ought properly to have corresponded with and been founded upon the commencement of the plea, and the effect of the matter contained in the body of it;" but, continues this author, "as the court would *ex officio* give judgment in favor of the defendant according to the substance of the plea, without reference to the conclusion, an error with regard to the prayer of judgment in the concluding part of the plea was not material, except in the case of a plea in abatement." In the case of *The King v. Shakespeare*, 10 East, 87, upon a demurrer to a plea in abatement, Lord Ellenborough said: "Praying judgment of the indictment means no more than praying judgment on the indictment; and if this were the case of a plea in bar, the court would give that judgment which, upon the whole record, appeared to be the proper judgment, though not prayed for by the party. But, in abatement, the court will give no other than the proper judgment prayed for by the party; and, without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they would be in the case of pleas in bar." In Att-

wood v. Davis, 1 Barn. & Ald., 173, it is said by Bayley, J., that "there is a distinction between a plea in bar and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter." In the case of Rowles v. Lusty, 4 Bing., 428, upon a writ of entry, it was ruled that the prayer for judgment for the messuages and land in the count did not vitiate the plea, notwithstanding the commencement of the plea applied only to the messuages and parcel of the land. And in this last case, The King v. Shakespeare and Attwood v. Davis are cited as authority.

But again (and this appears to give a conclusive answer to any objection to the admission here of proofs in diminution of damages), if we must treat this case according to the strictest rules of pleading, it might be said that the plea averring the note to have been obtained by fraud, which is admitted by the demurrer, would be sufficient to entitle the defendant below to a judgment on a declaration counting merely on the note, without regard to the question of total or partial rescission of the original contract. And then, if the plaintiff could be entitled to recover at all, it must be on a count on the original contract, or on a *quantum valebat* for the thing sold. And this would open the entire range of inquiry as to the character of the contract, and as to what in truth constituted the *quantum valebat* on which, if on anything, the plaintiff could found himself. Upon this branch of the case, we think the matter averred in the special plea of the defendant below was legitimately pleaded under the statute, and with sufficient certainty and pertinence to authorize a defense on the grounds of a false and deceitful warranty, or of a partial failure of consideration, and that he should have been let in to sustain, if he could, such a defense before the jury. We, therefore, consider the judgment of the district court to be erroneous, and do adjudge that the same be reversed, and that this cause be remanded to that court, with instructions to cause an issue to be made up on the special plea filed by the defendant below, under the statute of Alabama, and a *venire facias* to be awarded to try that issue.

Mr. Justice NELSON dissented, holding that the plea for a rescission of the contract was defective in not alleging an offer to return the property, and that, on failing on this line of defense for want of a sufficient plea, it was not admissible to set up a failure of consideration. 1 Stewart and Porter, 71, 226, 242; 3 id., 98; 3 Stewart, 169, 170, cited.

ELMINGER v. DREW.

(Circuit Court for Michigan: 4 McLean, 388-396. 1848.)

Opinion by the COURT.

STATEMENT OF FACTS.— This is an action of *assumpsit* by the indorsee against the indorser of a note. The declaration contains eleven counts. The first count states that E. Morse & Co. made their promissory note on the 10th of March, 1838, for \$1,500, payable sixty days after date, to the order of defendant, at the office of the American Fur Company, in the city of New York, which note was assigned by the defendant to the plaintiff, was duly presented for payment and protested. The second count was substantially the same. The third count the same, and in addition that the makers of the note, who were commission merchants, transferred to the defendants a large amount of merchandise to indemnify the defendant for his indorsements, etc., and therefore that he was not entitled to notice, etc. The fourth count was substan-

tially the same as the third. The fifth count, that the said Morse & Co. made their certain other note in writing on the same day, payable to the defendant, at the same place, four months after date, for \$1,101, which was indorsed by the defendant to the plaintiff; that at maturity the note was presented at the place of payment, and due diligence used, etc. The sixth count states the making of the said note, payable to the order of the defendant, which was indorsed by him; and due diligence was used, etc., and that at the time the note was executed a large amount of merchandise was transferred to defendant for his indemnity, etc. The seventh count was substantially the same. The four following were the general counts:

The defendant pleaded, 1. The general issue. 2. That the American Fur Company are the owners of the notes sued on, which company is incorporated, and that some of the corporators reside in the district of Michigan. The third plea is to the same effect. The 4th plea. That previous to the execution of the notes E. Morse & Co. contracted with the American Fur Company to purchase a large quantity of white fish at \$8 per barrel; and that the company warranted the fish to be well cured, good, sound and wholesome, on which six hundred barrels were purchased, and that the notes were executed in part payment of the same, and avers that the fish were not well cured, but were bad, unsound, unwholesome and of no value whatever. That the said notes were assigned to the plaintiff after their maturity, to wit, on the 1st of February, 1842, and at the place last aforesaid. 5th plea. That E. Morse & Co. purchased six hundred barrels of white fish, at \$8 per barrel, from the company, who fraudulently and deceitfully and knowingly stated and represented to said E. Morse & Co. that the fish were well cured, good, sound and wholesome; that the same were unsound, etc., and of no value. 6th plea. That the defendant was a mere accommodation indorser on the notes; that the plaintiff, by an instrument of writing, gave to Morse & Co. six months' time, for a valuable consideration paid, for the payment of the notes, by which the defendant was discharged. 7th plea. That defendant was an accommodation indorser, and received no consideration therefor; that six weeks' time to the maker was given after the notes became due, etc. 8th plea. That defendant was an accommodation indorser, and that six months' time was given, etc. 9th plea. That time was given, etc., for a valuable consideration, etc. 10th plea. That the promises in the second, third, fourth, sixth, seventh, eighth and ninth counts were the same as set forth in the first and fifth counts, and that he received no consideration therefor, and that, without the assent or knowledge of defendant, for a valuable consideration, time was given.

The plaintiff replies to the second plea that the notes were not the property of the Fur Company at the time stated in the plea, and tenders an issue. To the third plea issue was joined. To the fourth and fifth pleas the plaintiff demurs, and assigns causes of demurrer. On these pleas the principal points arise on the pleadings. The defendants joined in demurrer. The first cause of demurrer alleged "that the property was not returned or offered to be returned;" it is insisted by the defendant that it was not necessary to aver any such thing. Chief Justice Spencer says: "We know of no case in which there is an omission to return the article agreed to be sold which precludes the defendant from contesting the price on the ground that it was not returned to the vendor." See 18 John., 141; 17 Com. L., 373, 121, 291; 3 N. H., 455. And the counsel remark, it was held in the above case, "that though the defendant had not returned or offered to return the hats, she might, in an action

brought against her, nevertheless, insist on a deduction of the price originally agreed to be paid, in proportion to the diminished value." This, it is contended, is the settled doctrine in this country and in England. The rule is, as contended, "that if there is no beneficial consideration there shall be no pay." 1 Camp., 38, 190; Peake's Cas., 59, 216; 2 New Rep., 136.

§ 1435. *Partial failure of consideration cannot be set up as a defense to a note.*

A promissory note given on the sale of a chattel, fraudulently represented by the seller to be of great value, when in fact it was of no value, is without consideration and void. So where there is a warranty, and the return of the property is unnecessary; and it is insisted that it is immaterial whether the suit is brought on the original contract or on the security for the purchase money. Even a partial failure, if fraud intervene, is a good defense. 5 Mass., 46; 2 Taunt., 2; 1 Esp., 201; 1 Camp., 41 n.; Bayley on Bills, 533, notes 7 and 8; 1 Mason, 439; 10 Mass., 415.

There is great conflict in the authorities, whether a partial failure of the consideration may be set up in defense, in an action on the note given for the purchase money. The authorities all agree that where there is a total failure of the consideration, it is a good defense; or where the parties have agreed upon the amount, the failure being partial, defense may be made. But where the question as to the extent of the failure is open, the weight of authority is against the argument of defendant's counsel. The article purchased, six hundred barrels of fish, is alleged to have been badly cured, and of no value, and the warranty of the vendor was, that they were well cured, etc. But there is no averment in any of the pleas that the barrels are worthless, and it is difficult to say that there is a total failure of the consideration. The barrels, at twenty-five cents each, would be worth \$150, which, it is true, is an inconsiderable amount when compared to the sum of \$1,800, agreed to be paid for the fish; yet there is no rule by which the court or jury can limit a defense in such a case. The failure, if matter of defense, cannot depend upon the extent of it. If it be less than total, it must avail the defendant, to the amount of it, on principle, however inconsiderable it may be, when compared to the purchase money.

§ 1436. *Rule of United States supreme court on partial failure of consideration of a note.*

In the case of *Greenleaf v. Cook*, 2 Wheat., 13, the court say, "where a promissory note has been given for the purchase of real property, with full knowledge of the extent of an incumbrance, defect of title, arising from that incumbrance, is no legal bar to an action on the note." And they say, "that any partial defect in the title is not inquirable into in an action on the note in a court of law, but the party must seek relief, if anywhere, in chancery."

There may be cases in which, to set up a partial failure of consideration, would be attended with but little difficulty, and, in the language of Chancellor Kent, would avoid a circuity of action. But the question is, not what might be practicable in some cases, but what is the best and safest rule on the subject. I say this, because there are decisions both ways. Now, where there had been a partial failure or defect of title, as in the above case cited from Wheaton, two issues would be presented; first, as to the execution of the instrument on which the action is brought; and second, the extent of damage by the partial failure of title. Can both of these be submitted to the same jury, or would the defendant be required to admit the execution of the instrument, on plead-

ing the partial failure? If this were adopted as a general principle, it would lead to embarrassment, if not uncertainty in pleading. A jury would not be the most competent tribunal to investigate an intricate controversy as to land titles; and if the partial failure had not been settled judicially, must the court and jury inquire into the title, and determine it? This would require another party to be brought before the court, who had no interest in the original suit. Such a course would be impracticable.

Where goods are sold and delivered with warranty, and a negotiable note is given in consideration of such sale and delivery, if the contract be absolute, such breach of it cannot be set up as a defense to an action on the security; unless the contract be rescinded by the consent of both parties, it remains open. Chitt. on Con., 742, 743, note 495; 28 Wend., 114; 2 Hill, 293; Thornton v. Wynn, 12 Wheat., 183 (§§ 1034-37, *supra*); 6 Conn., 508, 515; Power v. Wells, Cowp., 818; Weston v. Downes, 1 Doug., 23; 1 Term R., 135-6. If the contract be yet open, the plaintiff's demand is for unliquidated damages, on a special contract of warranty; and the issue as to whether there has been a breach of warranty cannot be tried, except on a special action on the warranty. Lewis v. Cosgrave, 2 Taunt., 2; Chitt. on Con., 465. The case of Oberl v. Bethune, 22 Com. L., 363, enforces the distinction between an action for the price of goods and one brought on a security given, on the authority of Morgan v. Richardson, 1 Camp., 40, and Tye v. Gwynne, 2 Camp., 346, cases which the court say have always been acted on, and the court expressly applies the doctrine to cases where there has been a warranty. 19 Com. L., 121; 1 Term R., 133; Solomon v. Turner, 2 Com. L., 291. The case of Moggridge v. Jones, 14 East, 486, is a strong case to show that in an action on a note the rule is strict with regard to letting in defenses founded on want of consideration. 25 Wend., 107. In New York, the English rule that partial failure of consideration cannot be shown in evidence in an action on a note has not been observed. 8 Wend., 109; 25 Wend., 114; 12 id., 566; Story on Bills, 204; 17 Com. L., 121. A partial failure cannot be set up as a defense to the note given for the purchase money. 12 Wheat., 183; 12 Wend., 566; 5 Mass., 319; 18 Pick., 95; 1 Metc., 547; 2 Kent Comm., 480; 5 East, 449; 2 Barn. & Ad., 456.

§ 1437. *Fraud a defense to a note; but consideration must be returned.*

The fifth plea sets up fraud and deceit, but does not aver an offer to rescind the contract by returning the property which, as appears from the plea, the defendant received, and still retains.

Fraud undoubtedly avoids a contract. But whenever the purchaser retains the property, it is evidence in law that he abides by the contract; and it is consequently considered as binding between the parties. And the only difference between such a case and one of warranty is, that the party defrauded may, at his own option, rescind the contract in a reasonable time. To this there may be an exception where, from the circumstances, it is impracticable to return the property, as the death of a horse, etc., and in such a case a notice should be given to the vendor. 2 Taunt., 2; 12 Wheat., 153; 2 Hill, 292; 14 East, 486; 2 Kent's Comm., 480; 1 Metc., 547; Chitt. on Con., 679, 680, 743; 15 Mass., 319; 12 Wheat., 193; Bleecker v. Vrooman, 13 Johns., 302; 3 Pet., 215; Scudder v. Andrews, 2 McL., 464. In the case above cited from 12 Wheat., the court say, "If the sale be absolute, and there is no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action on the warranty." But in such a case, where there had been a total failure of the consideration, it might be set up in defense. From the authorities

cited on both sides, it will be seen that courts differ as to the right of a defendant to set up a partial failure in defense to an action on the note given; but the weight of authority, especially in England, is against the right. And such I considered to be the established doctrine of the supreme court, as declared in 2 McLean, above cited. A very recent decision, not yet reported, in the supreme court, has overruled the cases in that court. But, as the light of that opinion was not given until long after the decision of the case now before us, the decision must be reported as it was pronounced. In its entombment, this opinion will not be dishonored; for it will repose, at least as regards the decision of the above point, by the side of the opinions of illustrious judges.

§ 1438. *Duplicity in pleading.*

The sixth plea avers that the defendant indorsed the note for the accommodation of E. Morse & Co., the makers, and without consideration; and that the plaintiffs, for a valuable consideration, agreed with E. Morse & Co., without the assent of the defendant, to extend the time of payment, etc. The replication traverses the averment that the defendant indorsed for the accommodation of E. Morse & Co., and avers that he received a valuable consideration therefor, and denies the agreement to extend the time of payment, etc. To this replication the defendant demurs, for duplicity in traversing both the averments; that the defendant was an accommodation indorser, and the averment that time was given. It is admitted to be a rule of pleading, where, on one side it consists of several distinct and material facts, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. A denial of either of them in law is an answer to the whole. A denial of more than one of such distinct and material points is duplicity. *United States v. Cumpton*, 3 McL., 163; *Gould's Pl.*, 406, sec. 49.

The averment in the plea that the defendant was an accommodation indorser, as regards the extension of the time of payment, could be of no importance. If the time were extended for a valuable consideration, as alleged, the indorser is discharged, whether he was an accommodation indorser or indorsed for a valuable consideration. That allegation in the plea may be considered as surplusage, for in no point of view, as regards the extension of time, raised in the plea, could such allegation be of any importance. *Story on Bills*, sec. 191; *Brown v. Mott*, 7 Johns., 361. To avail himself of the fact of his being an accommodation indorser, the defendant must aver and prove that the plaintiff gave no value for the notes, or took them over due. He will be presumed to be a holder for value, unless the contrary be made to appear. 3 Phil. Ev., 447; *Swift v. Tyson*, 16 Pet., 16; *Bramah v. Roberts*, 27 Com. L., 464. The demurrer to the above replication is overruled. The demurrers to the fourth and fifth pleas are sustained. Leave given to amend the pleadings of either party, etc.

BANK OF BRITISH NORTH AMERICA v. ELLIS.

(Circuit Court for Oregon: 6 Sawyer, 96-106. 1879.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This action is brought to recover the sum of \$2,025, alleged to be due the plaintiff on forty-three promissory notes, with interest, costs of protest and an attorney's fee. The complaint alleges that the plaintiff is a corporation organized in the united kingdom of Great Britain and Ireland, and that the defendants are citizens of Oregon; that all of said notes were:

made on May 1, 1878, and eight of them are payable on October 1, 1878, and the remaining thirty-five on January 1, 1879; that each of said notes was indorsed by said defendants, and thereafter, and prior to their maturity, the plaintiff acquired the same in the regular course of business, and is now the owner and holder thereof, and that, "said notes falling due and remaining unpaid," the plaintiff procured the same to be protested.

The answer of the defendants contains sundry denials and three special pleas or defenses. The first one alleges that the makers of said notes received no consideration for the same, and "these defendants, indorsers of said notes, . . . received no consideration for such indorsement," and that the plaintiff, at the time it acquired said notes, had knowledge of these facts. The second one alleges that said notes were made in pursuance of an agreement between the makers thereof and the Dayton, Sheridan & Grand Ronde Railway Company that the latter would construct and put in operation, by October 1, 1878, a branch of its railway from a place called Broadmeads to the town of Dallas, and were placed in the hands of the defendants, R. S. Crystal, J. D. Lee and H. C. Brown, as agents and trustees, to deliver the same to said railway company upon the completion by it of said contract; that afterwards said trustees, with the consent of said makers, delivered said notes to said railway company upon its promise to perform said contract, but that said company has hitherto wholly failed to perform said contract, and the consideration for said notes has failed, and that the plaintiff had notice of these facts when it acquired said notes. The third defense alleges that the defendants did not indorse such notes "until long after they were made;" that the same were made payable to the order of said railway company; that said defendants never had "any interest in said notes," or consideration for indorsing the same, and that the plaintiff, at the time of acquiring the notes, had knowledge of these facts.

§ 1439. *No consideration is no defense against bona fide purchaser of negotiable paper.*

The plaintiff demurs to each of these defenses because the same does not state facts sufficient to constitute a defense. Each of these defenses must stand or fall by itself, and without any aid from either of the others. *Hall v. Austin*, 1 Deady, 107; *Bachman v. Everding*, 1 Saw., 72. The first defense merely alleges that the notes were made by the makers and indorsed by the defendants without consideration — not that the consideration has failed, but that there never was any. This is not a shadow of a defense to the action. The mere possession of a negotiable note imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any circumstance impeaching its validity, and that he is the owner thereof, entitled to recover the contents of the same from all prior parties thereto. 1 Dan. Neg. Inst., sec. 812; 1 Par. N. and B., 184; *Collins v. Gilbert*, 4 Otto, 754 (§§ 432-436, *supra*). Here the plaintiff not only alleges that it is the owner and holder of these notes, but that it acquired them before maturity in due course of business. An allegation, then, that these notes were made or indorsed by the defendants without consideration is no defense to its claim to recover. Inquiry into the consideration of negotiable paper can only be made between privies or immediate parties thereto,—as the maker and payee, an indorser and his indorsee. All other parties to negotiable paper are called remote, and as between them, a consideration for making or indorsing the same is conclusively presumed. But the defendant may make the defense of a want of consideration against a remote party, if he could have done so against a nearer party, and such remote

party took the paper with a knowledge that it was open to this defense. 1 Dan. Neg. Inst., sec. 174; Par. N. and B., 175, 183. And to this qualification of the rule there is an important exception in the case of accommodation paper. A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot make the defense of a want of consideration against any one except the accommodated party. The note is supposed to be taken by third persons upon the credit given to him, and he is expected to pay it. 1 Dan. Neg. Inst., sec. 189; 1 Par. N. and B., 183. A party to negotiable paper who seeks to make the want of consideration a defense to an action thereon must not only allege such want of consideration, but must go further, and show how and why he is entitled to make such defense as against the plaintiff, in any aspect of the case made in the complaint. In this case it does not appear from the plea that the defendants are entitled to avail themselves, as against this plaintiff, of the want of consideration for either making or indorsing these notes. The makers are not sued, and the question of their liability in this respect is not in the case. An indorser's contract and liability is separate and distinct from that of the maker's. An indorsement is not merely a transfer of the note, but it is also a fresh and substantive contract, by which the indorser agrees, among other things, that the note will be paid at maturity by himself, if not by the maker, and as his own debt, and not that of another. 1 Dan. Neg. Inst., sec. 669; 2 Par. N. and B., 23.

For aught that appears here, there is no privity between the plaintiff and the defendants, and therefore it is immaterial in this action whether the latter received any consideration for their indorsement or not, unless it further appears that the plaintiff gave no consideration for the notes, and that no holder, intermediate between the plaintiff and the defendant, did so. *Hoffman v. Bank of Milwaukee*, 12 Wall., 191 (§§ 1497, 1498, *infra*). Again, it would not be inconsistent with this defense, if the defendants indorsed these notes without consideration for the accommodation of the makers or payee or its indorsee, and therefore they may be liable thereon, notwithstanding such want of consideration. The plea to be a good defense must meet this phase of the case by denying directly that the defendants were accommodation indorsers, or by stating facts inconsistent therewith.

§ 1440. *Failure of consideration no defense to note as against bona fide purchaser.*

The second plea is still less material than the first. It only alleges in effect that the consideration for the making of the notes, to wit, the promise of the railway company to construct and operate a branch road to Dallas by October 1, 1878, has failed. This may be so; but in an action by a holder of these notes against an indorser, such fact alone is wholly immaterial. Notwithstanding this, even the defendants may have indorsed these notes to the plaintiff, and received from it therefor their full value.

§ 1441. *Time when accommodation indorsement was made is immaterial in action by bona fide holder.*

The third defense is also bad. The only fact which it contains in addition to the others is, that the defendants did not indorse these notes "until long after they were made, and never had any interest in them." In the absence of anything to the contrary, an indorsement upon negotiable paper is presumed to have been made after the making of the same and before maturity; and if such indorsement be made by any one other than the original payee, then after his

indorsement. And, as between an indorser after maturity, and a subsequent holder of a negotiable note, the former is held liable as upon a note payable on demand, and even as an original promisor. 2 Par. N. and B., 9, 13; 1 Dan. Neg. Inst., sec. 928; New Orleans, etc., Co. v. Montgomery, 5 Otto, 18. This allegation as to the time when the indorsement of the defendant was made only amounts to this: that such indorsement was made after the note was, which fact is consistent with the allegation of the complaint, and the defendants' liability to the plaintiff. But upon this fact and the allegation that the defendants never had any interest in the notes, it is argued by counsel that they are not in law indorsers, but guarantors, which is a collateral agreement and void unless made upon a distinct consideration. What is the nature of the liability which a third person incurs who indorses a note before the payee thereof, has been a vexed question in the law and has been settled differently in different states. In the supreme court of the United States, the rule is established that such person is either an original promisor, a guarantor or indorser, according to the nature of the transaction and the intent and purpose with which the indorsement is made; which may be shown by parol, upon the theory that such an indorsement is irregular and ambiguous. *Rey v. Simpson*, 22 How., 350; *Good v. Martin*, 5 Otto, 94 (§§ 541-549, *supra*). But the allegation that the defendants did not indorse these notes until long after they were made does not even imply that they indorsed them before the payee did — before they were put in circulation — but rather the contrary. Nor is it a sufficient allegation that they were indorsed after maturity. The presumption is that the defendants indorsed the notes regularly — after the payee — and although they then had no interest in them, they are still liable to the plaintiff as indorsers, unless there was an agreement or understanding at the time that they were to be liable only as guarantors, and that this was known to the plaintiff at the time of acquiring the notes. But in favor of the plaintiff the defendants are presumed to have indorsed as payees; and for the purpose of maintaining this action against them, as such, the plaintiff may write over the indorsement of the original payee, "Pay to the order of the defendants," naming them, or any other contract or direction not inconsistent with what it knew to be the purpose of such indorsement. 2 Par. N. and B., 2.

Besides, the defendants may have indorsed these notes for the accommodation of the maker, or the original payee, or its indorsee; and in such case the fact that they had no interest in the notes, and received no consideration for their indorsements thereon, is wholly immaterial, and would be just what every one, at all conversant with the subject, would ordinarily infer from the premises. In the course of the argument for the defendants, it was suggested that if their defenses must be considered separately, application would be made to amend the answer so as to state the three in one; and counsel for the plaintiff, as a matter of convenience, has considered this as already done. But such an amendment will make no difference in the result. The plaintiff, being presumed to be the *bona fide* holder of these notes for value, before maturity, and such assumption not being negatived or contradicted by these pleas, *prima facie*, it is entitled to recover their contents from any and all of the prior parties thereto; and no plea is or can be a defense to this action unless it states facts sufficient to negative this conclusion, so far as the defendants are concerned, in any and every phase of the case made in the complaint. Negotiable paper is the life-blood of commerce and business, and its circulation and usefulness would be seriously impaired if every maker or remote indorser thereof

could set up a failure to keep the private understandings or agreements between himself and third persons, upon which he claims to have signed or indorsed the same, to avoid the payment thereof according to his obligation, as shown by the instrument, in the hands of a *bona fide* holder for value. Parties who put their names to or upon negotiable paper upon the faith of other people's expectations and promises, must not expect, if they are thereby deceived or disappointed, to throw the loss upon those who in good faith have taken their paper for what they or those whom they trusted gave it out to be. The demurrer is sustained.

DEMURRER TO AMENDED ANSWER.

Opinion by DEADY, J.

The complaint alleges that each of said notes contained a stipulation, that, in case suit should be instituted for the collection of the same, there should be paid such sum as the court might deem reasonable as an attorney's fee in said suit, and that \$220 is such fee. The amended answer denies that the plaintiff is entitled to recover any attorney's fee in this action; and for a further defense alleges that after said notes had been indorsed in blank by said Gaston and the defendants, the said Gaston negotiated the same to the plaintiff, and he became the owner thereof; that afterwards, and before the commencement of this action, the plaintiff wrote over said Gaston's name thereon a special indorsement to itself: "Pay to the — of the Bank of British North America, or order;" and "thereby released the defendants, and each of them, from any and all liability on said indorsements." The answer also shows the order in which the indorsements were made on said notes, from which it appears that Gaston's name was written first, and those of the five defendants immediately thereunder; so that it was convenient, if not necessary, for the plaintiff, in writing the special directions thereon, making the notes payable to itself or order, to write the same as it did, immediately above the name of Gaston.

§ 1442. *Filling up prior blank indorsement not a discharge of subsequent indorsers.*

This defense assumes that the holder of a negotiable instrument, who makes an early blank indorsement payable to himself, thereby discharges all subsequent indorsers thereon from liability as such, the same as if he had stricken their names therefrom. The only case cited which is directly in point is that of *Cole v. Cushing*, 8 Pick., 48, in which it was held that such an act did not discharge the subsequent indorsers, but they still remained liable to the holder. To the contrary of this, there is a *dictum* or suggestion in 2 Par. on N. and B., 19, to the effect that "it might be said, in such a case, that when the holder made the note payable to himself by the first indorser, he made himself indorsee of that indorser, and thereby discharged all subsequent indorsers." The suggestion, "it might be said," however distinguished the source, scarcely amounts to a *quere*, and certainly cannot overcome or cast doubt upon the well-considered decision in *Cole v. Cushing*, with which my own judgment fully concurs. It is not to be presumed that the holder of a note with a number of indorsers thereon will intentionally discharge any of them without some reason or consideration commensurate with the loss of security for his debt thereby sustained. The indorsers having no right to be discharged, the act of the plaintiff ought not to be construed to have that effect, unless it plainly appears that such was the intention with which it was done, than which nothing is more improbable. The direction written by the plaintiff over the indorsements upon the

notes is not written over the signature of Gaston exclusively, and under the circumstances may be regarded as having been made with reference to those of the defendants as well as that of the former. The defendants were without interest in the notes. They were mere accommodation indorsers, and their signatures could not and did not have the effect to transfer them to any one, but only to give them currency so as to enable Gaston to dispose of them as he did. Under these circumstances, there is no room for the inference that the plaintiff intended by this act, even if it had no reference to the indorsements of the defendants, to discharge them from all liability thereon.

§ 1443. *Stipulation in note to pay attorney's fee does not render it non-negotiable; authorities.*

As to the attorney's fee, the defendants claim that the promise to pay one was only made by the makers of the notes, and that the subsequent parties thereto are under no such obligation to any one. In *The Wilson Sewing Machine Co. v. Moreno*, 6 Saw., 35, this court held that a stipulation to pay a reasonable attorney's fee to the holder of a promissory note, in case suit is brought to enforce the payment of the same, is just and valid, and that the negotiability of such note is not thereby affected or impaired. But the defendants herein claim that such a stipulation or contract is only the promise of the maker, and therefore not that of the defendants; and also that such stipulation, not being an integral part of the note, but a contract collateral thereto, is not negotiable, and therefore can only be enforced as between the immediate parties to it, the maker and payee. In *Smith v. Muncie National Bank*, 29 Ind., 153, it was held that the acceptor of a bill of exchange which contained a stipulation for the payment of an attorney's fee was bound to pay the same. But this conclusion rests upon the fact that the acceptor of a bill of exchange sustains the same relation thereto as does the maker of a note. In *Hubbard v. Harrison*, 38 Ind., a stipulation in a promissory note to pay an attorney's fee was enforced in an action by the indorser against the payee, who was in fact an accommodation indorser. It was implied rather than said by the court that the note being negotiable, notwithstanding the stipulation, the latter passed with the former, and might be enforced by the holder thereof against any party to the instrument. In 1 Dan. Neg. Inst., sec. 62, it is said that the attorney's fee need not be sued for by the attorney, but may be recovered by the holder; and that the liability therefor "as for every engagement, imported by the bill or note, enters into the acceptor's and indorser's contract."

While there is a conflict in the authorities upon the question of whether an instrument, otherwise negotiable, that contains a stipulation for the payment of an attorney's fee, is thus negotiable or not, no case has been cited which holds that such stipulation does not pass with the instrument, in case the same is deemed negotiable. A stipulation in a negotiable instrument for an attorney's fee, which in effect provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and currency to such instrument, and is therefore to be regarded with favor as being a just and convenient means of promoting the general object and utility of the same. At common law the compensation of an attorney consisted of the various items allowed for his services, called collectively his "costs;" and in case his client prevailed in the action, these were collected off the adverse party as a part of the judgment. Substantially this stipulation for an attorney's fee is a substitute for the allowance of costs at common law, and enables a party taking a negotiable instrument to provide by agreement with the maker

or indorser thereof that if the same is not paid without suit the holder shall recover his attorney's fee as well as the principal and interest. The maker of these notes having agreed to pay an attorney's fee to the holder thereof if the same were not paid without action, in my judgment each subsequent party thereto assumed a like responsibility to such holder, and therefore the plaintiff is entitled to recover such fee from the defendants in this case. But I think the defendants are liable to the plaintiff in this action for an attorney's fee, even if the stipulation therefor can only be enforced between the immediate parties thereto. The defendants are accommodation indorsers, in effect makers of these notes. By their indorsement of them they authorized Gaston, the then holder, to transfer them to the plaintiff, which was done. Every stipulation in them, and every obligation incident thereto, thereby became the stipulation and obligation of the defendants, made directly to the plaintiff. The demurrer is sustained.

§ 1444. *Bona fide holders.*— A. gave his note to B., and it was indorsed to C. The consideration for it failed, whereupon A. and B. made a new contract, by which B. provided for reimbursing A. This agreement B. failed to perform. *Held*, that A. could not set up such failure as a defense to a suit by C. upon the note. *Young v. Grundy*, *7 Cr., 548. See § 1429.

§ 1445. A. built a sugar mill for B., who complained of its being defectively constructed, and A. agreed to send workmen to put the mill in proper order, whereupon B. agreed unconditionally to accept a bill for the purchase price of it, and did accept it. A. failed to put the sugar mill in order. *Held*, that A.'s failure in this respect was no defense to a suit against B. on the acceptance by a *bona fide* purchaser of the bill, although such purchaser knew of the defective construction of the mill, and also of B.'s unconditional promise to accept the bill. *Arthurs v. Hart*, 17 How., 6. See §§ 1, 7, 40, 117, 212, 230, 306, 328, 1429.

§ 1446. *Total*—Total failure of consideration a good defense to a note. *Slacom v. Wishart*, *8 McL., 517; *Greenleaf v. Cook*, 2 Wheat., 13; *Parkwood v. Clark*, *2 Saw., 548.

§ 1447. A total failure of consideration is a good defense to an action on a promissory note, whether the consideration was land or personal property, and if it was land, whether it was conveyed by deed or by agreement to convey. *Scudder v. Andrews*, *2 McL., 464.

§ 1448. *Heir's note for ancestor's debt.*— A note given by an heir or personal representative to renew a note of the ancestor, barred by limitation, is void for want of consideration, heirs at law and distributees not being liable to pay the debts of the ancestor. *Didlake v. Robb*, 1 Woods, 682. See, also, *Alston v. Mumford*, 1 Marsh., 266.

§ 1449. *Several tracts of land.*— Where the purchase of three tracts of land was one transaction, *held*, that the failure of consideration in the sale of one tract may be set up as a defense to a suit to foreclose a mortgage on another tract of land executed to secure a note given for the purchase price of that other tract. *Hicks v. Jennings*, 4 Fed. R., 855.

§ 1450. *Illegal consideration.*— When a bill is drawn for a consideration which is illegal, or which happens to fail, neither the payee nor any subsequent indorsee with notice can recover. *Perry v. Crammond*, *1 Wash., 100.

§ 1451. *Inquiry into consideration.*— In a suit by the payee against the drawer of a bill, the consideration may be inquired into. *Ryberg v. Snell*, *2 Wash., 294.

§ 1452. Though a bill drawn for value received may be presumed to have been drawn for a consideration, yet where a strong ground is laid to show a want of consideration, it behooves the party to clear the matter of suspicion. *United States v. Price*, *2 Wash., 460.

§ 1453. *Deposit with trustee as collateral.*— The A. bank held the bills of the B. bank to the amount of \$100,000. The B. bank agreed to and did give drafts on New York to pay the \$100,000, which were deposited with a trustee to be delivered to the B. bank when the drafts were paid. The B. bank also deposited with the same trustee \$10,000, which, in case of non-payment of the drafts, was to be given as damages to the A. bank, to which in such case the \$100,000 was also to be returned. The drafts were not paid and the \$100,000 and \$10,000 were given to the A. bank by the trustee. The holder for the benefit of the A. bank sues the B. bank upon the drafts. *Held*, that the deposit of the \$100,000 and the \$10,000 as collateral with the trustee, and his payment thereof to the A. bank, could not be pleaded by the B. bank as a failure of consideration for the drafts. *Stickney v. Bank of Illinois*, *3 McL., 182.

§ 1454. *Consideration for note given to secure accommodation notes*— Payment of latter. A. was in habit of indorsing accommodation notes for C. C. gave A. his note to secure such indorsements. Before it became due A. indorsed and delivered it to B. for less than one-fifth of

its face. After it became due, B. delivered it to D., without indorsing it, for some lots valued at one-sixth of the face of the note, but which were never conveyed to B. *Held*, that until A. was obliged to pay the notes he had indorsed to accommodate C., C.'s note was without consideration, and A. could only recover nominal damages upon it. Nor could third parties with knowledge of the facts recover, and that D. was chargeable with such notice. *In re Hook*,* 11 N. B. R., 282.

§ 1455. *Accommodation notes*.—Accommodation notes in the hands of third parties as collateral security for an existing debt, delivered before maturity, and without notice of any infirmity, are not open to the defense of want of consideration. *Fogg v. Stickney*,* 11 N. B. R., 167. See §§ 5, 278, 364, 498, 6.6, 701, 1216, 1428.

§ 1456. *Accommodation indorser cannot set up want of consideration*. *Bank of Columbia v. French*,* 1 Cr. C. C., 221.

§ 1457. *Warranty of consideration*.—A party to negotiable paper having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing an illegal consideration. *Henderson v. Anderson*, 3 How., 73.

§ 1458. *Failure to perform promises*.—One who subscribes for stock in a railroad, giving his note secured by mortgage in payment thereof, in an action by a *bona fide* holder of the note cannot plead want of consideration in that the representations made to him when he subscribed for the stock were never carried into effect. *Sawyer v. Prickett*, 19 Wall., 160.

§ 1459. *Partial failure*.—Partial failure of consideration no defense to an action at law upon a note. *Slacom v. Wishart*,* 3 McL., 517.

§ 1460. *Prior mortgage; foreclosure*.—Where a promissory note was given for the purchase price of land, and at the time there existed a prior mortgage on the land as to which a decree of foreclosure had been rendered, *held*, that the note was not void for failure of consideration, such failure not being total. *Greenleaf v. Cook*, 2 Wheat., 13.

§ 1461. *Failure to complete work on time*.—A railway company having become embarrassed and unable to pay for work of construction as it progressed, the president of the company agreed to give the contractor his individual notes for the work done, in consideration of the contractor agreeing to complete the work by a certain time. *Held*, that the contractor could not recover from the maker of the note without showing completion of the work at the time agreed upon. *Slater v. Emerson*, 19 How., 224.

§ 1462. *Bond for title; failure to give, as required*.—The maker of a note delivered it to B. with instructions to go with the plaintiff (the payee) to C., who would draw a bond of conveyance from the plaintiff to the maker in accordance with a contract of sale between them, and to deliver the note to the payee upon his executing the bond. *Held*, that, although the bond did not agree with the contract of sale in every respect, and was for a smaller amount, there was not such a failure of consideration as would prevent the payee from recovering on the note. But if the bond be drawn for a less amount than provided for in the contract of sale, by reason of the fraudulent representations of the payee of the note, he cannot recover on the note. *Boone v. Queen*, 2 Cr. C. C., 371.

§ 1463. *Failure to convey*.—Debt on a note, by indorsee against maker, the plaintiff having received the note after dishonor. Defense, that the note was given for the purchase of land which the payee had not conveyed according to covenant. *Held*, no defense. *Holy v. Rhodes*,* 2 Cr. C. C., 245.

§ 1464. *Partial failure; recoupment*.—When some portion of the consideration remains, the defense can only come in by way of recoupment of damages for the partial failure; but the counterclaim must be pleaded and proved the same as if an action had been brought upon it. *Packwood v. Clark*,* 2 Saw., 549.

5. *Fraud*.

SUMMARY—*Note paid to indorsee who obtains it by fraud*, § 1465.—*Fraud and want of consideration*, § 1466.

§ 1465. The maker of a note who pays it to an indorsee who has obtained it by fraud is discharged from liability to the payee, unless the maker had notice of the fraud. *Alexander v. Horner*, §§ 1467-1471.

§ 1466. Where, in a suit on an acceptance for \$4,500, the plea was that plaintiff's draft for a like sum had been indorsed to defendants by A., the payee, and protested for non-payment, and plaintiff replied that said draft had been procured by A. by fraud, and without consideration, and was part of a discount of \$5,000, which defendants knew, and it was shown in evidence that plaintiffs had in fact recovered from A. \$4,000, part of the consideration for the \$5,000 draft, *held*, that an instruction which ignored this fact was misleading. *Hall v. Weare*, §§ 1472-1475.

[NOTES.—See §§ 1476-1487.]

ALEXANDER v. HORNER.

(Circuit Court for Arkansas: 1 McCrary, 634-647. 1879.)

STATEMENT OF FACTS.—The material facts in this case are, that the Columbia Life Insurance Company, of which plaintiff is trustee, held notes of defendant, secured by mortgage, for over \$5,000; that by a negotiation between the directors of the company and Davis, the latter became the holder of defendant's notes and mortgage; that defendants sold to Davis certain stock which they held in the Columbia Life Insurance Company, and received in payment their notes and mortgage; that no proof shows any knowledge on the part of defendants of fraud charged by plaintiff against Davis. The bill seeks to require the defendants to pay their notes to plaintiff, as receiver of the (insolvent) Columbia Life Insurance Company. Neither Davis nor the Life Association, that is charged with co-operating with him in the alleged frauds, is made a party to the bill.

§ 1467. *Insurance company may hold or negotiate commercial paper.*

Opinion by CALDWELL, D. J.

The board of directors of the insurance company had an undoubted right to sell the defendants' notes and other securities to Davis, and authorize its secretary to indorse them as was done. Banks, insurance companies, and other like corporations, have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them. *Hardy v. Merriwether*, 14 Ind., 203; *McIntire v. Preston*, 5 Gilm., 48; *Nichols v. Oliver*, 36 N. H., 218; *Spear v. Ladd*, 11 Mass., 94; *Northampton Bank v. Pepoon*, id., 288; *Lester v. Webb*, 1 Allen, 34. The notes were negotiable, and their assignment and delivery invested Davis with the legal and equitable title to them and the right to receive payment and cancel them. He did receive payment from the makers—the defendants—in shares of stock in the company, then worth par in the market, and canceled and surrendered up the notes to them.

§ 1468. *One who pays a note to a fraudulent indorsee is discharged, unless he has notice of the fraud.*

The amended answer and the deposition of J. J. Horner make it certain that the defendants in this case had no knowledge or suspicion personally, or through their agents, that Davis had obtained their notes by fraud, or that there was any infirmity in his title; and having paid the notes in good faith to Davis, the indorsee and holder, the plaintiff cannot compel the defendants to pay the notes a second time, even if Davis was a fraudulent holder. Payment to the thief or finder himself of a negotiable note transferable by delivery will discharge the maker, provided such payment was not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. *Byles on Bills*, 213. Nothing short of fraud, not even gross negligence, if unattended with *mala fides*, will invalidate the payment so as to take away the rights founded thereon. *Story on Bills*, § 416; *Edwards on Bills*, § 537. The bill counts upon the notes exclusively; it does not seek a recovery upon a stock subscription, nor does it even allege that the notes were stock notes. The answer discloses that the notes were given for a subscription to the capital stock of the company, but that fact did not render the notes any the less negotiable, or prevent the company from negotiating them, or excuse the defendants from paying them to the indorsee and holder; and when paid in good faith to the holder,

the company can have no claim against the makers, either upon the notes or for the original consideration. It is not true the defendants paid nothing of value for the notes. The shares of stock owned by the defendants were issued as full paid shares; the stock was then worth par in the market; the defendants refused to sell it for less, and Davis agreed to give par for it. The test is its then market value, and not what it was really worth in the light of subsequent events. The company having indorsed and transferred the notes to Davis, it is not open to it to object that he discharged the debt for an inadequate consideration, if the defendants had no notice of the alleged fraud and acted in good faith. If Davis had been a *bona fide* holder of the notes, he could not successfully maintain that they had not been fully paid, and no more can the company.

§ 1469. *Fraudulent indorsee a necessary party to a suit by owner to compel payee to pay a second time.*

The bill is fatally defective for want of proper parties. The *gravamen* of the plaintiff's bill is that Davis and the life association, acting in concert, fraudulently procured the assignment and transfer of the defendants' notes from the company to Davis. It is not alleged in the bill, nor was it claimed in argument, that defendants were parties to that fraud; it is claimed that their agent only had notice of it before paying the notes. Obviously the plaintiff has no case unless he can impeach and set aside the sale and transfer of these securities to Davis. Davis ought to be a party to any bill seeking to do this. He is entitled to an opportunity to repel the imputation of fraud, and protect himself from liability if he can do so; the defendants are entitled to his aid in defending the action; and as he would be liable over to the defendants in the event of the plaintiff's recovering, he must be made a party for the protection of the defendants, and to avoid multiplicity of suits. *Robertson v. Carson*, 19 Wall., 94. The defendants have a right to insist that Davis shall be brought in; and on the averments in the bill the life association also, because, if they are compelled to pay their notes a second time, they are entitled to an action over against these parties, to be reimbursed the amount paid them or Davis in satisfaction of their notes, which would be the par value of their stock, that being the market value as well as the agreed value between Davis and the defendants. But as Davis and the life association are not made parties, it would be open to them in any suit that the defendants might bring against them to be reimbursed the amount of plaintiff's recovery, to contest the question of fraud in the transfer of these securities to Davis, and it might result that the court or jury trying that issue would find the transfer was not fraudulent, and thus the defendants would be wronged in a mode that would leave them no redress. Equity will not permit a plaintiff to put a defendant in this predicament. The rule is well settled that where, in the event of the plaintiffs' succeeding, the defendants will be subjected to undue inconvenience, or to danger of loss or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court; or will thereby acquire a right to call upon the absent parties either to reimburse him the whole or a part of the plaintiffs' demand, then such absent parties must be brought before the court in order that the rights and liberties of all may be settled by one proceeding and a multiplicity of suits avoided, with a possible different determination of the same issue, to the irreparable injury of the defendant sued. *Story's Eq. Pl.*, secs. 136, 138; 1 *Daniell's Ch. Pl. & Pr.*, 281, 282; *Robertson v. Carson*, 19 Wall., 94; *Milroy v. Stockwell*, 1 *Carter (Ind.)*, 35.

§ 1470. *Rules as to necessary parties in equity.*

Anticipating this objection, and with a view to avoid it, the plaintiff alleges in his bill that Davis and the life association are beyond the jurisdiction of the court and citizens of the same state as the plaintiffs, and cannot therefore be made parties without ousting the jurisdiction of the court. The learned counsel for the plaintiffs argued earnestly that these averments under the act of congress of February 28, 1839 (sec. 737, R. S.), and the forty-seventh equity rule, dispensed with the necessity of making these parties defendants. This argument has often been made before, and always unavailing in a case like this. The supreme court of the United States have divided parties to suits in equity into three classes: (1) formal; (2) necessary or proper; and (3) indispensable. The first two classes may be dispensed with; the third, never. The absent parties in this case are indispensable parties, as that term is defined and applied by the supreme court. The act of congress and the forty-seventh rule effected no change of the law on this subject of parties to suits in equity. In the leading case upon this subject the supreme court say: "The act of congress does not affect any case where persons are not joined because their citizenship would defeat the jurisdiction; and so far as it touches suits in equity it is no more than a legislative affirmation of the rule previously established by the decisions" of that court. "And the forty-seventh rule is only a declaration for the government of practitioners and courts, of the effect of this act of congress and of the previous decisions of the court on the subject of that rule. It remains true, notwithstanding the act of congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decrees between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting these rights, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How., 130. And in a late case the court say: "The act of congress of 1839, and the rule of this court upon the subject, give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with." *Ribon v. Railroad Co.*, 16 Wall., 450. And the rule established in these cases has been affirmed, illustrated and applied in many other cases. *Kendig v. Dean*, 97 U. S., 423; *Florida v. Georgia*, 17 How., 508; *Coiron v. Millaudon*, 19 How., 115; *Barney v. Baltimore City*, 6 Wall., 284; *Florence Sewing Machine Co. v. Singer Manuf'g Co.*, 8 Blatch., 127; *Tobin v. Walkinshaw*, 1 McAl., 26; *Litchfield v. The Register and Receiver*, 1 Woolw., 299. The ruling in *Robinson v. Carson*, 19 Wall., 94, is directly in point in this case, and concludes the question.

Counsel for plaintiff urge that the rules as to parties in equity are somewhat flexible; that the forty-seventh rule in terms empowers the courts to dispense with "necessary or proper parties, in their discretion;" and attention is called to the case of *Elmendorf v. Taylor*, 10 Wheat., 152, where it is said the objection for want of parties does not affect the jurisdiction, but addresses itself to the policy of the court, and is subject to its discretion. Neither the rule nor the case cited touch the question of indispensable parties; the term itself implies they can never be dispensed with. And the absent persons in this case belong to that class, and not only cannot be brought in on account of their common citizenship with the plaintiff, but they would not be permitted to come in; and in all such cases the court cannot act at all, but will leave the parties to termi-

nate their dispute by other means. *Florida v. Georgia*, 17 How., 508; *Florence S. M. Co. v. Singer Manuf'g Co.*, 8 Blatch., 127; *Kendig v. Dean*, 97 U. S. 423. And if the absent persons were not indispensable parties, but only "necessary or proper," and if the forty-seventh rule invested the court with the discretion to proceed or not with the case in the absence of such parties, there is nothing in the case calling for an exercise of that discretion favorable to the plaintiff, but the reverse, as will be seen from a brief *resumé* of the case. The bill only seeks to set aside the contract between Davis and the company so far as it concerns the defendants' notes; it does not seek to set aside the contract as to the other securities embraced in it; nor does the plaintiff offer to repay what the company received in cash on this sale of its securities or any part of it, or to surrender back to defendants their stock, or to place any of the parties in *statu quo*, nor does it seek to annul the subsequent action of the company by which it blotted out of existence nine-tenths of its capital stock, including the shares formerly owned by the defendants, and which reduction was effected by using as cash the draft received from Davis on the life association. The validity of the company's action in reducing its stock \$900,000 by the purchase of nine thousand shares from the life association and its cancellation ought to be determined before any relief is granted; for if that action was valid, it amounted to a ratification of all that had gone before, and the company ought not to be heard to assert that Davis did not pay value for the securities transferred to him when it appropriated and used the draft received from him as money. But that transaction cannot be inquired into in this case, because the bill does not attack, or even refer to it; and if it did, the indispensable parties to its determination are not before the court.

Passing by the originators, actors and participants in the alleged fraud, all of whom are citizens of the same state as the plaintiff, and solvent, so far as the record discloses anything on that subject, affirming the sale of the company's securities to Davis, so far as it profited by it, keeping all that was obtained by that transaction and the subsequent operations based on the fruits of that transaction, the plaintiff seeks a recovery against defendants, admittedly innocent of any participation in the alleged fraud, by proceeding in a mode that would deprive them of that sure recourse on the actual parties to the alleged fraud, to which they would be entitled, and in a mode that would probably result in exempting the actual perpetrators of the fraud from liability altogether. A plaintiff occupying this attitude has no claims to the favorable exercise of an equitable discretion on the subject of parties, if such discretion exists, which is not decided.

§ 1471. *Objection for non-joinder; how taken.*

Objection for the non-joinder of necessary parties need not be taken by demurrer, plea or answer; it is open to the defendant to make it any time; and it may, and in a clear case ought to be raised and acted upon by the court on its own motion.

These conclusions render it unnecessary to decide whether the transactions between Davis and the life association and the life insurance company were or not fraudulent, or to rule upon the other questions presented at the hearing. Decree dismissing bill without prejudice.

HALL v. WEARE.

(2 Otto, 728-733. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

§ 1472. *Requisites of record.*

Opinion by MR. JUSTICE STRONG.

This record has been brought up in a shape of which we can hardly speak in too strong terms of disapproval. The bill of exceptions spreads out at length the testimony of numerous witnesses, in regard to which no question arises that we can consider; and exception appears to have been taken to almost every paragraph in the charge. The whole is like a drag-net, bringing up in shapeless mass a portion of what occurred at the trial, apparently in the hope that something might somewhere be found that would justify a reversal of the judgment. The purpose in thus making up the record seems to have been to treat the case here both as a motion for a new trial and as a writ of error, and much of the argument has been directed to showing that the evidence did not justify the verdict that was rendered. Eighteen errors have been assigned, some of them to matters not reviewable in this court, as has often been decided, and others to matters that were quite immaterial, and that could have had no possible effect upon the judgment in the court below. We shall not consider in detail these assignments. It is not necessary to a correct decision of the case. Those that have any apparent soundness only will be noticed.

STATEMENT OF FACTS.—The plaintiff sued upon two acceptances, together amounting to \$4,500, and the defendants pleaded as a set-off a draft for \$4,500, drawn by the First National Bank of Cedar Rapids, of which the plaintiff was cashier, upon the First National Bank of Chicago, and protested for non-payment. The draft was dated March 16, 1869. It was drawn in favor of Charles H. Hall, and by him indorsed to the defendants. To these pleas the plaintiff replied that the draft offered to be set off had been obtained from the bank by false and fraudulent representations of Charles H. Hall, the payee, and that the consideration for it had wholly failed; and, further, that the defendants, when they received it, had knowledge of the fraud, and of the failure of consideration. Following the replications, there were rejoinders and surrejoinders; but the replications tendered the only material issues between the parties, and to the maintenance of one side or the other of these issues the evidence was directed. Thus the case was put to the jury by the circuit court. The learned judge instructed them as follows: "The issues under the pleadings are these: *First*, that the consideration for the said draft has wholly failed, of which the defendants had notice at the time they received the same, and that it is not now a valid demand against the plaintiff in the hands of the defendants. *Second*, that the said draft was obtained from the said bank by certain fraudulent acts of the said Charles H. Hall, of which the defendants were cognizant at the time they took the same, and that the said draft is void in the defendants' hands, by reason of said fraud. If either of these issues is found for the plaintiff, he will be entitled to recover."

§ 1473. *Right to set off one draft against another.*

This instruction is the first error assigned to the charge. That the issues raised by the pleadings were correctly stated is perfectly plain. In our examination of the voluminous pleas, replications, rejoinders and surrejoinders, we have been unable to find any other, either tendered or accepted. But it is said the court erred in the instruction that, if either of the issues was found for the

plaintiff, he was entitled to recover. The argument is that, even if there was a failure of consideration for the \$4,500 draft, if the bank did not get for it all it was agreed it should have, the evidence was that the bank subsequently obtained \$4,000 as fruits of Charles H. Hall's draft for \$5,000 of even date therewith, a part of the proceeds of the discount whereof was the draft attempted to be set off. To understand this, it is necessary to look at the evidence. The \$4,500 draft was given as part of the proceeds of a discount of Charles H. Hall's draft for \$5,000. Both were dated March 16, 1869. The evidence tended to show that, when the \$5,000 draft was offered for discount, Hall stated falsely that former drafts drawn by him upon the defendants, amounting to \$12,000 or \$13,000, had been accepted, and that collaterals had been put up to secure their payment; that he had grain in value equal to or exceeding \$20,000, and that he engaged the \$5,000 draft would be accepted and secured by collaterals; that such was his arrangement with the defendants. On the faith of these representations and assurances, the \$5,000 draft was discounted, and the bank's draft for \$4,500 was given on account. The former drafts had in fact not been accepted. Collaterals for acceptance had not been put up. Charles H. Hall had the day previous sold his grain, much less in value than he had stated, and the \$5,000 draft was dishonored. It was not accepted, and collaterals were not put up for it. Had these been all the facts in evidence, the charge would have been strictly correct. What the bank gave its \$4,500 draft for was not the draft it got, but that draft to be accepted and secured by collaterals; and when the defendants refused to accept the \$5,000 draft, and put up collaterals, the consideration for the bank's draft failed. This would appear very plainly if Hall had himself sued the bank as drawer of the \$4,500 bill. It cannot be pretended for a moment that he could maintain such a suit in the face of such a state of facts. And why not? Obviously for the reason that he failed to give the consideration for the bank's contract which he agreed to give. In other words, because, as between him and the bank, the consideration of the latter's contract had failed or been withheld. And if he could not enforce the bank's contract, certainly the defendants cannot, if at the time they took the draft they knew of the agreement between the drawer and the payee, and knew of the stipulated consideration, or knew of the fraud. And such was substantially the charge to the jury. But the judge overlooked, or did not notice, the subsequent recovery by the bank of \$4,000, by suit upon the \$5,000 draft, of which there was some evidence. It is true, no point was made of this in the court below. The circuit judge was not asked to instruct the jury as to the effect of a subsequent recovery of a part of the \$5,000 draft, if there ever was such a recovery, and there was no averment in the pleadings that the bank or the plaintiff had ever obtained anything in virtue of that draft. And even if the bank did obtain \$4,000 by suit upon Hall's draft, some time after it was discounted, there was still a failure of consideration for the bank's draft to the extent of \$1,000; and for this reason the plaintiff, if either of the issues was found in his favor, was entitled to a verdict, so far as the consideration had failed. The instruction complained of, therefore, so far as it was given, was correct. If the defendants desired further instruction respecting the extent of the recovery, it was their duty to ask it. We think, however, the general effect of the charge must have been misleading. It tended to withdraw from the notice of the jury the evidence that the failure of consideration for the bank's draft was only partial. Had the bank made no use of the \$5,000 draft, had there been no suit upon it, and no collection of any

part of the sum mentioned in it, the jury would have been justified in finding a total failure of consideration for the instrument which the defendant sought to set off. But if Hall's draft has yielded \$4,000 to the bank, though that was not the consideration stipulated for, it cannot be said that the consideration of the \$4,500 draft has wholly failed. The bank cannot derive a benefit from Hall's draft, and at the same time insist that it got nothing for its own draft. This view of the case, we think, should have been presented to the jury, as bearing upon the amount which the plaintiff was entitled to recover, if the issues, or either of them, were found for him.

We find no other error in the charge. Nor was there any material error in the admission of evidence. There was evidence from which the jury might have inferred that Hall, the defendants, and McAfee were acting in concert, having a common purpose to obtain drafts from the bank, and to cover up Hall's property so that the bank could not reach it. If such was the fact, the acts and declarations of Hall and McAfee in furtherance of the common design were evidence against the defendants. And if that was not so, Hall's declarations and acts were evidence to show his fraud in obtaining the bank draft, and McAfee's declarations were evidence of his fraudulent concert with Hall. Proof of Hall's fraud was legitimate, for it was a protection to the plaintiff, if knowledge of it was brought home to the defendants. The objection to the proof of the contents of the letter from the defendants to Charles H. Hall would be serious, if the letter as proved by the witness could have had any injurious effect upon the defendants' case. But we do not perceive that it could have had any injurious bearing.

§ 1474. *Decision as to right to open and close not reviewable.*

It has been assigned for error that the court gave to the plaintiff the opening and close of the argument to the jury. The assignment cannot be sustained. Under the pleadings the affirmative of the issues framed was upon the plaintiff. He was, therefore, entitled to the conclusion. But if he was not, the decision of the court awarding it to him is not a subject that will be reviewed here.

§ 1475. *Refusal to award new trial not reviewable.*

The motion for an arrest of judgment was properly overruled. It rested upon no substantial basis, and the refusal to grant a new trial is not assignable in error, as we have often said heretofore.

But, for the error in the charge which we have noticed, the judgment must be reversed.

§ 1476. *Duress.*—The fact that a note was obtained from the maker by duress does not affect it in the hands of an innocent holder. *McClintick v. Johnston*, 1 McL., 414.

§ 1477. *A., on a requisition from the governor of Pennsylvania, arrested and imprisoned B., in Indiana, for larceny. While in prison a note was given A. by B., C. becoming surety thereon. B. was then released, on the ground that the state of Pennsylvania had provided no means of carrying him back to Pennsylvania. It not appearing that the imprisonment was unlawful, nor that B. was detained until he executed the note, and there being no agreement that on executing the note B. should be released, held, no duress either as to the principal or the surety — especially as the latter signed the note deliberately, and received at the same time an indemnity for the liability he incurred.* *McClintick v. Cummins*, * 3 McL., 158.

§ 1478. *Defense of fraud generally.*—Fraud may be set up as a defense by the maker against the payee of a note, or an assignee with notice, or one who took the note after maturity or without paying a consideration for it. But it cannot be set up against a *bona fide* indorsee for value and without notice. *Slacom v. Wishart*, * 3 McL., 517.

§ 1479. The words "without defalcation," in a note, do not preclude the maker from showing fraud in the note. *Commercial & Farmers' Bank v. Patterson*, * 2 Cr. C. C., 346.

§ 1480. Acceptance of a draft obtained by fraud — indorsee must prove consideration for its acceptance; and the drawer's receipt is not admissible for such purpose. *Platt v. Jerome*,* 2 Blatch., 186.

481. Where a party obtains possession of an acceptance by fraud and deceit, he cannot recover upon it. *Wilson v. Cromwell*,* 1 Cr. C. C., 214.

§ 1482. Fraud is a defense to an action upon a note; but the consideration must be returned, if the contract is rescinded. *Elminger v. Drew*, 4 McL., 888 (§§ 1485-88).

§ 1483. Fraud in inception.— Where a negotiable instrument is originally infected with fraud, invalidity or illegality, the rule is that the title of the original holder being destroyed, the title of every subsequent holder which reposes upon that foundation, and no other, falls with it. *Commissioners v. Clark*, 4 Otto, 278.

§ 1484. The amount of a bill of exchange given for the purchase price of a prize of war landed and sold in a neutral port may be recovered by the plaintiff (the captor), although the cargo was wrecked and landed at the neutral port by collusion of the captor and the purchaser (defendant), in order to avoid towing it to the captor's own country, at the risk of recapture, for regular condemnation and sale. Although such collusive wrecking and sale might be a fraud upon the courts of the captor's country, it was held not to be such an illegality as vitiated the transaction between the plaintiff and the defendant. *Hopner v. Appleby*, 5 Mason, 71.

§ 1485. If a maker, when sued upon a note, shows that it was fraudulently obtained, this throws suspicion on the note, and plaintiff, an assignee, must then show that he received the note in due course of business, and paid for it a valuable consideration. *McClintick v. Cummins*,* 2 McL., 98.

§ 1486. Fraud of agent; charging upon principal.— In an action to subject directors to liability on notes of their bank, a plea which avers a fraudulent issue of said notes by one G., but which does not aver that G. was agent of the bank or the directors, and does not in any wise connect them with the fraud, nor show that the plaintiff was not a *bona fide* purchaser, is no defense. *White v. How*, 8 McL., 291.

§ 1487. County order.— An order drawn by the county supervisors upon the county treasurer, payable to A. or bearer, with interest, is an evidence of indebtedness which can only be set aside by showing fraud in the county officers,— and no proof of acceptance or notice is necessary. *Lyell v. Supervisors of Lapeer Co.*, 6 McL., 446.

6. Forgery.

SUMMARY — *Forged indorsement*, §§ 1488, 1489. — *Discount of note with knowledge of forgery*, § 1489. — *Forged bill of lading*, § 1490.

§ 1488. As a general rule a forged indorsement of a bill conveys no title to it; the indorsee cannot recover of the acceptors, and if the latter pay the bill and subsequently discover that the indorsement was forged, they can recover the money paid to the indorsee. But if the drawer puts the bill in circulation, with the indorsement of the payee forged, and it comes into the hands of an innocent holder, and he is paid the amount of the bill by the drawee, the latter cannot recover from him the money paid. The fact that the drawer put the bill in circulation after the forgery authorizes the persons who take it to receive the money notwithstanding the forgery. *Hortsmann v. Henshaw*, § 1491. See § 42.

§ 1489. A. made a note payable to B., forged B.'s indorsement of it, and the C. Bank discounted it with knowledge of the forgery. *Held*, that the bank might sue the maker in the name of the payee for its use, notwithstanding the forgery; that A.'s partner could not urge the forgery as a defense to a suit against him and A. on the note, it having been made by A. within the scope of his authority as a partner. *York Bank v. Asbury*, §§ 1492-1496.

§ 1490. Where an acceptor of a bill of exchange drawn upon a bill of lading, with the bill of lading attached, pays the same to a payee or holder for value and without notice, he cannot recover the payment from such payee or holder, or have any recourse against him, although the bill of lading proves to have been forged. *Hoffman v. Bank of Milwaukee*, §§ 1497, 1498.

[NOTES.— See §§ 1499-1510.]

HORTSMAN v. HENSHAW.

(11 Howard, 177-184. 1850.)

ERROR to U. S. Circuit Court, District of Massachusetts.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The material facts in this case may be stated in a few words. Fiske and Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortzman, of London, payable at sixty days' sight to the order of Fiske and Bridge, for £642. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error *bona fide* and for full value. They transmitted it to their correspondent in London, and, upon presentation, it was accepted by the drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated. It turned out that the indorsement of the payees was forged,—by whom does not appear; and a few months after the bill was paid the drawers failed and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

§ 1491. *Rights of one who takes a bill upon a forged indorsement.*

The precise question which this case presents does not appear to have arisen in the English courts, nor in any of the courts of this country, with the exception of a single case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question. The general rule undoubtedly is, that the drawee, by accepting the bill, admits the handwriting of the drawer, but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder, therefore, has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer. But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For, having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order. Now the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him by the holder. The rights of the parties are therefore to be determined as if this bill was paid by Hortzman out of the money of Fiske and Bradford in his hands. And as Fiske and Bradford:

were liable to the defendants in error, they are entitled to retain the money they have thus received. We take the rule to be this: Whenever the drawer is liable to the holder the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot, upon that ground, defend himself against a *bona fide* indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties. The English cases most analogous to this are those in which the names of the drawers or payees were fictitious, and the indorsement written by the maker of the bill. And in such cases it has been held that the acceptor is liable, although, as the payees were fictitious persons, their handwriting, of course, could not be proved by the holder. 10 Barn. & Cress., 478. The American case to which we referred is that of *Meachim v. Fort*, 3 Hill (S. C.), 227. The same question now before the court arose in that case, and was decided in conformity with this opinion.

Another question was raised in the argument upon the sufficiency of the notice; and it was insisted by the counsel for the defendants, that, if they could have been made liable to this action by the plaintiff, they have been discharged by his laches in ascertaining the forgery and giving them notice of it. But it is not necessary to examine this question, as the point already decided decides the case. The judgment of the circuit court is affirmed, with costs.

YORK BANK v. ASBURY.

(Circuit Court for Ohio: 1 Bissell, 280-287. 1858.)

STATEMENT OF FACTS.—Asbury & Pierce were partners in the cattle business. Pierce, being in Pennsylvania, agreed with the York Bank that it should discount his firm's note for \$4,000, payable in sixty days to Cyrus Milner & Co., and indorsed by Samuel Milner and Amos Carter. This note was to be paid by another note for \$4,000, indorsed by the same parties and payable in Philadelphia. All of this was without the knowledge of Asbury. The first note was discounted and at maturity paid with a second note payable to Amos Carter and indorsed by Cyrus Milner & Co. and Samuel Milner. Pierce forged the name of Amos Carter, the payee, and then gave the note to the bank—the forgery being known to the bank, which, when the note matured, brought suit upon it against Asbury & Pierce, in a court of the state of Ohio, and recovered judgment thereon. This action is *assumpsit* for \$4,000, money lent. Pierce being in California, process was served upon Asbury alone, who sets up the foregoing facts by a special plea of *res judicata*, to which the York Bank, plaintiff, demurs.

Opinion by McLEAN, J.

This demurrer raises the question whether the above judgment is a bar to the present action. In support of the demurrer it is argued the note was made by Asbury to Amos Carter, or order, and that the indorsement of Carter was forged, of which Asbury was not privy, and that the court of common pleas held that Carter had neither paid anything for the note, nor indorsed it; that Asbury was not concluded by the felonious act of Pierce; that the bank was without remedy on the note against the firm.

§ 1492. *A maker who forges the name of the payee may be sued on the note.*

It may be admitted that the bank could not claim under the forged indorse-

ment, nor was the action brought in that form. Carter being the payee of the note, the action was brought in his name, as payee, for the benefit of the bank; and no sufficient reason is perceived why this was not properly done. The bank received this note in payment of the first one discounted, of the same amount, which was a full consideration. The forgery did not affect the drawers on the paper, nor the obligations they assumed. It was treated as a genuine note, payable to Carter, for the benefit of the bank. And this was the true character of the note, before the indorsement, under the contract with the bank; and the indorsement being void, after the payment of the money, the bank held the note for its security and benefit. The facts stated in the plea are admitted by the demurrer. The note was made payable to the order of Amos Carter, and without his indorsement the other indorsers, it is supposed, could not be held responsible; but the drawers of the note, who received the money for their own benefit, could be sued in the name of Carter for the use of the bank. The drawers promised to pay him or order; and it is averred that Carter well knew the suit was prosecuted, but made no objection to it. Under the circumstances, the court would protect the bank in the use of his name, requiring it to indemnify him as to the costs. If the court of common pleas, of Madison county, erred in their decision on any point, it was the duty of the bank to remove the case by appeal or writ of error to the supreme court, and have the error corrected. Asbury, it is said, was not concluded by the felonious act of Pierce. This may be admitted; but, as one of the partners, it is not disputed that he had the right to draw the note and negotiate it; and although he was estopped from denying the indorsement of Carter, such indorsement could, in no respect, affect the rights of Asbury. If the maker of a note make it payable to a fictitious person, and puts it in circulation with the fictitious name written on it; or if he make it payable to a real person and forge the indorsement, or procure it to be done, and then put it in circulation, he is estopped from saying that it was not genuine. *Riley's Law Cas.*, 248; *Meacher v. Fort*, 3 Hill (S. C.), 227. In England it has been held that a bill drawn payable to a fictitious payee is payable to bearer, and may be declared on as such in favor of a *bona fide* holder ignorant of the fact. *Chitty on Bills*, 10 Amer. ed., 157. Whether Carter had paid anything or not for the bill was a matter of no importance, as it was made to obtain money from the bank, and the suit was brought for its benefit.

§ 1493. *Action on note bars a suit on the original cause of action against the same parties.*

But it is contended that the judgment in the Madison court of common pleas is no bar to the action of the bank, as to constitute a bar the former action must not only be for the same cause of action, but between the same parties. And it is insisted the action of Carter was on his title as indorser; the present action being for the money originally advanced by the bank to Pierce and Asbury. The former action was not brought by Carter as indorser, but by the bank in his name as the payee of the note, for its benefit, the drawers having promised to pay him. Whether the cause of action was the same in the former action as in the present is matter of fact and law. The present action is brought on general counts for money, claiming \$5,000. The former action was brought on the note for \$4,000 signed by Pierce and Asbury. But the special plea in bar states in detail the former action in the name of Carter for the use of the bank to be the same cause of action as the present, and this is admitted by the demurrer. And on this the issue of law is

raised whether the facts stated in the plea constitute a bar to the present action.

The judgment of a court having jurisdiction of the case before it is final between the litigant parties. And this is true whether the parties have used the proper vigilance or not to bring the entire equity before the court and jury. No defect of either party in this respect can avail him, under a plea in bar. If it be the same subject matter of controversy, if it was fully brought before the court and jury, or might have been so brought before them, the judgment is final. Negligence or want of knowledge in the management of the case by the counsel or party will constitute no excuse. If, on such ground, a judgment could be regarded as not final, it would destroy its effect and make litigation endless. Where injustice has been done, a motion for a new trial, appeal or writ of error is the only corrective at law. The suit brought by the bank in the name of Carter, for its benefit, as appears from the facts admitted in the special plea, brought into litigation the second note given to the bank by Pierce and Asbury, and which, on proof of the facts, entitled the bank to a recovery; nor can it be doubted that it was the same subject matter involved in the present suit. That such a trial and judgment is final between the parties is clearly shown by the authorities cited in the defendants' brief. *LeGuen v. Gouverneur*, 1 Johns. Cas., 436; *Baker v. Rand*, 13 Barb., 152, 160; *Lawrence v. Hunt*, 10 Wend., 81; *Wood v. Jackson*, 8 id., 10; *Ehle v. Bingham*, 7 Barb., 494; *Dunckle v. Wiles*, 6 Barb., 515; *Birckhead v. Brown*, 5 Sandf., 135; *Miller v. Manice*, 6 Hill, 114; *Rose v. Turnpike Co.*, 3 Watts, 46; *Hughes v. Blake*, 1 Mason, 515; *Greenl. on Ev.*, §§ 522, 528. The bank was substantially a party in the first suit. The suit was brought for its benefit and was under its control, and its right so to prosecute the suit would, if objected to, have been protected by the court. The bank was a party within the rule which requires a judgment to be between the same parties, to constitute a bar. 1 *Greenl. on Ev.*, 523; *Tuttle v. Wilson*, 10 Ohio, 24. Where a suit is brought for the use of another, a second action cannot be sustained for the same cause. The case of *McDonald v. Rainor*, 8 Johns., 412, seems to have no application to the case under consideration. In that case the payee sued the maker of a note who pleaded that the payee had indorsed the note, and the indorsee sued the defendant, who defeated the suit on an objection to the assignment. This was pleaded in bar by the same defendant in a suit by the payee; but it was held that a defect in the assignment, on which the assignee failed, did not bar the suit by the payee, which did not involve the assignment. For the reasons assigned, the demurrer to this plea must be overruled.

§ 1494. *Exchange to be added to interest will not necessarily make a note usurious.*

The second special plea is usury. The bank is alleged to be located at the town of York, in York county, Pennsylvania; that by the terms of its charter it is prohibited from taking more than at the rate of one-half of one per centum for thirty days upon a loan. And it is averred that for many years before the time of the loan, the rate of money exchange between the town of York and the city of Philadelphia was and has been in favor of Philadelphia, and against the town of York, varying in amount from one-quarter of one per centum to one-half of one per centum; all which was known to the York Bank; and that as a scheme and device for the unlawful taking of more than at the rate of one-half of one per centum, for thirty days, it was agreed by the bank to loan Asbury and Pierce the sum of \$4,000; and for the for-

bearance of the loan, that they should give their note for the above sum, indorsed and payable at the bank in sixty days, reserving \$42 of interest; and when that note matured the said Asbury and Pierce, as had been agreed, paid the bank, by way of renewal of the same, the sum of \$62 in money, and gave another note for the sum of \$4,000, payable at the Western Bank of Philadelphia, in ninety days from date, which is the note on which the first suit was brought. The usury, as alleged in the plea, consists in agreeing to make the payment at the Philadelphia Bank, the exchange on which was worth from one-quarter to one-half per centum, at the York Bank. The exchange here spoken of must mean on sight bills, and can have no reference to a bill payable in ninety days. It is not alleged that more than six per cent. was reserved as interest, but this difference of exchange being added to the interest reserved or paid, makes the usury, and was a device adopted for that purpose. An agreement to pay the first note when due, in a note for the same amount payable at Philadelphia, or on the second discount to pay the note when due at the Philadelphia Bank, does not constitute usury. It is true, the plea alleges a corrupt agreement for the loan, but from the facts stated there was no such agreement. If the agreement had been that the difference of exchange proved should be added to the interest, and the payment made at the York Bank, it would have been usurious, and a device to cover the usury. But on a transaction to pay in ninety days the amount at the Philadelphia Bank, without showing that bills on that bank at ninety days commanded a premium at York, the court will not presume usury. Such a contingency cannot be incorporated with the contract to pay, so as to make it usurious.

§ 1495. *A contract must be usurious at the time it is entered into, or it cannot become so by any future contingency.*

To constitute usury there must be a loan of money, and for the forbearance, a corrupt agreement to pay more than the legal rate of interest. In the case under consideration, there was a loan of money, but there was no agreement that more than the legal rate of interest should be paid. The payment was to be made at a bank in Philadelphia, on which, at the York Bank, sight bills generally sold at from one-quarter to one-half per centum advance; but whether a bill would sell at an advance payable in ninety days is not shown. A contract must be usurious at the time it is entered into, or it cannot become so by any future contingency. The corrupt intent must be apparent on the face of the contract; or at least it must contain all the elements to make it usurious. It is believed that the books furnish no instance of a contract which might or might not become usurious, according to circumstances, at the time of payment.

§ 1496. *Pleading; duplicity; demurrer.*

The plea not only sets up the usury on the ground stated, but it alleges that the charter prohibits the bank from receiving more than at the rate of six per centum, and that on this ground the contract is void. These two defenses united in the same plea make it double, and consequently bad, on special demurrer. A general demurrer only has been filed, on which no advantage can be taken of this defect in the plea. But, aside from this consideration, the want of sufficient averments to show the usury is fatal. It must appear that more than at the rate of six per cent. was charged in violation of the charter.

It may be a convenience to the debtor to pay the amount in Philadelphia, rather than the York Bank. And a fair presumption arises that this would be the case with cattle dealers, who generally sell at the large cities.

The demurrer is sustained to the second special plea.

HOFFMAN v. BANK OF MILWAUKEE.

(12 Wallace, 181-193. 1870.)

ERROR to U. S. Circuit Court, District of Wisconsin.

§ 1497. *Acceptor's liability generally.*

Opinion by MR. JUSTICE CLIFFORD.

Acceptors of a bill of exchange, by the act of acceptance, admit the genuineness of the signatures of the drawers, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same if duly presented, when it becomes due, according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawer. Drawers of bills of exchange, however, are not liable to the holder, under such circumstances, until it appears that the bill was duly presented, and that the acceptor refused or neglected to pay the same according to the tenor of the instrument, as their liability is contingent and subject to those conditions precedent.

STATEMENT OF FACTS.—Three bills of exchange, as exhibited in the record, were drawn by Chapin, Miles & Co., payable to the order of the defendants, and the record shows that they, the defendants, received and discounted the three bills at the request of the drawers. Attached to each bill of exchange was a bill of lading for two hundred barrels of flour, shipped, as therein represented, by the drawers of the bills of exchange, and consigned to the plaintiffs; and the record also shows that the drawers, in each case, sent a letter of advice to the consignees apprising them of the shipment, and that they would draw on them as such consignees for the respective amounts specified in the several bills of exchange. Prompt reply in each case was communicated by the plaintiffs, acknowledging the receipt of the letter of advice sent by the shippers, and promising to honor the bills of exchange, as therein requested. Evidence was also introduced by the plaintiffs showing that the defendants indorsed the bills of exchange and forwarded the same, with the bills of lading attached, to the National Park Bank of the city of New York, their regular correspondent; that the same were subsequently indorsed by the latter bank, and forwarded to the Commonwealth Bank of Philadelphia for collection; that the Commonwealth Bank presented the bills of exchange, with the bills of lading attached, to the plaintiffs, as the acceptors, and that they paid the respective amounts as they had previously promised to do, and that the Commonwealth Bank remitted the proceeds in each case to the National Park Bank, where the respective amounts were credited to the defendants. Proof was also introduced by the plaintiffs showing that each of the bills of lading was a forgery, and that the plaintiffs, before the commencement of the suit, tendered the same and the bills of exchange to the defendants, and that they demanded of the defendants, at the same time, the respective amounts so paid by them to the Commonwealth Bank. Payment as demanded being refused, the plaintiffs brought an action of *assumpsit* against the defendants for money had and received, claiming to recover back the several amounts so paid as money paid by mistake, but the verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error, and removed the cause into this court. Testimony was also introduced by the defendants tending to show that the shippers were millers; that they made an arrangement with the plaintiffs to ship flour to them

at Philadelphia for sale in that market, the plaintiffs agreeing that they, the shippers, might draw on them for advances on the flour, to be reimbursed out of the proceeds of the sales; that for more than a year they had been in the habit of shipping flour to the plaintiffs under that arrangement, and of negotiating drafts on the plaintiffs to the banks in that city, accompanied by bills of lading in form like those given in evidence in this case; that the drafts, with the bills of lading attached, were sent forward by the banks, where the same were discounted, and that the same were paid by the plaintiffs; that the drawers of the drafts in every case notified the plaintiffs of the same, and that the plaintiffs, as in this case, answered the letter of advice and promised to pay the amount. They also proved that the drawers of the drafts in this case informed their cashier that the same would always be drawn upon property, and that the bills of lading would accompany the drafts, and that they had no knowledge or intimation that the bills of lading were not genuine. Instructions were requested by the plaintiffs, that if the jury found that the respective bills of lading were not genuine, that they were entitled to recover the several amounts paid to the Commonwealth Bank, with interest; but the court refused to give the instruction as prayed, and instructed the jury that if they found the facts as shown by the defendants, the plaintiffs could not recover in the case, even though they should find that the several bills of lading were a forgery.

§ 1498. *Forged bill of lading; no recovery of money paid on bill of exchange drawn against it.*

Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception or that the consideration was illegal, or that the facts and circumstances which impeach the transaction as between the acceptor and the drawer were known to the payee or subsequent indorsee at the time he became the holder of the instrument. *Fitch v. Jones*, 5 Ell. & Bl., 238; *Arbouin v. Anderson*, 1 Ad. & Ell., N. S., 498; *Smith v. Braine*, 16 id., N. S., 244; *Hall v. Featherstone*, 3 Hurlst. & N., 287. Such an instrument, as between the payee and the acceptor, imports a sufficient consideration, and in a suit by the former against the latter the defense of prior equities, as between the acceptor and the drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except

the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same, and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described. Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced, and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale, and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of exchange. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. *Leather v. Simpson*, Law Rep., 11 Eq., 393. Different rules apply between the immediate parties to a bill of exchange — as between the drawer and the acceptor, or between the payee and the drawer — as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defense to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and secondly, that which the plaintiff gave for his title; and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations. *Robinson v. Reynolds*, 2 Q. B., 202; *Same v. Same*, in error, id., 210; *Byles on Bills* (5th Am. ed.), 124; *Thiedemann v. Goldschmidt*, 1 Dæ G., F. & J., Ch. App., 10.

Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff. *Hunter v. Wilson*, 4 Exch., 489; *Boyd v. McCann*, 10 Md., 118; *Howell v. Crane*, 12 La. Ann., 126; *Watson v. Flanagan*, 14 Tex., 354. Where it was arranged between a drawer and his correspondent that the latter would accept his bills in consideration of produce to be shipped or transported to

the acceptor for sale, the supreme court of Pennsylvania held (*Craig v. Sibbett*, 15 Penn. St., 240) that the acceptor was bound to the payee by his general acceptance of a bill, although it turned out that the bill of lading forwarded at the same time with the bill of exchange was fraudulent, it not being shown the payee of the bill was privy to the fraud. Evidence was introduced in that case showing that the payee knew what the terms of the arrangement between the drawer and the payee were, but the court held that mere knowledge of that fact was not sufficient to constitute a defense, as the payee was not a party to the arrangement and was not in any respect a surety for the good faith and fair dealing of the shipper. Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defense to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument. *United States v. Bank of Metropolis*, 15 Pet., 393 (§§ 127-134, *supra*). Testimony to show that the payees were not *bona fide* holders of the bills would be admissible in a suit by them against the acceptors, and would constitute, if believed, a good defense, but the evidence in this case does not show that they did anything that is not entirely sanctioned by commercial usage. They discounted these bills and they had a right to present them for acceptance, and having obtained the acceptance they have an undoubted right to apply the proceeds collected from the acceptors to their own indemnity. *Thiedemann v. Goldschmidt*, 1 De G., F. & J., Ch. App., 10; *Robinson v. Reynolds*, 2 Q. B., 211.

Forgery of the bills of lading would be a good defense to an action on the bills if the defendants in this case had been the drawers, but they were the payees and holders for value in the regular course of business, and the case last referred to, which was decided in the exchequer chamber, shows that such an acceptance binds the acceptor conclusively as between them and every *bona fide* holder for value. Very many cases decide that the drawee of a bill of exchange is bound to know the handwriting of his correspondent, the drawer, and that if he accepts or pays a bill in the hands of a *bona fide* holder for value he is concluded by the act, although the bill turns out to be a forgery. If he has accepted he must pay, and if he has paid he cannot recover the money back, as the money, in such a case, is paid in pursuance of a legal obligation as understood in the commercial law. *Goddard v. Merchants' Bank*, 4 Comst., 149; *Bank of Commerce v. Union Bank*, 3 id., 234; *Bank of United States v. Bank of Georgia*, 10 Wheat., 348; *Price v. Neal*, 3 Burr., 1355. Difficulty sometimes arises in determining whether the plaintiff, in an action on a bill of exchange, is the immediate promisee of the defendant, or whether he is to be regarded as a remote party, but it is settled law that the payee, where he discounts the bill at the request of the drawer, is regarded as a stranger to the acceptor in respect to the consideration for the acceptance; consequently, if the acceptance is absolute in its terms, and the bill is received in good faith and for value, it is no answer to an action by him that the defendant received no consideration for his acceptance, or that the consideration therefor has failed; and it is immaterial in that behalf whether the bill was accepted while in the hands of the drawer and at his request, or whether it had passed into the hands of the payee before acceptance and was accepted at his request. *Parsons on Bills*, 179; *Munroe v. Bordier*, 8 C. B., 862.

Certain other defenses, such as that the payments were voluntarily made, and that the title to the bills at the time the payments were made was in the National Park Bank, were also set up by the defendants, but the court does not find it necessary to examine those matters, as they are of the opinion that the payments, if made to the payees of the bills, as contended by the plaintiffs, were made in pursuance of a legal obligation, and that the money cannot be recovered back.

Judgment affirmed.

§ 1499. Government paying forged draft; delay.—Where the United States paid a draft drawn upon it, and it afterwards appeared that it was forged, and the government did not sue to recover the money paid for six years, *held*, a delay fatal to the government's action. *United States v. Cook*,* 16 Int. Rev. Rec., 148.

§ 1500. Check; forged indorsement.—Where a check was paid upon a forged indorsement of the payee's name, and a credit entered to the bank in a settlement between the bank and the drawer, of the amount of the check, neither such payment nor credit amounts to a legal payment of the check, or to an acceptance or promise to pay it. *First Nat. Bank v. Whitman*, 4 Otto, 343; 15 Alb. L. J., 392 (§§ 345-348).

§ 1501. When the United States government pays a check upon a forged indorsement, it is bound to give notice of the forgery within a reasonable time after it takes the check, and its failure to give such notice and make claim for the value of the check amounts to negligence which will bar a recovery. "No good reason can be assigned for relieving the government, when dealing with commercial paper, from observance of the rules respecting vigilance which are enforced against individuals." Per Cadwallader, J. *United States v. Central Nat. Bank*,* 6 Fed. R., 184.

§ 1502. Innocent holder; passing forged note; liability.—If the innocent *bona fide* holder of a forged note which he has received for a valuable consideration passes it to another innocent person, *bona fide*, and for a valuable consideration, without indorsing it, although not liable upon the note, he is liable for the amount he has received for it, provided the other party has not been guilty of such negligence as would deprive the person from whom he received the note of his remedy against prior parties who might be liable to him, and has given notice and offered to return the forged paper in a reasonable time. *Semmes v. Wilson*,* 5 Cr. C. C., 285.

§ 1503. Knowledge of forgery; proof of original cause of action.—It is not necessary to prove that one who passes a forged note knew it to be forged, or that he passed it fraudulently. One who takes such paper in payment for goods sold may sue on the original cause of action without making such proof. *Ibid*.

§ 1504. Money paid on forged note; recovery.—In order to recover money paid on a forged note it is only necessary to show that it is forged. It need not, as against an indorser, be shown that suit has been brought against the apparent maker. *Ibid*.

§ 1505. Liability of carrier of forged paper.—A. fraudulently obtained possession of B.'s promissory note, payable in three months. After changing it to a two months note A. delivered it to an express company, to be taken to a distant bank and discounted, and the proceeds returned to him. A. at the same time represented himself as B., and wrote a letter to the bank, to which he signed B.'s name, directing that the proceeds be returned by the carrier, and sent the letter by the carrier to be delivered with the note to the bank. The note was discounted and the proceeds, minus express charges, delivered to the express company in a package addressed to B., but the company delivered it to A. *Held*, that the note by its alteration became forged and was not binding upon B., and that the express company were not responsible for its genuineness. *Norwalk Bank v. Adams Express Co.*, 4 Blatch., 455.

§ 1506. Payment in forged notes.—Bank A. paid Bank B. in the forged notes of the latter, neither bank knowing at the time that the notes were forged, and Bank B. accepted the notes as its own. *Held*, that it could not set up the forgery and payment as a defense against a suit by Bank A. for a balance due it upon general account. *United States Bank v. Bank of Georgia*, 10 Wheat., 333.

§ 1507. Raised check.—Where the payee of a check took it to the teller of the bank upon which it was drawn to ascertain if it was good, and the teller said: "It is all right, send it through the clearing house," and it afterwards turned out that the check had been raised, and the payee's name forged, *held*, that in the absence of anything to direct the attention of the bank officer to other matters, he had a right to suppose that information was desired of him merely in regard to the signature of the drawers and the state of their account, and the answer he gave was held responsive only as to these two points, and did not relate either to the

amount of the check or to the signature of the payee. A drawee of a check is under no obligation to give information as to the amount of the check or the signature of the payee. *Espy v. Bank of Cincinnati*, 18 Wall., 604. See BANKS, §§ 234-238.

§ 1508. It is no more incumbent on the bank than on the holder to ascertain from the maker of the check its general validity. *Ibid.*

§ 1509. A check drawn by Bank A. on Bank B. was fraudulently raised before being presented for certification. Bank B. certified that the check was "good." *Held*, that the certifying bank became primarily liable to any innocent holder thereof for the debt, which it had certified was "good." *Louisiana Nat. Bank v. Citizens' Bank*, * 13 Alb. L. J., 275.

§ 1510. Certificate of deposit.—Where a certificate of deposit was made payable to the order of the depositor, a person who could not write, and the bank issuing the certificate took a description of him and his mark, in their signature book, and afterwards the depositor lost the certificate and the finder presented it to another bank, representing himself as the person mentioned in the draft and said that he could not write, and the bank without any identification had him indorse the certificate by making his mark, *held*, that the second bank was guilty of negligence in not having the person presenting the certificate identified. *State National Bank v. Freedmen's Savings and Trust Co.*, 2 Dill., 11. See BANKS, § 259.

7. Alteration.

SUMMARY — *Instrument given to another for use; filling up blanks*, § 1511. — *Alteration as to time of payment*, § 1512.

§ 1511. Where a party to a negotiable instrument intrusts it to another for use, with blanks not filled up, such intrusting carries with it implied authority to fill up the blanks, but not to vary or alter the material terms of the instrument by erasures, or by interpolations repugnant to the purpose for which the instrument was intended. If such erasures or interpolations are made, it renders the instrument void even in the hands of an innocent holder. Thus an order to pay money "in drafts to the order of" was signed in blank and given to a person who erased the words "drafts to the order of" and inserted the words "current funds," and upon such order secured the money in cash and absconded. *Held*, that the interlineation was so plainly repugnant to the erased words that it amounted to sufficient notice to put the payer of the money upon inquiry, and rendered the order void. *Angle v. N. W. Mutual Life Ins. Co.*, §§ 1513-1516.

§ 1512. The alteration of a note as to time of payment, without the knowledge or consent of the maker or indorsers, discharges them, although such alteration may postpone the maturity of the paper. The rules that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, and that the holder of commercial paper taken in good faith in the ordinary course of business is unaffected by the latent infirmities of the security, have no application in such a case. *Wood v. Steele*, §§ 1517, 1518. See § 1519.

[NOTES.— See §§ 1519-1526.]

ANGLE v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(2 Otto, 830-842. 1875.)

APPEAL from U. S. Circuit Court, District of Iowa.

§ 1513. *Fraudulent erasure and interlineation in filling blanks in negotiable instrument.*

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority. Pursuant to that rule, it is settled law, that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor

to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered. By virtue of the implied authority, such a depository may perfect, in his discretion, what is incomplete, by filling the blanks; but he may not make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same as shown by its written or printed terms. *Goodman v. Simonds*, 20 How., 361 (§§ 420–425, *supra*); *Bank v. Neal*, 22 id., 108 (§§ 405–407, *supra*).

Much reference to the pleadings will be unnecessary, as the questions presented for decision arise chiefly out of the facts deducible from the proofs exhibited in the record. Suffice it to say, in that regard, that the suit was instituted by the complainant to procure a decree that the bond and mortgage and the two fire insurance policies described in the bill of complaint were delivered and assigned to the respondents without consideration, and to obtain a decree setting aside said bond and mortgage, and for a return of said policies, the same having been delivered to the respondents as additional security for a loan of \$10,000, the proceeds of which never came to the hands of the complainant; and he charges that the proceeds of the loan were never forwarded to him by his authority; that if the insurance company ever paid the same in current funds to the person through whom the loan was negotiated upon any order signed by him, as pretended by the respondents, the order was forged by the party who presented it, or by some person interested, to cheat and defraud the complainant out of the money. Service was made, and the corporation respondents appeared and filed an answer, in which they allege that the bond, mortgage and fire policies were duly delivered to the company by the agent of the complainant; and they deny that the order for the payment of the proceeds of the loan was forged, and aver that they made the payment to the person who presented it, in good faith. Proofs were taken, and the court, having heard the parties, entered a decree dismissing the bill of complaint, and the complainant appealed to this court. Sufficient appears to show that the respondents are a corporation created by the laws of Wisconsin, and that they were doing a life insurance business throughout the northwestern states; and it also appeared that they were accustomed to loan money on real estate securities. Agents were appointed by the respondents, in the different states, whose duty it was to solicit applications for policies, and to transact other matters connected with their insurance business.

State agents were appointed by the company; but it is conceded that they in turn appointed sub-agents to perform the same duties, and it appears that the commissions for all such services were paid by the company to the state agents. Applications for loans of money were frequently made to the company through the state agents; and it appears that such agents of the company were furnished with blank forms for such applications, and for the appraisement of real estate intended as security for such loans. When an application for a loan was made, the blank forms were filled up by the agent. It was the business of the borrower to furnish abstracts of the title of the real estate offered as security, all of which were transmitted by the agent to the home office for examination; and, if they were approved, the course of business was that the bond and mortgage were prepared and forwarded to the agent, to be delivered to the applicant for execution and return. Of course, the applicant might still refuse to execute the bond and mortgage; but if he was satisfied with the

terms of the instruments, and completed the same, they were given back to the agent, and were by him returned to the company. It seems that the money loaned was usually transmitted to the applicant by means of a draft payable to the order of the borrower; or, in certain cases, the money was paid by the company at the home office, pursuant to the written order of the borrower, evidenced by a receipt on the back of the order by the person in whose favor it was drawn. Such papers from the home office to the borrower and from the borrower to the company, it is conceded, are usually mailed to the state agent, and that they pass through his office; but it is insisted by the respondents that he has no interest in the business, and that he receives no compensation from the company for his services. Sub-agents, it is conceded, were employed by the agents appointed by the company; and it appears that I. T. Martin, during the winter and spring of 1871, was a regular agent of the company, appointed for the state of Iowa; that he employed one C. W. Copeland, as sub-agent, to solicit applications for life insurance; that Copeland claimed to be the agent of the company to effect loans in their behalf on security of real estate; and that he represented to the complainant that he, the sub-agent, could procure for the complainant a loan from the company of \$10,000 on such security.

Both the complainant and Copeland then resided at Cedar Rapids, and it was at that place and about that time that the former was introduced to the latter; and it appears that Copeland was at that time canvassing for the company, to procure customers to take policies in the company, and to induce persons to take loans from the company on security of real estate. About the same time, Copeland published a card in one or more of the local newspapers, representing that he was the agent of the company; and it appears that he exhibited to the complainant pamphlets, circulars, and other documents, of the kind prepared and distributed by the state agents, as the means of extending the business of the company, and that notice was published by the same party in one or more of the local journals, in which he is described as the agent of the insurance company. Evidence entirely satisfactory was introduced, showing that it was during that period that the complainant commenced negotiations with Copeland to obtain for him a loan from the company for the sum of \$10,000, to be secured by bond, and mortgage of real estate. Conversation ensued between them; and the evidence shows that Copeland told the complainant that he was going to quit preaching, and that he had made arrangements to act as attorney for the said insurance company; that he had already secured a loan for one person; and that, being an intimate friend of the general agent, he could get the money whenever he recommended a loan. Blank forms were requisite; and it appears that Copeland furnished the complainant with a printed blank form of an application for a loan, and that he requested the complainant merely to insert the description of the property to be offered as security and his valuation of the same, stating that he, the agent, would fill the other blanks, and send the application forward. Accordingly, the complainant inserted the description of the property, giving his valuation of the same in figures, and also gave the name of his wife and the date of the instrument, and his own name, and place of residence. Incomplete though the instrument was, yet the witness states that he delivered it to Copeland, and that he, the witness, never saw it afterwards until he gave his deposition in the case, and that the indorsements on the back of the instrument were not there when it left his possession.

Due notice was received by the complainant, from the president of the company, that his application for the loan was accepted; and he was also informed, in the same communication, that abstracts of the title of the property and certain certificates were required to show that the property was free of incumbrances and liens, and that when the same were received, if found to be correct, their attorney would prepare the bond and mortgage, and forward the same to him for execution. Such abstracts and certificates were procured by the complainant, at the instance of Copeland, and they were delivered by the complainant to him at his request; and it appears that Copeland presented to the complainant the bond and mortgage, ready for his signature, he having procured the signature of the complainant's wife to the mortgage before the instruments were exhibited to the complainant for execution. They were signed by the complainant at his house, no one being present except his wife and Copeland; and the complainant testifies that he then and there delivered the same to Copeland, together with two fire policies of insurance, in order that the fire policies might be indorsed by the agent of the companies issuing the same, in a way to make the loss, if any, payable to the corporation respondents. Decisive proof that Copeland received the bond and mortgage for record and transmission is also exhibited by the receipt which he gave in behalf of the company, and which he signed as agent.

Throughout the whole transaction the negotiations with the complainant were conducted by Copeland; and the evidence shows beyond doubt that all the instruments and documents which were delivered by the complainant to Copeland were by him delivered or transmitted to the state agent of the company, and that they were all forwarded by the latter to the company at their home office, where the officers of the company transact all their business. Such applications for loans are usually made direct to the executive committee, and are required to be signed by the party desiring the loan; and when the loan papers have been perfected, the company pay to the owner directly, either in checks or drafts *to his order*, unless the borrower, by written request or order, may have otherwise directed; but the president, in his testimony, admits that the state agent sometimes forwards applications to the executive committee for parties residing in the state, and that the home office does advise such parties, through him, of the action of the company in respect to such applications. Cases of the kind, therefore, it may be assumed, had occurred before, where the business was transacted through the state agent; but, if not, still it is proved beyond all doubt that all the negotiations with the complainant were conducted by the sub-agent, and that all the propositions to and from the company, in respect to the loan in question, were transmitted to the company through the same state agent. Satisfactory abstracts and certificates having been forwarded, and the due execution and delivery of the bond and mortgage having been procured, nothing remained to be done to enable Copeland to carry his fraudulent scheme into effect, except to get an order for the money in such a form that he could convert the fund to his own use, without danger of immediate exposure and detection. Antecedent conversations between the parties made it known to him that the complainant expected to receive the proceeds in drafts payable to his own order; it appearing that the complainant had told him that he wanted the amount in two drafts, one for \$6,000 and the other for \$4,000, each payable to his own order. Apprised of what the complainant desired, he doubtless thought it prudent to seem to conform to his expressed wish. Circumstances occasioned some delay, but Copeland finally

informed the complainant that the papers had gone forward, and stated that notice that the papers were satisfactory might come any day, and suggested that the complainant might as well sign the blank order for the money, adding that he "would fill it out;" and the witness testifies that he looked at the blank, and seeing that it contained the words "in drafts to the order of," put his signature to it, placed it in the drawer of Copeland, and went home.

Taken as a whole, the evidence satisfies the court, beyond all doubt, that the blank form which the complainant signed was without date, except the year, which was in printed figures; that it contained no direction except the printed word "to," followed by a blank; that it did not contain the name of any payee, nor anything upon the subject, except the printed words "pay to," followed by a blank; that it did not specify any amount, nor contain anything upon the subject, except the printed word "dollars," preceded by a blank; that it did not specify for what the payment was to be made, nor did it contain anything upon the subject, except the printed words "on account of," followed by a blank; and that it contained nothing in respect to the medium of payment, except the printed words "in drafts to the order of," the word "of" immediately preceding the name of the plaintiff, H. G. Angle, and so close to the first initial of the signature as to leave no blank between the erased sentence and the name of the complainant. Subsequent to the time when the blank form was signed by the complainant, and was left in the drawer of Copeland, the printed words "drafts to the order of," just preceding the signature of the complainant, were erased, evidently with pen and ink, and the words "current funds" were inserted in writing between the printed word "in" and the word "drafts," which is the first word of the sentence "drafts to the order of," the effect of which was to authorize the company to pay the proceeds of the loan "in current funds," instead of "drafts to the order of" the signer of the blank form. Armed with that instrument, the blanks having been filled, and the words "current funds" having been inserted in lieu of the words "drafts to the order of," which were erased, Copeland went to the home office and obtained the whole proceeds of the loan, and absconded with the whole amount.

Full power to receive the proceeds of the loan would have been conferred upon the person who presented it, even if the holder of the blank form had done nothing more than to fill the blanks contained in the incomplete instrument; but it is quite obvious, that, if he had merely filled the blanks of the instrument, the company would have been obliged to make the payment "in drafts to the order of" the complainant, which, it is easy to see, would have defeated the fraudulent intent of the party who presented it for payment, as the drafts, if payable to the order of the complainant, could not be by that party converted into current funds. Had he merely filled the blanks, the body of the completed instrument would have read as follows, to wit: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in drafts to the order of H. G. Angle." Evidently such an instrument would not have answered the purpose of the holder of the blank form, if he intended to betray his trust, and to convert the proceeds of the loan to his own use, without the consent of the lawful owner of the fund. Blanks necessary to complete the instrument and render it operative, it may be admitted, might be filled by the holder of the instrument; but it is clear that it was not possible, within the meaning of that rule, to give the instrument such a form as would make it answer the supposed fraudulent intent, without doing violence to the scope and design of the blank form, as evidenced by the printed terms it contained, which, as outlines,

plainly indicate that the signer required that the payment of the proceeds of the loan should be made in drafts to his own order. Manifest as that indication was, and as it would be, even to the casual reader, it became necessary, in order to make the completed instrument answer the fraudulent intent of the holder, to change the scope and design of the same, which he effectually accomplished by erasing the printed words "drafts to the order of," which immediately preceded the name of the signer, as before explained, and by inserting the words "current funds" between the erased word "drafts" and the word "in," between which and the erased word "drafts" there was a short blank, scarcely sufficient to admit the written words "current funds," as will be seen by reference to the instrument actually presented to the company, which was sent up with the transcript as an original paper.

Compare the altered instrument with what it would have been if nothing had been done to it except to fill the blanks, and the criminal character of the act is manifest. By the erasure and insertion of the words "current funds," it was made to read as follows: "Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in current funds." Such an alteration, it is insisted by the complainant, is not and cannot be justified by any implication which arises from the existence of blanks in the instrument, inasmuch as the alteration consists both of the erasure of material words and the insertion of other material words in lieu of those erased, which change the scope and legal effect of the instrument from what it would have been if the blanks had been filled without any such erasure and insertion. Complainant concedes that blanks in such an instrument may be filled by the person to whom it is intrusted for use; but he contends that the said alterations made in the instrument in this case were a forgery, which renders the completed instrument void; and the court here concurs in that proposition.

§ 1514. *Authority to fill up blanks.*

Negotiable instruments are frequently delivered for use, with blanks not filled; and, in respect to such instruments, it is held that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is that, as between such party and innocent third parties, the person to whom the instrument was so intrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument. *Violett v. Patton*, 5 Cranch, 142; *Russell v. Langstaffe*, 2 Doug., 514; *Collis v. Emett*, 1 H. Black., 313; *Montague v. Perkins*, 22 Eng. L. & Eq., 516. Questions of the kind most frequently arise in respect to negotiable instruments; but the court here is of the opinion that the same rule is properly applicable to the case before the court. Authority to act for another may be express, or it may, in certain cases, be implied; but an implied authority has its limitations as well as that which is express. Examples to prove that proposition exist everywhere; but it would be difficult to give one more apposite and striking than the one presented by the case in decision, where the authority to fill blanks is implied from their existence in an instrument intrusted to another for use. 1 Greenl. Ev. (12th ed.), § 567. Beyond all doubt, such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative, within its scope and design, if the terms or words of the instrument sufficiently indicate what that scope

and design are. Cases arise, it must be conceded, where a party signs his name to a blank paper, and intrusts the paper containing his signature to another for use; but it is sufficient to say upon the subject, that the case before the court is not of that character. Instead of that, the blank form signed by the complainant contained terms clearly indicating that the money was to be paid on account of "the bond and mortgage," and that the signer of the blank form required the payment to be made "in drafts to the order of" the signer of the same; and it was no more competent for the person to whom it was intrusted, in that state of the case, to erase the words "drafts to the order of," and to insert in the short blank preceding that sentence the words "current funds," than it would have been for that person to have prepared and executed a new instrument in the name of the signer, requesting the company to pay the proceeds to the order of the holder of the blank form.

Argument is scarcely necessary to support that proposition, as it is self-evident that the erasure of the words "drafts to the order of" changed the manifest scope and design of the incomplete instrument; and it is equally clear that the words "current funds," which were inserted, are utterly repugnant to the printed terms "drafts to the order of," which were erased by black lines. *Bank v. Douglas*, 31 Conn., 180. Properly applied, that case is decisive of the present case. It appears that the defendant in that case put his name upon an inchoate bill of exchange, drawn and signed by the maker, on a certain firm, blanks being left for the date, amount, time of payment, and the name of the payee; and that the defendant delivered the paper, thus indorsed, to the maker of the same, who struck out the name of the place where it was made, and the name of the firm on which it was drawn, and filled out the instrument, so as to make it a promissory note for \$3,500, payable to the order of another party. Upon these facts the court held that an inference arose — which, in favor of a *bona fide* holder of the paper, was irresistible — that the person to whom the paper was intrusted was authorized, by filling the existing blanks, to complete the instrument and to fill the blanks so as to bind the defendant as indorser of a bill of exchange, drawn by him on the firm therein named, for any sum, payable at any time and place. But, say the court, no inference, or presumption of authority, can arise that he might turn the bill drawn on one firm into a bill drawn on another, or to turn it into a promissory note. Neither *dictum* nor decision, say the court, has been cited to warrant such a claim; and they add, that they suppose that none such can be found. Suit in that case was brought by the bank, claiming to be an innocent holder; but the court held that, notwithstanding the erasures, unmistakable evidence of the original character of the instrument remained, and that the evidence was amply sufficient to excite distrust, and make it the duty of any one to whom the paper was offered to inquire when and by what authority such erasures and alterations had been made. *Gardner v. Walsh*, 32 Eng. L. & Eq., 162.

Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks; but it does not confer authority to make any addition to the terms of the note; and if any such of a material character are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder. *Ivory v. Michael*, 33 Mo., 400. Proof was given in that case that the parties had for many years been in the habit of indorsing for each other; that the defendant indorsed the note, which was in blank as to the time of payment, and was pay-

able without defalcation or discount. Before using it the other party filled the blank with thirty days, and added after the word "discount," "bearing ten per cent. after maturity." Attempt was made in argument to sustain the right to make the addition to the note, because it was delivered before the blank was filled; but the court held that the insertion of the words, "bearing ten per cent. after maturity," was not the filling of a blank, and that it rendered the note invalid. *Wood v. Steele*, 6 Wall., 80 (§§ 1517–18, *infra*). Persons intrusted with negotiable securities for use by the parties to it may, if it contains blanks, fill the same; but Mr. Parsons, though he admits that rule to its fullest extent, adds, that if one materially changes words which are printed or written, the note by such change would be rendered invalid; and certainly it must be so if the change substantially varies the scope of the instrument to the prejudice of the party from whom it was obtained. 2 Pars. on Bills & Notes, 566. Suppose that is so; still it is insisted by the respondents that the rule is not applicable in this case, because they had not notice of the defect in the blank order. But the court here is entirely of a different opinion. Even the holders of negotiable securities taken in the usual course of business, before the securities fall due, are held chargeable with notice where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. *Goodman v. Simonds*, 20 How., 365 (§§ 420–425, *supra*).

§ 1515. *Holder with notice.*

When it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties; and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made. These principles are of universal application; but where a person takes a negotiable security, which, upon the face of it, is dishonored, he cannot, says Taney, C. J., be allowed to claim the privileges which belong to a *bona fide* holder. *Andrews v. Pond*, 13 Pet., 65. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. The same doctrine was enforced and applied in a subsequent case, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, the court held that all those dealing in paper "with such marks on its face must be presumed to have *knowledge* of what it imported." *Fowler v. Brantly*, 14 Pet., 318 (§ 427, *supra*); *Brown v. Davies*, 3 Term R., 80.

§ 1516. *Actual notice of fraudulent erasure and interlineation not necessary to put upon inquiry.*

Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased so as to be inoperative, were still entirely legible, even to the casual reader; and that the words "current funds," inserted before the erased word "drafts," were plainly repugnant to the erased words, "drafts to the order of," which followed them in the same connection. Constructive notice in such cases is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon

inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained. *Hawley v. Cramer*, 4 Cow., 712; *Hill v. Simpson*, 7 Ves. Jr., 170; *Kennedy v. Green*, 3 Myl. & K., 722; *Booth v. Barnum*, 9 Conn., 286; *Pitney v. Leonard*, 1 Paige, 461; *Pringle v. Phillips*, 5 Sandf., 157. Authorities to show that the material alteration of a written instrument renders it void is unnecessary, as it is a principle of universal application.

Decree reversed, and the cause remanded, with direction to enter a decree in favor of the complainant.

WOOD *v.* STEELE.

(6 Wallace, 80-83. 1867.)

ERROR to U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The action was brought by the plaintiff in error upon a promissory note made by Steele and Newson, bearing date October 11, 1858, for \$3,720, payable to their own order one year from date, with interest at the rate of two per cent. per month, and indorsed by them to Wood, the plaintiff.

§ 1517. *Alteration in time of payment discharges maker.*

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time it appeared on the face of the note that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury "that if the said alteration was made after the note was signed by the defendant Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury covered the entire ground of the controversy between the parties. The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month exonerates the maker who has not assented to it? Was the instruction given correct? It was a rule of the common law as far back as the reign of Edward III. that a rasure in a deed avoids it. *Brooke's Abridg., Feats*, pl. 11. The effect of alterations in deeds was considered in *Pigot's Case*, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In *Master v. Miller*, 4 Term R., 320, 1 Smith's Lead. Cas., 1141, the subject was elabo-

ately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson cannot affect the result. He had no authority to change the date. The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that *it is not his deed*; and if it be not under seal, that he did not so promise. In either case the issue must necessarily be found for him. To prevent and punish such tampering the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged.

§ 1518. *Rules as to bona fide purchaser, and as to which of two innocent persons must suffer, have no application to cases of altered notes.*

The rules that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly.

The instruction was correct, and the judgment is affirmed.

§ 1519. *Prolonging time.*—The alteration of the date of the note so as to prolong the time of payment does not avoid it as to the maker. *Union Bank v. Cook*, 2 Cr. C. C., 218. See § 1512.

§ 1520. *Adding place of payment.*—The addition by a third person to the signature of the maker of a note of the words "Washington, D. C.," with the intention of affecting the negotiability of the paper, is a material alteration which avoids the note. *Commercial & Farmers' Bank v. Patterson*,* 2 Cr. C. C., 346.

§ 1521. *Erasing place of payment.*—In *assumpsit* on a note "payable at the Commercial Bank of Canada," held, that the erasure of these words after the note had left the maker's hands and without his knowledge or consent did not prevent a recovery, there being nothing shown connecting the plaintiff with the erasure and its effect being to enlarge, not restrict, the rights of the maker. *Major v. Hansen*,* 2 Biss., 195.

§ 1522. *Adding "value received."*—Writing after an indorsement the words "value received" does not avoid the note, unless done with the privity of the plaintiff. *Riggs v. St. Clair*,* 1 Cr. C. C., 606.

§ 1523. *Adding "and company."*—A. bought goods and gave his promissory note therefor. A. and B. afterwards formed a partnership and the goods became the property of the firm. After the note became due, and with the consent of the partners and the holder, the words "and company" were added to A.'s name. Held, binding on the firm. *Crum v. Abbott*, 2 McL., 233.

§ 1524. *As to date.*—An accommodation maker signed a blank form of a note. Subsequently the printed words of the form, "after date," were erased and the words "on demand" substituted, and then the blanks for amount and dates, etc., were filled up; and two or three weeks later two additional accommodation securities signed the note as makers.

Held, that neither the erasure and insertion, nor the addition of the two securities, were material alterations of the note operative to discharge the accommodation maker. *Bingham v. Reddy*,* 5 Ben., 266.

§ 1525. Delivery of a note or bill to an agent without date authorizes him to fill up the blank. *Goodman v. Simonds*, 20 How., 843 (§§ 420-425).

§ 1526. Alteration apparent, holder must explain.—Where under a count in a declaration upon a note dated "April 14, 1838," a note was offered in which the original date, "March 24, 1838," appeared to be partially obliterated with a pen, and under it was written "April 14, 1838," the same was held not admissible until the alteration was accounted for by the holder. *Low v. Merrill*,* 1 Burn. (Wis.), 185; S. C., 1 Pin., 340.

8. Miscellaneous Defenses.

SUMMARY.—*Bank not chargeable with knowledge of president, when*, § 1527.—*Diverting money from use for which it was intended*, §§ 1527, 1528, 1530.—*Accommodation paper*, § 1530.—*Conflict of jurisdiction*, § 1531.

§ 1527. An accommodation note given to a railway company was negotiated for a purpose alleged to be different from that for which it was agreed to be used. The president of the railway company was also president of the bank at which the note was discounted, and had knowledge of the purposes for which the paper was made. *Held*, that the bank was not chargeable with notice arising out of his knowledge, if he withdrew and took no part in the transaction involving the discount. *Waynesville National Bank v. Irons*, §§ 1532-1538. See §§ 5, 278, 364, 498, 626, 701, 1216, 1428, 1455.

§ 1528. The preamble to a resolution of directors of a company stated the necessity for raising money and the plan by which it was to be raised, embracing the giving of accommodation notes by the directors and securing them by bonds deposited in trust. No expression of the purposes for which the money was to be used was stated by the resolution. *Held*, that it did not amount to an agreement to use the notes or their proceeds for a special purpose and for no other. *Ibid*.

§ 1529. In an action by a bank upon accommodation paper given to a railway company, *held*, that if the note, having previously been indorsed in blank by the treasurer of the railway company, was delivered to the bank by W., assuming to represent the railway company in the transaction, and in consideration thereof the bank paid W. the amount thereof, less the discount, or paid, at W.'s request, an equivalent amount in obligations of the railway company, so that the railway company in fact received the value thereof, and the transaction was reported by W. to the secretary of the company and by him to its treasurer, and the company has continued ever since to enjoy the proceeds of said discount without any offer to return the consideration, then neither the railway company nor the accommodation makers can set up the defense that the note was negotiated without the authority or consent of the railway company. *Ibid*.

§ 1530. A bank discounting in good faith accommodation paper given for a special purpose is not chargeable with a misapplication of the proceeds of such paper by the person accommodated. *Ibid*.

§ 1531. A foreign attachment in a state court of the debt due the payee from the maker, commenced after the institution of an action on a note in a federal court, is not a bar to such action. *Wallace v. McConnell*, §§ 1539-1543.

[NOTES.—See §§ 1544-1563.]

WAYNESVILLE NATIONAL BANK v. IRONS.

(Circuit Court for Ohio: 8 Federal Reporter, 1-10. 1881.)

Charge by MATTHEWS, J.

STATEMENT OF FACTS.—This action is brought by the Waynesville National Bank as the owner and holder of a promissory note which reads as follows:

"\$10,000.

LEBANON, OHIO, April 15, 1878.

"One year after date, we, or either of us, promise to pay to the order of the treasurer of the Miami Valley Railway Company ten thousand dollars, for value received."

It is signed by Samuel Irons, William F. Dill, Daniel Perrine, F. Hutchinson, William Morlatt and William V. Bone. On the back of it is the following indorsement: "Demand and notice of protest waived. W. B. Sellers, Treas. M. V. R'y Co."

§ 1532. *What is sufficient for a recovery in an action on negotiable paper.*

The note is what is known as negotiable paper, and the production of it by the plaintiff, with proof or admission of the genuineness of the signatures and of the indorsement, without any additional evidence, entitles it to recover from the parties the full amount thereof, with interest, unless the defendants make out some satisfactory defense. The railroad company is sued together with the makers, and they defend separately. The answer of the railroad company sets up that the note was not indorsed or delivered by the treasurer to the bank, neither for a valuable consideration nor otherwise; denies that there is anything due thereon, and denies that the plaintiff is the legal or equitable owner of it, and alleges that the plaintiff came into possession of it wrongfully and illegally, and without authority from, or consent of, the defendant. It sets up the circumstances in detail of the original negotiation of the note as collateral security by Mr. Irons and the treasurer of the company at the Lebanon National Bank to secure a demand note of the company for \$3,000, and that it was obtained from the possession of that bank and discounted by the plaintiff without any authority.

§ 1533. *Circumstances under which an indorser (corporation) is bound upon its indorsement.*

The relation that the railway company occupies to the paper is different from that occupied by the other defendants, and it is proper to dispose of the questions arising on the defenses of the railway company independently, in the first instance, and with a view to that I give you this charge: If the jury are satisfied from the testimony that the note in suit, having previously been indorsed in blank by the treasurer of the railway company, was delivered to the plaintiff by Israel Wright, assuming to represent the railway company in the transaction, and in consideration thereof the plaintiff paid to Israel Wright the amount thereof, less the discount, or paid, at Wright's request, an equivalent amount in obligations of the railway company, so that the railway company in fact received the value thereof, and the transaction was reported by Wright to the secretary of the company, and by him to its treasurer, and the company has continued ever since to enjoy the benefit of the proceeds of said discount without any offer to return the consideration, then the railway company is not entitled to set up the defense upon which it relies.

§ 1534. *Accommodation paper, misuse of.*

The answer of Mr. Irons is filed separately. He denies that the plaintiff is the owner or holder of the note. It avers that the note was made by the defendant herein and his co-defendants, except the railway company, jointly and severally, and all as principals, for the accommodation of said railway company, and loaned to it upon the agreement and understanding that said company should, upon the maturity of said note, pay the same, and that the proceeds of said note should be applied exclusively by said company to the purchase of right of way for said company's road and the further construction and completion of the same; of all which the plaintiff had due notice before said note came into plaintiff's possession. He alleges that the note came into the possession of the plaintiff without the knowledge or consent of himself or of any of his co-defendants, and with notice that the proceeds would be applied to the

payment of debts of said company incurred prior to the making of said note, and to purposes other than those aforesaid, for which said note was made. He further alleges that no part of said proceeds was applied by said plaintiff to the purposes aforesaid, for which said note was made, nor by any other person to whom they may have paid the same. The third defense alleges the insolvency of the railway company prior to the time when the note came into the possession of the plaintiff, and its final and complete suspension of work upon its road and all attempts to complete the same, whereby, and in consequence of other facts in the prior defense which I have just read, of which it is alleged the plaintiff also had notice, it is claimed that the negotiation of the note was illegal. The fourth defense alleges the circumstances in reference to the original deposit of the note with the Lebanon National Bank, and claims that possession of the note was obtained from the Lebanon National Bank without the authority, knowledge or consent of the defendants. The fifth defense denies that Sellers, as treasurer, assigned or transferred the note to the plaintiff, or that the railway company authorized him to do so. Then comes the sixth defense, in reference to which a ruling has already been made excluding testimony offered in its support, and which is not, therefore, open to any further consideration. The answers of the other defendants, except in one particular, in respect to which it is not necessary to refer you, contain substantially, if not literally, the same defenses which I have just enumerated as contained in Mr. Irons' answer. And without referring to them by number, inasmuch as the same defenses seem to be reiterated several times in different forms, I will state in the first place that the defense of these gentlemen rests upon a denial of the title of the plaintiff to this note, based upon the want of authority alleged to exist on the part of Mr. Sellers to make the transfer, and of Mr. Wright to make the negotiation, and a denial of the fact that the company, through any of its officers, assented to the arrangement whereby the plaintiff became the owner of the note. In respect to that I give you this charge: That if the title of the plaintiff, so far as it depends upon the question of indorsement and delivery, and the authority of Wright to bind the railway company in its negotiations, is sufficient as against the railway company, it is equally valid as against the other defendants.

§ 1535. *Rule as to notice; bona fide holder for value.*

And the further question is whether the legal title to the note, which was in the railway company, passed by the acts done in its name to the plaintiff. The note having been indorsed in blank by the treasurer of the railway company, the title would thereafter pass by mere delivery, and would be sufficient in the hands of a *bona fide* holder, for value paid, receiving the same before due in the ordinary course of business, without any notice of want of authority or other defect of title in the party transferring its possession. In other words, if this note, being indorsed in blank by the treasurer, was found in the possession of Israel Wright on a certain day before its maturity, and was by him presented for discount to the bank, and the bank discounted it and paid to him the proceeds of it, without any notice that Wright had no authority, and without notice that the railway company was not assenting to the transaction, and without notice of any other facts which would constitute a defect in the authority of either the treasurer or the agent representing himself to be such, then the plaintiff is what in law is termed a *bona fide* holder, for value, prior to maturity, without notice of defect. And it would make no difference whether Wright had found the paper somewhere or had stolen it, or had pos-

session of it in any other way; his delivery of it, under these circumstances, would have vested the plaintiff with the complete legal title as against the railway company and as against the other parties. I speak of the legal title. I am not now considering the defenses resting on other grounds; they depend on other circumstances, to which I will now advert. I am simply calling your attention to the questions raised by these parts of the answer which assert that the plaintiff has no right to sue because it is not the holder and owner of the paper, or because it has not the title to it.

§ 1536. *What does not constitute a contract by payee of a note to use its proceeds in a stipulated manner.*

Then we come to the other defenses made on the part of the defendants, other than the railway company, and which constitute the equities claimed on their part. It is claimed, to state it shortly, that the other defendants signed the note as an accommodation to the railway company, upon the faith of an understanding between them and the railway company as to the appropriation of its proceeds; that this understanding was violated by the transaction in this case by which the bank became the holder of the note in suit, and that this was done, so far as the bank is concerned, with full notice on its part of the rights of the defendants. The first question under this head, therefore, is this: Was there such an understanding; if so, what were its terms? It is claimed, in the first instance, that that understanding exists by force of the resolutions of the board of directors of the railway company, of April 15, 1878, and of the obligation of the company, given to a trustee in trust for the makers of these notes, in pursuance of this preamble and resolution. I will read them:

“WHEREAS, in the judgment of this board of directors the interests of the Miami Valley Railway Company demand that certain rights of way should be speedily procured, and that the work of construction should be vigorously prosecuted, these two objects requiring much more money than is at present under the control of the company, and it having been suggested the most feasible mode of raising said money would be by certain of the directors and others executing their notes in sums not exceeding ten thousand dollars (\$10,000), each due in one year, and loaning same to the company, said Miami Valley Railway Company to provide for the payment of said notes at their maturity, and also to indemnify the makers of said notes against loss by reason thereof, by depositing with a trustee the first mortgage bonds of the company, in the ratio of three dollars in bonds to one dollar of liability created by said notes; therefore,

“Resolved, that the treasurer of the Miami Valley Railway Company be, and he is hereby, authorized and instructed to execute, in the name and on behalf of the company, instruments of writing, in substance as follows, namely:

“Whereas, ——— have executed their joint notes to the order of the treasurer of the Miami Valley Railway Company, dated April 15, 1878, and due in one year, for the sum of ——— thousand dollars; now, this instrument of writing is to show that said notes are made for the accommodation of the Miami Valley Railway Company, and said company hereby agrees and binds itself to pay same at maturity, and said company has placed in the hands of ———, as trustee, first mortgage bonds of the company, in the ratio of three to one of the liability incurred, to indemnify said parties against any loss by reason of making said note; and in the event of the Miami Valley Railway Company failing to pay said notes at maturity, or within ten days (10) thereafter, then the said trustee is hereby authorized to realize the money

upon said bonds at such rate as he shall deem proper, and apply the proceeds thereof to the payment of note; provided, however, sale of bonds shall not be made until authorized by a majority of the makers of said note, and when said note shall have been paid by the Miami Valley Railway Company, the aforesaid bonds shall be returned to said company, and the treasurer of the company be also authorized and instructed to deliver aforesaid bonds to said trustee in order to consummate the transaction."

I charge you that these papers do not constitute any pledge or agreement on the part of the railway company to use these notes for the purposes specified in the preamble and for no other purposes. Those purposes are referred to in the preamble by way of recital as indicating the grounds and reasons for the necessity which, in the opinion of the board of directors, existed for raising more funds than they then had in their control. But I am unable to perceive in it any pledge or agreement to use the notes in any other way than might at the time seem best to the board of directors for the general purpose of carrying on the interests in which they were engaged. I think, therefore, so far as any such agreement is deduced from this paper, that such claim is unfounded. I mean to be understood that the use of the note in maintaining the credit of the company, by the payment of any of its debts, is not a breach of the faith upon which the note was given.

§ 1537. *Province of jury to distinguish between an (alleged) agreement and a recital of purposes and hopes.*

Now, then, going beyond that paper, there is still a question of fact outside of it, or possibly the testimony taken in connection with it, from which it is possible to claim the existence of such an understanding, which cannot be deduced from the paper itself. That is for your consideration. You are to examine the oral testimony in addition to this and in connection with it, and to find what the facts are in regard to the claim,—whether there was any understanding and agreement outside of the paper, between the makers of these notes and the railway company, by which it was understood and agreed, as the condition on which these gentlemen signed these notes, that they were to be signed only and merely for the purpose of procuring rights of way and in payment of liabilities for construction thereafter to be incurred. In exercising your discretion and judgment in the examination of the evidence on that point, I deem it necessary only to say that you are to discriminate as reasonable, sensible, business men, so as to be satisfied clearly of the existence of a definite agreement and understanding to that effect, as distinguished from mere declarations and statements, on the part of the officers of the company, as to the purposes and expectations that they entertained and indulged the hope of realizing by the use of this additional fund. A mere statement that they believed that such and such an object would be accomplished, that they hoped the final and complete construction of the road would be secured, and they intended so to apply the money as to realize that purpose, does not, in my opinion, amount to proof sufficient to satisfy the law of the definite understanding which is claimed in this case to exist.

§ 1538. *Notice to officer of bank notice to bank, when.*

But if you find that the communications between the parties went beyond that, and that there was a definite understanding that the proceeds of these notes should be applied only to a specific purpose, then the defense based on that ground will have been established to that extent—as to the existence of an agreement. In order, however, to make that defense available in this case,

as against this plaintiff, you must go another step and ascertain whether or not, at the time when the discount was in fact made by the plaintiff, the plaintiff had what is considered in law to be notice of the existence of such an understanding and agreement; and it becomes, therefore, important to understand what constitutes such notice. It is claimed by the defendants that the bank is chargeable with knowledge of all the facts of the transaction between the original makers of the note and the railway company; that they were in fact known to Mr. S. S. Haines, he at that time being president of both corporations, a member of the executive committee of the railway company, and a member of the committee of the bank having charge of the business of its discounts. The rule which should govern you on this point is this: If you find that Mr. Haines had actual knowledge of the facts, as alleged by the defendants, the makers of the note, that the proceeds should be applied only to particular purposes, or that it was to be discounted only under specified circumstances, and that he was aware of, and acted in, the negotiation on the part of the bank for its discount, while such negotiation was in progress, then the bank is chargeable with notice of these facts, otherwise it is not. And in order that I may not be liable to any misapprehension on a point that may turn out to be very important in your consideration of the case, I wish to add that it was quite competent and proper for Mr. Haines, occupying these relations to both parties to the transaction, to say, when it was proposed to have the note discounted by the bank, "My position in reference to both the bank and the railway company is such that I do not think it would be proper for me to take any part in the transaction on either side;" and that, if he did so, any knowledge of any facts which he might have had at that time would not affect the rights of the bank. To charge the bank with responsibility and liability on account of any knowledge of Mr. Haines, he must, in my opinion, be acting at the time in the name and on behalf of the bank, as its agent and representative. If he was not, but if the negotiation was in fact conducted by the cashier, and Mr. Haines declined to take any part in it, and refused to be considered as acting for either party, then the question will be, not what Mr. Haines knew, but what the bank may have known by reason of any knowledge on the part of the cashier, and is not chargeable with the knowledge of Mr. Haines.

I am asked to add to the charge, in reference to the relation between Mr. Haines and the bank, and the effect of any knowledge on his part, this charge: "If you find that Mr. Haines declined to participate in the negotiations for the discount of the note, but, notwithstanding that, he did in fact participate in any part of these negotiations, the bank is chargeable with notice of any facts in the knowledge of Haines constituting a defense to the makers of the note, as already stated in the general charge." I am unwilling to give that charge in these terms, because it is possible there is ambiguity in them. But I will add to my charge this: In order to prevent the bank from being liable for Mr. Haines' knowledge, his declining to participate in the negotiations must be real, and not merely formal; it must not have been a mere pretense; it must not have been merely in words, but in fact. What I mean to say is, not that he said so and so, but that he did not in fact participate in the negotiations on behalf of the bank. At the same time if you find this to be the fact: that Mr. Haines, on being inquired of by the cashier in respect of the propriety of discounting the note, had replied to him, "These names are undoubtedly good for \$10,000, but my relation to the two companies is such that I decline any part in the decision of the question of the discount of the note" and thereupon

withdrew and took no further part in it, I don't consider the mere answering of that question a participation in the transaction in such a manner as to warrant fixing any responsibility upon the bank for any knowledge of Mr. Haines.

There is one other matter that is essential to the maintenance of this defense: *First*, the agreement between the makers and the railway company upon which it is based; *second*, the knowledge of that on the part of the bank (of both of which I have heretofore spoken); and *third*, a violation of that agreement in the actual appropriation of the note at the time of the discount or subsequently. In respect to that, my charge to you is that the misapplication of the proceeds of the note, made by the officers of the railway company without the knowledge and without the participation of the bank, would not invalidate the right of the bank to recover on the note. It is only a knowledge of the purpose of the officers of the railway company to make the misapplication, and their joining in effecting that purpose, by giving them the amount of the discount of the note with that intention, that makes them responsible for the breach of faith towards the makers of the note. For instance, in respect to the \$3,000 and the interest on it, part of the consideration of this note consisted of the payment of that amount of indebtedness from the railway company to the Lebanon National Bank, incurred by an original transaction with it; if you find that that was a legitimate transaction, and that the proceeds of that much of the note were applied in fact according to the intention of the makers of the note, then the Waynesville National Bank, in respect to that part of the consideration, stands exactly in the shoes of the Lebanon National Bank, and would be entitled to recover for that part of the consideration. So with regard to the additional amount of \$1,500, applied in another similar way; and so with regard to all of them. These notes were obligations of the railway company, and in order to complete the defense of the makers of the note, as against the bank, on this ground, it must be shown that the appropriation of the proceeds, in which the bank participated with knowledge, was contrary to that agreement; that is, that the debts, the payment of which was provided for by the appropriation, were not embraced within the terms of the agreement according to which the note was originally given.

WALLACE v. M'CONNELL.

(18 Peters, 136-152. 1839.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a writ of error from the district court of the United States for the southern district of Alabama. The action in the court below was founded upon a note, which, although under seal, is considered in Tennessee a promissory note, and is in the words following: "Three years and two months after date, I promise to pay Corry M'Connell, or order, at the office of discount and deposit of the Bank of the United States, at Nashville, four thousand eight hundred and eighty dollars, ninety-nine cents, value received." The declaration sets out this note according to its terms, and alleges the promise to pay at the office of discount and deposit of the Bank of the United States, at Nashville, without averring that the note was presented at the bank, or demand of payment made there. The defendant pleaded payment and satisfaction of the note, and issue being joined thereupon, the cause was continued until the next term thereafter. At which time the defendant interposed a plea *puis darrein continuance*, alleging that

the plaintiff, as to the sum of \$4,204, part and parcel of the sum demanded in the declaration, ought not further to have and maintain his action therefor against him, because that sum had been attached by Blocker & Co., by proceedings commenced by them against the plaintiff in this cause, under the attachment law of Alabama, in which he was summoned as garnishee. And setting out the proceedings against him according to the requirements of that law, and under which he was examined on oath; and did declare that he executed the note to the said M'Connell, the plaintiff in this cause, as set out in the declaration; that he had paid on the note \$372.34, and that the remainder of the said note was due by him to said M'Connell. And the plea further sets out that, under the proceedings on the attachment, the court had given judgment against him for \$4,204, and costs; but with a stay of all further proceedings until the further disposition of the case, and which remains yet undetermined.

To this plea the plaintiff demurred. And the court sustained the demurrer, and gave judgment for the plaintiff for \$675.39, the residue of the plaintiff's debt in his declaration mentioned, by default; and thereupon gave a final judgment for the plaintiff, for the full amount of the note, \$4,830, the debt aforesaid, and \$394, the interest assessed by the clerk, together with his cost. And the plaintiff remits upon the record the sum of \$351.28; and the questions arising upon this record have been made and argued under the following objections: 1. That the declaration is bad for want of an averment that the note was presented and payment demanded at the office of discount and deposit of the Bank of the United States, at Nashville. 2. That the matters pleaded of the proceedings, under the attachment laws of Alabama, were sufficient to bar the action, as to the amount of the sum so attached; and that the demurrer ought therefore to have been overruled. 3. That the judgment by *nil dicit*, for the \$675.39, was erroneous.

§ 1539. *When demand need not be averred and proved.*

The question raised, as to the sufficiency of a declaration in a case where the suit is by the payee against the maker of a promissory note, never has received the direct decision of this court. In the case of the *Bank of United States v. Smith*, 11 Wheat., 171, the note upon which the action was founded was made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington; and the suit was against the indorser, and the question turned upon the sufficiency of the averment in the declaration of a demand of payment of the maker. And the court said, when in the body of a note the place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require the holder to apply at such place for payment. In the opinion delivered in that case, the question now presented in the case before us is stated; and it said, whether, where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial to prove such demand, is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that the question in such case may, perhaps, be considered at rest in England, by the decision of the late case of *Rowe v. Young*, 2 Brod. & B., 165, in the house of lords, where it was held that if a bill of exchange be accepted, payable at a particular place, the declaration on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. But it is there said a con-

trary opinion has been entertained by courts in this country; that a demand on the maker of note, or the acceptor of a bill payable at a specified place, need not be averred in the declaration or proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment, at the place appointed, it is matter of defense to set up by plea and proof. But it is added, as this question does not necessarily arise in this case, we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think that, as against the maker of a note or the acceptor of a bill, no averment or proof of a demand of payment at the place designated would be necessary. The question now before the court cannot, certainly, be considered as decided by the case of the Bank of United States v. Smith, 11 Wheat., 171. But it cannot be viewed as the mere obiter opinion of the judge who delivered the judgment of the court. The attention of the court was drawn to the question now before the court, and the remarks made upon it, and the authorities referred to, show that this court was fully apprised of the conflicting opinions of the English courts on the question; and that opinions, contrary to that of the house of lords, in the case of Rowe v. Young, 2 Brod. & B., 165, had been entertained by some of the courts in this country; and under this view of the question, the court say they are strongly inclined to adopt the American decisions. As the precise question is now presented by this record, it becomes necessary to dispose of it.

§ 1540. *Authorities reviewed.*

It is not deemed necessary to go into a critical examination of the English authorities upon this point; a reference to the case in the house of lords, which was decided in the year 1820, shows the great diversity of opinion entertained by the English judges upon this question. It was, however, decided that if a bill of exchange is accepted, payable at a particular place, the declaration in an action on such bill against the acceptor must aver presentment at that place, and the averment must be proved. The lord chancellor, in stating the question, said this was a very fit question to be brought before the house of lords, because the state of the law, as actually administered in the courts, is such that it would be infinitely better to settle it in any way than to permit so controversial a state to exist any longer. That the court of king's bench has been of late years in the habit of holding that such an acceptance as this is a general acceptance; and that it is not necessary to notice it as such in the declaration, or to prove presentment, but that it must be considered as matter of defense; and that the defendant must state himself ready to pay at the place, and bring the money into court, and so bar the action by proving the truth of that defense. On the contrary, the court of common pleas was in the habit of holding that an acceptance like this was a qualified acceptance, and that the contract of the acceptor was to pay at the place; and that as matter of pleading, a presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment; and that the holder of the bill has no cause of action unless such demand has been made. In that case the opinion of the twelve judges was taken and laid before the house of lords, and will be found reported in an appendix to the report of the case of Rowe v. Young, 2 Brod. & B., 180. In which opinions all the cases are referred to in which the question had been drawn into discussion; and the re-

sult appears to have been, that eight judges out of the twelve sustained the doctrine of the king's bench on this question, notwithstanding which the judgment was reversed.

It is fairly to be inferred from an act of parliament passed immediately thereafter, 1 & 2 Geo. IV., c. 78, that this decision was not satisfactory. By that act, it is declared that "after the 1st of August, 1821, if any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill. But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." Bayley on Bills, 200, note. In most of the cases which have arisen in the English courts, the suit has been against the acceptor of the bill, and in some cases a distinction would seem to be made between such a case and that of a note when the action is against the maker, and the designated place is in the body of the note. But there can be no solid grounds upon which such a distinction can rest. The acceptor of a bill stands in the same relation to the drawee as the maker of a note does to the payee; and the acceptor is the principal debtor in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is to be governed by, the terms of his acceptance, and the liability of the maker of a note grows out of, and is to be governed by, the terms of his note; and the place of payment can be of no more importance in the one case than in the other. And in some of the cases where the point was made the action was against the maker of a promissory note, and the place of payment designated in the body of the note. The case of *Nicholls v. Bowers*, 2 Camp., 498, was one of that description, decided in the year 1810; and it was contended on the trial that the plaintiff was bound to show that the note was presented at the banking house where it was made payable. But Lord Ellenborough, before whom the cause was tried, not only decided that no such proof was necessary, but would not suffer such evidence to be given; although the counsel for the plaintiff said he had a witness in court to prove the note was presented at the banker's the day it became due; his lordship alleging that he was afraid to admit such evidence lest doubts should arise as to its necessity. And in the case of *Wild v. Rennards*, 1 Camp., 425, note, Mr. Justice Bayley, in the year 1809, ruled that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment.

The case of *Saunderson v. Bowes*, 14 East, 500, decided in the king's bench in the year 1811, is sometimes referred to as containing a different rule of construction of the same words, when used in the body of a promissory note, from that which is given to them when used in the acceptance of a bill of exchange. But it may be well questioned whether this use warrants any such conclusion. That was an action on a promissory note by the bearer against the maker. The note, as set out in the declaration, was a promise to pay on demand at a specified place, and there was no averment that a demand of payment had been made at the place designated. To which declaration the defendant demurred; and the counsel, in support of the demurrer, referred to cases where the rule had been applied to acceptances on bills of exchange, but contended

that the rule did not apply to a promissory note, when the place is designated in the body of the note. Lord Ellenborough, in the course of the argument, in answer to some cases referred to by counsel, observed: "Those are cases where money is to be paid or something to be done at a particular time as well as place, therefore the party (defendant) may readily make an averment that he was ready at the time and place to pay, and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the note. It is true Lord Ellenborough did not seem to place his opinion, in the ultimate decision of the cause, upon this ground. But the other judges did not allude to the distinction taken at the bar between that case and the acceptance of a bill in like terms, but placed their opinions upon the terms of the note itself, being a promise to pay on demand at a particular place. And there is certainly a manifest distinction between a promise to pay on demand at a given place, and a promise to pay at a fixed time at such place. And it is hardly to be presumed that Lord Ellenborough intended to rest his judgment upon a distinction between a promissory note and a bill of exchange, as both he and Mr. Justice Bayley had a very short time before, in the cases of *Nicholls v. Bowes*, 2 Camp., 498, and *Wild v. Rennards*, 1 Camp., 425, note, above referred to, applied the same rule of construction to promissory notes where the promise was contained in the body of the note. Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made, and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded.

Thus we see that until the late decision in the house of lords in the case of *Rowe v. Young*, and the act of parliament passed soon thereafter, this question was in a very unsettled state in the English courts; and without undertaking to decide between those conflicting opinions, it may be well to look at the light in which this question has been viewed in the courts in this country. This question came before the supreme court of the state of New York in the year 1809, in the case of *Foden v. Sharp*, 4 Johns., 183, and the court said the holder of a bill of exchange need not show a demand of payment of the acceptor any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money, and that he was always ready afterwards to pay. This case shows that the acceptor of a bill and the maker of a note were considered as standing on the same footing with respect to a demand of payment at the place designated. And in the case of *Wolcott v. Van Santvoord*, 17 Johns., 248, which came before the same court in the year 1819, the same question arose. The action was against the acceptor of a bill payable five months after date at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica, and upon a demurrer to the declaration the court gave judgment for the plaintiff. Chief Justice Spencer, in delivering the opinion of the court, observed that the question had been already decided in the case of *Foden v. Sharp*; but considering the great diversity of opinion among the judges in the English courts on the question, he took occasion critically to review the cases which had come before those courts, and shows very satisfactorily that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled; and the law in that state for the last thirty years has been considered as settled upon this point. And although the action was against the acceptor of a bill of exchange, it is very evident that this circumstance had no influence upon the decision; for the court say

that in this respect the acceptor stands in the same relation to the payee as the maker of a note does to the indorsee. He is the principal, and not a collateral debtor. And in the case of *Caldwell v. Cassady*, 8 Cow., 271, decided in the same court in the year 1828, the suit was upon a promissory note payable sixty days after date at the Franklin Bank in New York; and the note had not been presented or payment demanded at the bank. The court said, this case has been already decided by this court in the case of *Wolcott v. Van Santvoord*. And after noticing some of the cases in the English courts, and alluding to the confusion that seemed to exist there upon the question, they add: "That whatever be the rule in other courts, the rule in this court must be considered settled, that where a promissory note is made payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place by way of a condition precedent to the bringing of an action against the maker. But if the maker was ready to pay at the time and place, he may plead it as he would plead a tender in bar of damages and costs by bringing the money into court.

It is not deemed necessary to notice very much at length the various cases that have arisen in the American courts upon this question, but barely to refer to such as have fallen under the observation of the court; and we briefly state the point and decision thereupon; and the result will show a uniform course of adjudication, that in actions on promissory notes against the maker, or on bills of exchange, where the suit is against the maker in the one case, and acceptor in the other, and the note or bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made in order to maintain the action. But that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defense to be pleaded and proved on his part.

The case of *Watkins v. Crouch*, in the court of appeals of Virginia, 5 Leigh, 522, was a suit against the maker and indorser, jointly, as is the course in that state upon a promissory note like the one in suit. The note was made payable at a specified time, at the Farmers' Bank, at Richmond, and the court of appeals, in the year 1834, decided that it was not necessary to aver and prove a presentation at the bank and demand of payment, in order to entitle the plaintiff to recover against the maker, but that it was necessary in order to entitle him to recover against the indorser; and the president of the court went into a very elaborate consideration of the decisions of the English courts upon the question; and to show that upon common law principles applicable to bonds, notes, and other contracts for the payment of money, no previous demand was necessary in order to sustain the action, but that a tender and readiness to pay must come by way of defense from the defendant; and that, looking upon the note as commercial paper, the principles of the common law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise where the place, but not the time, was specified; a demand in such case ought to be made; and he examined the case of *Sanderson v. Bowes*, to show that it turned upon that distinction, the note being payable on demand at a specified place. The same doctrine was held by the court of appeals of Maryland, in the case of *Bowie v. Duvall*, 1 Gill & J., 175; and the New York cases, as well as that of the *Bank of United States v. Smith*, 11 Wheat., 171, are cited with approbation, and fully adopted; and the court put the case upon the broad ground that when the suit is against the

maker of a promissory note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that it is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it. That it is matter of defense, on the part of the defendant, to show that he was in attendance to pay, but that the plaintiff was not there to receive it; which defense generally will be in bar of damages only, and not in bar of the debt. The case of *Ruggles v. Patten*, 8 Mass., 480, sanctions the same rule of construction. The action was on a promissory note for the payment of money, at a day and place specified; and the defendant pleaded that he was present at the time and place, and ready and willing to pay, according to the tenor of his promises, in the second count of the declaration mentioned, and avers that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff in his declaration had alleged; the court said this was an immaterial issue, and no bar to an action or promise to pay money.

So, also, in the state of New Jersey, the same rule is adopted. In the case of *Weed v. Van Houten*, 4 Halst. (N. J.), 189, the chief justice says: "The question is whether, in an action by the payee of a promissory note, payable at a particular place, and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the holder at that place, at the maturity of the note." And, upon this question, he says: "I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion; that a special averment of presentment at the place is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy more or less directly to the subject." The same rule has been fully established by the supreme court of Tennessee, in the cases of *M'Nairy v. Bell*, and *Mulherrin v. Hannum*, 1 Yerg., 502, and 2 Yerg., 81, and the rule sustained and enforced upon the same principles and course of reasoning upon which the other cases referred to have been placed. And no case, in an American court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases which have arisen in this country, where this question has been drawn into discussion, were upon promissory notes, where the place of payment was, of course, in the body of the note. After such a uniform course of decisions for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established might be questionable; which, however, we do not mean to intimate. It is of the utmost importance that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties.

§ 1541. *Place of payment of a note.*

The place of payment in a promissory note, or in an acceptance of a bill of exchange, is always matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. And when a note or bill is made payable at a bank, as is

generally the case, it is well known that, according to the usual course of business, the note or bill is lodged at the bank for collection; and, if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business is closed. But, should he not find his note or bill at the bank, he can deposit his money to meet the note when presented; and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or, should the note or bill be made payable at some place other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place would protect him against interest and costs, on bringing the money into court; so that no practical inconvenience or hazard can result from the establishment of this rule to the maker or acceptor. But, on the other hand, if a presentment of the note and demand of payment at the time and place are indispensable to the right of action, the holder might hazard the entire loss of his whole debt.

§ 1542. *Subsequent attachment in a state court no bar to suit on note in federal court.*

The next point presents the question as to the effect and operation of the proceedings under the attachment law of Alabama, as disclosed by the plea *puis darrein continuance*. The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected, *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle would support a plea in abatement of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there in favor of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit; and the maxim, *qui prior est tempore, potior est jure*, must govern the case. This is the doctrine of this court in the case of *Renner v. Marshall*, 1 Wheat., 216, and also in the case of *Beaston v. Farmers' Bank of Maryland*, 12 Pet., 102; and is in conformity with the rule that prevails in other courts in this country, as well as in the English courts; and is essential to the protection of the rights of the garnishee; and will avoid all collisions in the proceedings of different courts, having the same subject matter before them. 5 Johns., 100; 9 Johns., 221, and the cases there cited. In the case now before the court, the suit was commenced prior to the institution of proceedings under the attachment. The plea was, therefore, bad, and the demurrer properly sustained.

§ 1543. *Plea puis darrein continuance waives prior pleas.*

The remaining inquiry is, whether the judgment, by *nil dicit*, for the \$675, was properly given after overruling the plea *puis darrein continuance*. The argument at the bar was that, as the attachment went only to a part of the debt, the case stood, as to the residue, upon the original plea of payment. The facts disclosed in the plea *puis darrein continuance* do not raise the question intended to be presented; for the defense set up in the plea *puis darrein continuance* goes to the whole cause of action, and leaves no part unanswered. And it may well be questioned whether such pleading ought to be sanctioned, even if the plea *puis darrein continuance* went only to a part of the cause of action. It would introduce great confusion on the record in the state of the pleadings. It is laid down in Bacon's Abridg., 6 Bac. Ab. by Gwillim, 377, that if, after a plea in bar, the defendant pleads a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of anything in the bar. And it is added that it seems dangerous to plead any matter *puis darrein continuance*, unless you be well advised, because, if that matter be determined against you, it is a confession of the matter in issue. This rule was adopted in *Kimball v. Huntington*, 10 Wend., 679. The court say the plea *puis darrein continuance* waived all previous pleas, and on the record the cause of action was admitted to the same extent as if no other defense had been urged than that contained in this plea. In the case now before the court the oath of the defendant, taken in the proceedings on the attachment, is made a part of the plea *puis darrein continuance*. And he admits that he executed the note on which this suit is brought for \$4,880. That he had paid on the note \$372.34, and that the remainder of the note was due by him to the plaintiff. And if the \$4,204 attached could not be deducted, the whole debt, according to his own admission, was due, except the \$372.34 set up by him to have been paid; and the plaintiff remits upon the record \$351.28, and the judgment will stand within a few dollars for the amount admitted by the defendant to be due. And this difference must arise from some error in the mere calculation, and may easily be corrected. The judgment of the court below is accordingly affirmed, with costs.

§ 1544. *Arresting judgment; title of plaintiff.*—The fact that at the trial plaintiff's name is indorsed on the back of the bill he sues upon is not ground for arresting judgment. The fact that the indorsement is not stricken out does not show that the plaintiff has no interest in the bill. *Vowell v. Alexander*,* 1 Cr. C. C., 38.

§ 1545. *Surety.*—Under a statute of Georgia, passed in 1826, which provides that the security or indorser of a promissory note or other instrument, after the same has become due, may require the holder to proceed to collect the same, and, if he does not do so within three months after such notice, the surety or indorser shall be no longer liable, does not apply where the principal is a resident of another state. The courts of Georgia having so decided, their decisions are binding on this court. *Davie v. Hatcher*, 1 Woods, 456.

§ 1546. *Plaintiff not the owner.*—It is a defense to an action on a promissory note that the plaintiff in whose possession the same is, is not the owner of it. *Hartshorn v. Green*,* 1 Minn., 92.

§ 1547. *Forfeiture of stock.*—A corporation that has forfeited the defendant's stock cannot recover payment of his note given before forfeiture for an unpaid assessment upon such stock. Neither can a party taking the note after maturity recover upon it. *Ashton v. Burbank*, 2 Dill., 435.

§ 1548. *Duty to make settlement.*—A note given provisionally and to abide a settlement between the maker and the payee cannot be sued upon by the payee until settlement; and this must be proved. *McMicken v. Webb*,* 6 How., 292.

§ 1549. *Equitable interest in mortgage.*—If a negotiable note and a mortgage to secure it be given a creditor to indemnify him, upon an agreement that they shall be retransferred when he has been indemnified, it is a conveyance in trust and not a legal mortgage. The

maker of the note may acquire the equitable interest of the assignor and use it as a defense to an action on the note. *Warren v. Emerson*, 1 Curt., 239.

§ 1550. Omission to stamp.—An objection that the maker of a promissory note omitted to stamp it, with intent to defraud the government, and that therefore it was void, is not available on demurrer. *Campbell v. Wilcox*, 10 Wall., 421.

§ 1551. *Ultra vires*.—Two railway companies consolidated without statutory or charter authority so to do, and the president of the consolidated company gave a note in its name for the price of a steamboat to run in connection with the roads. *Held, ultra vires*, and notes not recoverable. *Pearce v. Madison, etc., R. Co.*, 21 How., 441.

§ 1552. Refusal to allow purchaser of share to enter firm.—The fact that the remaining partners in a firm would not allow the purchaser of an aliquot share of a retiring partner to participate in the business is not a defense to an action on a note given for such share. *Varnum v. Monroe*, 2 Cr. C. C., 425.

§ 1553. Injury to stock in transit; set-off.—In an action on bills of exchange drawn for the price of transporting certain horses, an injury to such horses in transit is not a defense which can be set up in bar to the action. It must be set up, if at all, by way of set-off. *Cent. Ohio R'y Co. v. Thompson*, 2 Bond, 296.

§ 1554. Misappropriation.—A. accepted a draft for the accommodation of B. and for the special purpose of enabling B. to raise money to pay his indebtedness to C. Failing to negotiate the draft, B. induced C. to receive it for the amount he owed him, and for the further consideration of advances up to its full amount. B. agreed to take up the acceptance at maturity, and C. was informed of this agreement at the time of the transfer. The draft went to protest. *Held*, that there was no misappropriation of the acceptance; that the negotiation was for value, and in the usual course of business, and C. was held entitled to recover against A. *Leach v. Lewis*,* 1 MacArth., 112.

§ 1555. Set-off.—Debts due from the payee to the maker cannot be set off against a note discounted at the bank at which it is negotiable. *Mandeville v. Union Bank of Georgetown*,* 9 Cr., 9.

§ 1556. One of several defendants will not be allowed to introduce an account of his own as a counterclaim to defeat an action upon a joint and several promissory note given by all the defendants. *Great Western Insurance Co. v. Pierce*,* 1 Wyom. Ty., 45.

§ 1557. A Virginia statute provided that "assignments of bonds, bills and promissory notes, and other writings obligatory for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt, but shall allow all just discounts not only against himself, but against the assignor before notice of the assignment was given to the defendant." The maker of a note, when sued upon it by an indorsee, set up a note given by the assignor as a set-off. It matured before the note sued upon became due. *Held*, a valid set-off. *Stewart v. Anderson*,* 6 Cr., 208.

§ 1558. Maker or payee has no right of set-off against indorsee. *National Bank of Washington v. Texas*,* 20 Wall., 72.

§ 1559. A stockholder of a bank having died insolvent and largely indebted to the United States, and also indebted to the bank as indorser of discounted notes, *held*, that the bank had no right to set off the dividends accruing on his stock against the notes. *Brent v. Bank of Washington*, 2 Cr. C. C., 517.

§ 1560. An acceptor of a bill cannot set off the bill against the claim of B., the indorser, on another bill which the indorser had paid, and upon which A. was the acceptor; both A. and B. being accommodation parties. *Robinson v. Kilbreth*,* 1 Bond, 592.

§ 1561. The defendant, in an action on a bill of exchange, may set off a claim he has upon the plaintiff for not having insured a particular sum on a vessel, as he was ordered and bound to do; the vessel being lost without insurance. *De Taslet v. Crousellat*, 1 Wash., 504.

§ 1562. Damages on bills paid by defendant for plaintiff may be set off in action on bill. *Ibid*.

§ 1563. Note of plaintiff may be set off against his claim for goods sold for cash. *Stettinius v. Myer*,* 4 Cr. C. C., 349.

X. LOST, DESTROYED OR STOLEN INSTRUMENTS.

SUMMARY — *Non-negotiable instrument; bona fide holder*, § 1564.

§ 1564. Certificates of money due A. under a convention between the United States and Mexico were issued to A. by the treasury department of the United States. Three of them, for \$1,000 each, were indorsed by him in blank. They were (it was alleged but not proved) subsequently lost or stolen. A. advertised for them, and notified the treasury department not

to pay them. Subsequently they were presented for payment by B., who took them from C. in good faith as collateral security for a debt due B. from C. *Held*, that such certificates, though not negotiable commercial paper, were nevertheless assignable by indorsement in blank; that as B. was a *bona fide* holder his title was good against A., but that B., being a pledgee, the certificates should be returned to A. upon his repaying B.'s advances to C., or, if A. refused to repay B. the amount of such advances, the certificates should be sold, the advances repaid to B., and the balance paid to A. *Baldwin v. Ely*, § 1565.

[NOTES.— See §§ 1566–1582.]

BALDWIN v. ELY.

(9 Howard, 580–602. 1849.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— This case is brought here by appeal from the decision of the circuit court for the District of Columbia for the county of Washington, sitting as a court of chancery. The appellant filed his bill in that court, stating that large sums of money were awarded to him under the convention with Mexico, for which he obtained certificates, payable to him or his assigns, from the treasury department, according to the act of congress of September 1, 1841 (5 Stats. at Large, 452). That among these certificates were three for \$1,000 each, numbered 989, 990 and 991; that upon the back of these certificates, among others, he wrote his name, but without any words of transfer or assignment, and continued to hold them as the lawful owner; and that while he thus held them, the said three certificates were either casually lost by him, or, as he verily believed, purloined or stolen. He states further that, upon discovering their loss, he gave notice of it to the secretary of the treasury, who agreed to suspend payment in case they should be presented, until an opportunity should be afforded him to regain possession of them, or to assert his right by some legal proceeding; but that he had been unable to discover where these certificates were, or who held them, until a short time before the bill was filed, when he received notice from the department that they had been presented for payment on behalf of the appellee, and would be paid accordingly, unless sufficient grounds for refusing should be furnished by the appellant; and that, as the appellee resided out of the District of Columbia, and his agent was a member of congress, and therefore not liable to arrest, he was without remedy except by the aid of the court to obtain a discovery of the right and title which Ely, the appellee, possessed, or under which he claimed; and prayed that he might be required to prove and show how the certificates were procured from the appellant, and for what consideration, and when and where, and to produce them before the court, and be compelled by its decree to deliver them to the complainant.

The appellee appeared and put in his answer, in which he states that these certificates, indorsed in blank by the appellant, were delivered to him by a certain Perry G. Gardiner, to be held as security for loans and advances previously made by the appellee to the said Gardiner, and also for such further loans and advances as he might thereafter make. He further states that he afterwards made sundry advances, which he particularly mentions, and that he has altogether advanced to Gardiner \$2,077, for which he holds these certificates. He further states that, at the time he took them, he believed, from Gardiner's representations, that he was the owner, and had no knowledge or suspicion of any circumstance that could invalidate his title. And, further, that he is informed, and believes, and charges, that they were indorsed with the express intention of passing by such indorsement a perfect title to Gardiner,

and handed by the appellant to him that he might go into the market and negotiate them, and apply the proceeds in payment of a debt due from Baldwin to him. The transactions between the appellee and Gardiner are set out in the answer much more particularly and in detail than is here stated, and a great portion of it is taken up in stating a transaction between him and Gardiner concerning a pledge of other certificates, upon which a large portion of the advances now due were originally made, and explaining how these three certificates became finally pledged for the whole amount loaned by the respondent, and the others released. But it is unnecessary to state these particulars here, because we see nothing in the case to impeach the fairness and good faith of the appellee, and the summary above given is sufficient to show the issues upon which this controversy must be decided. Gardiner was examined as a witness on the part of the appellee, and sustains in every respect the statement in the answer. But his testimony is objected to by the appellant, first, upon the ground that he is interested, and therefore incompetent; and secondly, that if he is competent, he is not worthy of credit. It is not necessary to express an opinion upon the validity of either of these objections, for the admission or rejection of his testimony would not change the equity of the case.

§ 1565. *Bona fide pledgee of government certificates that were, after assignment in blank, lost or stolen, held to have a good title against original owner.*

Putting aside, therefore, the testimony of Gardiner, it appears from the bill and answer that the appellee is in possession of these certificates, claiming title to them as assignee. The act of congress directs that such certificates shall be made payable to the person entitled under the award of the commissioners, his legal representatives or assigns, and the certificates in question were issued in conformity to the law, and made payable to the party, his legal representatives or assigns, upon the surrender of the certificates at the department. They are therefore legally transferable by assignment, and no particular form of assignment is prescribed. The certificates in question were indorsed in blank by the appellant, and that indorsement would be altogether useless and unmeaning, unless made for the purpose of transferring the property to an assignee, and authorizing any person entitled to it in that character to write over his name a formal and regular assignment, if it should become necessary, or he should deem it his interest to do so. The holders of certificates of this description, thus indorsed in blank, have always been recognized at the treasury department as assignees, without any formal assignment, and the money due on the certificate paid to them, except only when doubts were entertained of the genuineness of the indorsement, or notice given that the title of the holder was disputed. Neither the law nor the usages of the department require that the indorsement or assignment should be attested by a witness. There is nothing, therefore, in the form and character of the indorsement calculated to awaken suspicion that the appellee had obtained them unfairly. The handwriting of the appellant is admitted, and the indorsement is according to the usage sanctioned by the department at which they are to be paid. His possession, therefore, upon established principles of law, is *prima facie* evidence that he is entitled to the property until the contrary appears. A different rule would put in jeopardy the title to a great portion of this scrip, which has been fairly purchased for a valuable consideration. For it has been a common article of traffic, and much of it has passed through a variety of hands, with no other evidence of an assignment to the holder but the indorsement in blank of the original payee. We do not mean to say that these certificates are to be regarded

as commercial instruments, to be regulated by the commercial law, and that the holder is entitled to all the rights which belong to a *bona fide* indorsee of a promissory note. He certainly is not. They are, however, property, and the legal right to them may, under the act of congress, be transferred to another, like the right to any other property. And the possession of them by the appellee, with the customary form of assignment indorsed upon them, in the handwriting of the party to whom they were originally issued, entitles him to the benefit of the legal presumptions in favor of his right which always arise from possession, until proof is offered to the contrary. Now the appellant offers no proof that the certificates were lost or stolen, as charged in his bill, nor any proof that they remained in his possession after he indorsed them, nor any evidence that the indorsement was made for any other purpose than that which it imports, that is, for the purpose of transferring it to another person.

It is true that it appears from the testimony of witnesses to whom there can be no objection, that these certificates were advertised by the appellant as having been improperly obtained from him, and that his advertisement appeared in some newspaper before they were pledged the second time to Ely. But the advertisement is no evidence of the fact stated in it, and there is no reason to believe that it came to the knowledge of the appellee before the last transaction between him and Gardiner. And if Gardiner's testimony is rejected, there is no evidence in the case to support the allegations in the appellant's bill, nor any ground upon which he can entitle himself to the relief he asks for. Besides, the object of the appellant's bill is for discovery as well as relief, and to obtain from the appellee a discovery of the right and title which he possesses, or under which he claims. The answer, therefore, is responsive to the bill when it states the transactions with Gardiner, and the circumstances under which he received the certificates, and the advances he made upon them. And it is entitled to all the weight which the rules of equity give to an answer when it is responsive to the bill and speaks of facts within the personal knowledge of the respondent.

The case of *Williamson v. Thomson*, 16 Ves. Jr., 442, relied on by the appellant, depended on different principles. The East India certificate in dispute in that case was not by law assignable, and the order indorsed upon it by the party to whom it was issued, to pay the amount to another, did not transfer the legal right to the money. It might pass the equitable title, if so intended, but nothing more. The decision turned upon the meaning and intention of the indorsement. The court of chancery was called upon to expound it, and to determine, from the evidence, whether it was intended as a transfer of the equitable right, or as an authority merely to receive the money as the agent of the original payee, and for his use. The court determined that he took it in the latter character, but upon evidence which presented a case altogether unlike the one now before us.

The decree of the circuit court dismissing the bill cannot, however, be sustained. The appellee admits that he did not purchase the certificates from Gardiner, but took them as security for the money loaned. Consequently, the appellant is entitled to redeem, upon payment of the advances stated in the answer, with interest upon the several sums from the time they were respectively loaned. The decree of the court below must, therefore, be reversed, with the costs in this court, and the case remanded, with directions to cause an account to be stated in conformity to this opinion, and to pass a decree requiring the certificates to be delivered to the appellant upon his paying or tendering to

the appellee the amount found to be due, and in case the money is not paid or tendered by a day to be fixed by the circuit court, then the certificates to be sold, and the proceeds apportioned between the parties in the manner herein directed. In taking the account, the appellee is to be allowed the whole amount of the loans and advances to Gardiner, for which these three certificates were ultimately left in pledge. And as the appellant did not offer to redeem them, and insisted on their absolute redelivery to him, the court think that, under the circumstances as they appear in the record, the appellee is equitably entitled to his costs in the circuit court, and they are accordingly in the account to be charged against the appellant. But as regards the costs in this court, the appellant, by the established rules and practice of the court, is entitled to recover them, and they must be charged against the appellee. A mandate will be issued to the circuit court in conformity with this opinion.

§ 1566. Note destroyed by holder.—The plaintiff sued for a sum due on settlement, but alleged that he had destroyed the note. On exception to the petition, Woods, J., delivered the following opinion: The exception must be sustained. Applying the rule that a pleading should be most strongly construed against the pleader, the petition in effect avers a voluntary destruction by the plaintiff of the evidence of the debt, to recover which his suit is brought. In such a case there can be no recovery, based either on the instrument itself or on the debt, which was the consideration for which the instrument was given. (*Angell v. Felton*, 8 Johns., 149; *Vanauken v. Hornbeck*, 2 Green (N. J.), 179; *Fisher v. Mershong*, 3 Bibb, 527; *Blade v. Noland*, 12 Wend., 173; "*Joannes*" *v. Bennett*, 5 Allen, 173; *Broadwell v. Styles*, 3 Halst. N. J. L., 58; Rev. Civil Code, art. 2279; Code Nap., art. 1348; *Nagel v. Mignot*, 7 Martin, 657). *Booth v. Smith*, 3 Woods, 19.

§ 1567. Recovery on one-half of bank note.—Where half of a bank note is lost, the holder may recover the whole amount on indemnifying the bank. *Armat v. The Bank*, *2 Cr. C. C., 180.

§ 1568. A bank note was cut in two, one-half of it sent by one mail and the other half by another subsequent mail, to the same person. One half failed to reach him. *Held*, that he might recover the whole amount of the note, on presenting one-half of it and showing the loss of the other half. *Bullet v. Bank of Pennsylvania*, 2 Wash., 172.

§ 1569. Assignee to sue; loss of note; recovery.—A note indorsed merely to enable the indorsee to collect it, and which has been lost, may be recovered upon for the benefit of the original promisee, in the name of the assignee. *Leavitt v. Cowles*, 2 McL., 491.

§ 1570. Stolen notes; recovery by owner; notice; record of; custom.—A bank purchased treasury notes overdue, and after notice that they had been stolen. In an action to recover them the bank attempted to prove that it was not the custom of dealers in government securities to keep records of those alleged to have been stolen. *Held*, that the owners might recover the notes, and that bankers and others could not establish a custom in their own interest which would contravene the established commercial law as to the rights of those who buy overdue paper. *Vermilye v. Adams Ex. Co.*, 21 Wall., 138.

§ 1571. Indemnity.—The indorsee of a lost bill of exchange cannot recover against the payee without tendering indemnity, and making demand upon the drawer for a new bill. *Riggs v. Graeff*, *2 Cr. C. C., 298.

§ 1572. Proof of genuineness.—Bank notes and drafts stolen from a letter are sufficiently proved if the person sending them is able to state that they were fair upon their faces, appeared genuine, and passed as instruments of value. *United States v. Keen*, 1 McL., 429.

§ 1573. Accounting for non-production.—It is sufficient to account for the non-production of bills to show that they are in England on file in a bankruptcy court. *Palmer v. Blight*, *2 Wash., 96.

§ 1574. A note was delivered to a person. It was proved that he was afterwards assassinated by insurrectionary negroes, that it was their custom to destroy the papers of those they assassinated, and that the town where the person lived was burned. *Held*, insufficient to establish the loss of the note so as to permit secondary evidence of its contents to be introduced. Evidence of the burning of such person's house should have been introduced. *Vuyton v. Brenell*, 1 Wash., 469.

§ 1575. Evidence that drafts are among the papers of a former holder, to whom they were paid by the payee, and cannot be found or are lost, and that they are the property of the payee, is sufficient after long lapse of time without their being produced by other parties, to entitle the payee to recover. *Fremont v. United States*, *4 Ct. Cl., 252.

§ 1576. To establish that certain drafts were lost it was shown that they were given to a receiver, to whom and others likely to have them application had been made for them without success. *Held*, insufficient evidence of the loss, no evidence being given that application or search had been made for them in the court that appointed the receiver, and to which the drafts were likely to have been returned by him with other papers. *Rogers v. Durant*, * 16 Otto, 644.

§ 1577. An indorser is a competent witness against his immediate indorsee to prove a written agreement made between them, but destroyed by fire, that the indorsement was made *pro forma* merely to pass title to the paper, and that, notwithstanding his indorsement, the indorser should not be liable as such. *Davis v. Brown*, 4 Otto, 423 (§§ 1410-15).

§ 1578. Secondary evidence.—Secondary evidence of the contents of a note indorsed in blank, which had been put into an attorney's hands for collection, but which could not be found after his death, *held*, admissible. *Patriotic Bank v. Little*, 2 Cr. C. C., 627.

§ 1579. Parol evidence is admissible to show the contents of a note canceled and surrendered to the maker. *Bank of Washington v. Pierson*, 2 Cr. C. C., 685.

§ 1580. Where a note was claimed to be lost, and a witness swore to having presented the note to one of the makers for payment, who admitted the note to be due, and that he lost the note, and the plaintiff also produced what purported to be a notarial copy of the same note, *held*, that the copy was admissible, and, taken in connection with the witness' testimony, afforded a presumption that the note copied by the notary was the same that the witness presented for payment. *Peabody v. Denton*, 2 Gall., 351.

§ 1581. Secondary evidence is not admissible to prove the contents of a written instrument without first showing that it is not in possession of the person offering the evidence, and this rule is not affected by the statute dispensing with proof of execution except where it is denied by affidavit. *Sebree v. Dorr*, 9 Wheat., 553.

§ 1582. It need not be proved that a note was destroyed, in order to introduce secondary evidence of it. Proof that it is lost, mislaid or cannot be found is enough—the party offering secondary evidence not being in fault. And secondary evidence of the note need not be a notarial copy of the note, nor need such loss be alleged in the declaration in order to admit secondary proof. *Renner v. Bank of Columbia*, 9 Wheat., 581 (§§ 754-759).

XI. PARTNERSHIP PAPER.

SUMMARY — *Note by one partner; bona fide holder*, §§ 1583, 1584.

§ 1583. Notes payable at bank are governed by the law merchant in Alabama, and an indorsee of a note for value, without notice, and before maturity, takes it free of equities which might have been urged against his indorser, such as that the note was issued by one partner in the firm name after a dissolution and in fraud of his copartners. *Smyth v. Strader*, §§ 1585-1593.

§ 1584. A partner cannot testify, as against an innocent indorsee of his firm's note, that it was issued by one partner in fraud of himself and other copartners after the firm had been dissolved. *Ibid*.

[NOTES.—See §§ 1594-1603.]

SMYTH v. STRADER.

(4 Howard, 404-420. 1845.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—The plaintiff brought his action as the second indorsee of two promissory notes in favor of E. Stevenson, purporting to be signed by Strader, Perrine & Co., which partnership consisted of Daniel P. Strader, James Perrine, E. Stevenson and John H. Woodcock. The notes were assigned by Stevenson to Stinson and Campbell, of New Orleans, and by them to the plaintiff. Stevenson died before the commencement of the suit, and the process was served only on Perrine and Woodcock. At the fall term of 1842, Woodcock pleaded a discharge under the bankrupt law, and Perrine pleaded that the partnership of Strader, Perrine & Co. commenced in November, 1835, and that in

December of the same year he withdrew from it. That at the time of leaving the firm he sold, for \$1,000, his interest to Stevenson, who, by Stinson and Campbell, through one Primrose, paid him the above sum; and that they knew of his withdrawal. That the notes were antedated, and were not in possession of Stinson and Campbell, or assigned to them, till after the 17th of May, 1836. Issues being joined on these pleas, the case was submitted to a jury, who found in favor of Perrine, and that Woodcock had been discharged under the bankrupt law.

The questions for decision arise on a bill of exceptions, taken by the plaintiff. The plaintiff proved, by the deposition of Hood, that Stevenson was a member of the firm of Strader, Perrine & Co., and that he executed the notes, and that they are dated before any public notice was given of the dissolution of the firm. That the firm of Stinson and Campbell were indebted to the plaintiff, in a large sum, in the summer of 1831; and that in part payment, the notes, before maturity, were assigned to him, for which a credit on their account was entered. And here the plaintiff's evidence closed. The defendant Perrine proved "that he withdrew from the firm the 6th of December, 1835, but that there was no public advertisement, giving notice of the dissolution of the firm, until the 23d of April, 1836, although the fact was known to Stinson and Campbell at the time of Perrine's withdrawal." The defendant also proved, by John Test, that in August, 1836, he saw in the hands of the plaintiff's agent an account current between him and the firm of Stinson and Campbell; that he made a copy of the same, which he produced, and from which it appeared that no credit had been entered for the notes sued on.

§ 1585. *Notes payable at a bank are governed by the law merchant in Alabama. An indorsee of a note for value without notice, and before its maturity, is not affected by fraud in its inception.*

The plaintiff's counsel moved the court to exclude from the jury all testimony as to the transactions between Stevenson and the firm of Stinson and Campbell, or between Stevenson and the other members of the firm of Strader, Perrine & Co., there being no proof of any notice to the plaintiff of any of these matters insisted on by the defendant in his defense. But the court overruled the motion, and "instructed the jury, that if they believed the said notes were made by Stevenson, without the knowledge and consent of his partners, and that he passed them off to the said Stinson and Campbell without the knowledge or consent of his partners, and that if the said Stinson and Campbell, at the time of their receiving the notes, knew that, prior to that time, to wit, on the 6th of December, 1835, Perrine had withdrawn from said firm, and was not then a partner, and that if it was also proved to them that the said notes were passed to the said Stinson and Campbell by Stevenson for his individual benefit, and not for the interest and benefit of the said firm, and that this was known to the said Stinson and Campbell when they received the said notes, that then the jury must find for Perrine, the defendant." To the above ruling and instruction, exceptions were taken by the plaintiff. From the instruction of the court, it appears the notes in controversy were considered as governed by the law merchant. By the Alabama statute of 1812 (Clay's Dig., 381), the assignee of "bonds, obligations, bills single, promissory notes, and all other writings for the payment of money," may sue in his own name; but all equities and grounds of defense remain open as fully as though the instrument had not been assigned, until the defendant had notice of the assignment. But by the act of 1828, Clay's Dig., 383, it is provided "that the same remedy on bills of

exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the law merchant as to days of grace, protest and notice;" and, by the succeeding section, all other contracts for the payment of money, etc., are made "assignable as heretofore, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant or *assumpsit*." The phraseology of this section would seem to place all other instruments, for the payment of money, etc., on a different footing from those described in the preceding section. The provision of that section appears only to relate to the remedy on bills of exchange and promissory notes payable at bank under the law merchant, as regards the days of "grace, protest and notice." But as the following section defines the rights of the assignee of "all other contracts in writing for the payment of money," etc., it may perhaps be fairly inferred that the legislature intended the negotiability and character of the instruments above named should be regulated by the general commercial law. Such seems to be the opinion of the supreme court of Alabama. In the case of *M'Donald v. Husted*, 3 Ala., 297, it was held "that a note made negotiable and payable at bank is not subject to offset in the hands of a *bona fide* indorsee, who has acquired it previous to maturity, although it has never been negotiated at the bank where it is made payable." Also in *Beal v. Wainwright*, 6 Ala., 156, the same principle is recognized.

§ 1586. *Firm bound by frauds of a member.*

However fairly Stevenson may have acted in the execution of these notes payable to himself, it is clear that he could not have sustained on them an action at law. A partner of a firm cannot, at law, sue it, for that would be to sue himself. But a *bona fide* assignee of Stevenson might maintain an action. *Jones v. Yates*, 9 Barn. & Cress., 532; *Bosanquet v. Wray*, 6 Taunt., 597; *Aubert v. Maze*, 2 Bos. & Pull., 371; *Smith v. Lusher*, 5 Cow., 688. Stevenson, in executing the notes to himself, under the circumstances proved, committed a fraud against his partners; and this fraud was greatly aggravated if, as alleged, he antedated the notes so as to charge Perrine as partner. That he assigned the notes to Stinson and Campbell, if for any consideration, for one that was personal to himself, and wholly disconnected with the partnership, is not controverted. These facts, or a part of them, of which Stinson and Campbell must have had knowledge, would have defeated a recovery by them. Every "contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm." Story on Partnership, 193. This rule as well applies to the indorsement of negotiable instruments as to other contracts. But the fraud of Stevenson, and the knowledge of that fraud by Stinson and Campbell, do not necessarily defeat the plaintiff's action. And the charge of the court on this point was clearly erroneous. If, before the maturity of the notes, in the due course of business, and without any knowledge of the circumstances of their execution and first indorsement, the plaintiff received them, he may be entitled to recover, notwithstanding the fraud. By "forming a partnership the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns." Story on Partnership, 161. On this principle the firm is bound for the frauds committed by one of its partners. Where one

of two innocent persons must suffer by the act of a third person, the rule is just, that he shall suffer who reposed the higher confidence and credit in such person.

§ 1587. *Taking note with notice of defenses.*

But if the plaintiff received these notes after their maturity, he holds them subject to all the defenses which might have been set up against them in the hands of Stinson and Campbell. Or, if he received them out of the ordinary course of business, without consideration, or under circumstances which authorize an inference that he had knowledge of the fraud in their execution or their first indorsement, he cannot recover. These are matters of evidence for the jury.

The testimony of John Test, which was excepted to, we think was rightfully admitted. He proved that in August, 1836, he saw in the hands of an agent of the plaintiff an account current between him and the firm of Stinson and Campbell. That he copied the account, which copy he exhibited, and from which it did not appear that a credit had been entered for the notes in controversy. As this, compared with the evidence of the plaintiff, might conduce to disprove the consideration alleged to have been paid for the notes by the plaintiff, it was properly admitted. The relevancy of the deposition of Charles, which was also excepted to, is not very apparent. It shows that Stinson and Campbell, in 1836, drew a large amount of drafts on the plaintiff, in part payment of drafts which he had previously drawn on them. This drawing and redrawing constituted no part of the account current spoken of by Test, but at the foot of the account a memorandum was made of these drafts. As this deposition conduced to show the nature of the accounts between the plaintiff and the firm of Stinson and Campbell, no very strong objection is perceived to its admission as evidence. It could not have misled the jury.

§ 1588. *A partner cannot testify against his firm's note.*

The deposition of Strader, which was also excepted to by the plaintiff, was not admissible under the decisions of this court. He was one of the firm of Strader, Perrine & Co., and his testimony conduced to show the fraud of Stevenson in the execution of the notes. In the case of the Bank of United States v. Dunn, 6 Pet., 57, this court said: "It is a well settled principle that no one who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate it." The same principle was held in Bank of Metropolis v. Jones, 8 Pet., 12. This was decided in the case of Walton v. Shelley, 1 Term R., 296; and although that decision was overruled by the king's bench in the case of Jordaine v. Lashbrooke, 7 Term R., 601, this court, in the cases cited, and in several subsequent cases, have established the rule as above stated. In the state courts there is a great diversity of judgment on this point. Strader was a party on the record, and that rendered him an incompetent witness. Scott v. Lloyd, 12 Pet., 149; Stein v. Bowman, 13 Pet., 219.

Upon the whole, the judgment of the circuit court is reversed and a *venire de novo* awarded.

Opinion by MR. JUSTICE CATRON.

In this case my opinion is founded on considerations that differ so much from those proceeded on in the principal opinion that I am under the necessity of stating my own views, or of dissenting, which I am not prepared to do.

§ 1589. *Firm note payable to partner valid only in hands of purchaser. Time of negotiation is true date of note.*

In the first place, Stevenson had been one of the firm of Strader, Perrine & Co. He made the note payable to himself, and signed the name of the firm to

it. Being both a maker and the payee, the note was void on its face, or at least could have no legal effect; when negotiated, that is, when it was indorsed by Stevenson and sold to Stinson and Campbell, it could only become a binding instrument in their hands on Strader, Perrine & Co., as Stinson and Campbell could enforce payment. The time of negotiation, therefore, is the true date of the note.

§ 1590. *Firm note negotiated after dissolution does not bind retired partners.*

It is in proof that the firm of Strader, Perrine & Co. was dissolved on the 23d of April, 1836, and that the usual advertisement was then made of the fact. This bound all persons who had not had previous dealings with the firm; nor is there any proof found in the record showing that either Stinson and Campbell or Smyth, the plaintiff, had had any such dealings. If the note was negotiated, therefore, to Stinson and Campbell after the dissolution of the partnership, it was void, and does not bind Perrine, inasmuch as Stevenson had no power to bind him.

§ 1591. *Partner who has withdrawn must charge bona fide purchaser of firm note with notice.*

2. Perrine is proved to have withdrawn from the firm in December, 1835. But as no regular notice was given of this fact, it rests on him to bring home knowledge of it to the holder of the paper. If Stinson and Campbell had knowledge when they took the note from Stevenson, then they could not have recovered from Perrine on it. So again, if Stinson and Campbell took the note from Stevenson in discharge of the individual debt of the latter, they could not recover from Perrine, whether he was or was not a partner at the date of its negotiation. The proof of either of these events is imposed on the plaintiff. But having shown either of the last two circumstances, then the plaintiff is bound to prove "under what circumstances or for what value he became the holder." I need only refer to Chitty on Bills (9th ed.), 648, for the established rule. If the plaintiff fails to show in such case that he came by the note in the due course of trade and before it fell due, then the defendant is entitled to a verdict.

§ 1592. *Where one member of a dissolved firm fraudulently signs a note in the firm name, the evidence of other members is competent to show the fraud.*

3. In regard to the question of the competency of Strader's evidence, I have found much difficulty. The competency of Strader to depose, in the principal opinion, is held to be governed by the cases of *United States Bank v. Dunn*, 6 Pet., 51, and *Bank of Metropolis v. Jones*, 8 Pet., 12. In the one case, Carr, the first indorser, was introduced by the second indorser, Dunn, who was sued, to make out a defense. In the second case Jones, the indorser and defendant, introduces Mr. Blake, the maker of the note, to establish a defense; and in each instance this court held that the witness was incompetent to invalidate the negotiable paper to which he was a party; and the decision in *Walton v. Shelley*, 1 Term R., 296, was followed. Of this case Mr. Chitty says (669): "Though it was formerly held that no party should be permitted to give testimony to invalidate an instrument he had signed, a contrary rule now prevails;" and refers to *Bent v. Baker*, 3 Term R., 36, and *Jordaine v. Lashbrooke*, 7 Term R., 601. "The general rule is," says Chitty, "that it is no objection to the competency of a witness that he is also a party to the same bill or note, unless he be directly interested in the event of the suit, and he be called in support of such interest, or unless the verdict, to obtain which his testimony is offered, would be admissible evidence in his favor in another suit." This was the prin-

ciple on which the cases of *Bent v. Baker* and *Jordaine v. Lashbrooke* proceeded. By the statute of 3 and 4 Will. IV., c. 42, § 26, for the amendment of the law, the rule was enlarged so as to let in parties to negotiable paper as witnesses for or against whom the verdict and judgment might be evidence, the statute providing that the record should not be evidence for or against them. And thus the law of evidence, in this regard, now stands in the courts of Great Britain. It is also settled, and had been, long before 1832, when the decision in the *Bank of the United States v. Dunn* was made, in a large majority of the states of this Union, in accordance with the principles laid down in *Jordaine v. Lashbrooke*, and *Bent v. Baker*; and the question now is for this court to determine how far the United States circuit courts, when acting in the states, shall enforce the doctrine laid down in *Dunn's* case, and which was very properly applied in that of *Jones*. The decision is: "That no man who is a 'party' to the note or bill shall, by his own evidence, invalidate it." But suppose he is no party to it, and that his name has been put on it, or to it, by forgery, and he is called on by another to establish that the defendant's name was forged, as well as that of the witness, is he then competent? He gave no credit to the paper; and, if the evidence of all those who could prove the defense is cut off, by the mere name appearing, nothing more would be required to effectuate the fraud than to put on the names of all persons who could prove the fraud. In such an instance, I feel sure the rule laid down by this court does not apply. Nor can I, satisfactorily to my own mind, distinguish the case put from one where a fraudulent note is made in the name of a firm by one of the original partners, after the dissolution of the partnership, when he had no authority to use the name of those he attempts to bind. Indeed, it is difficult to say that *Stevenson* was not guilty of forgery, if he made the notes and passed them off to *Stinson* and *Campbell*, after the dissolution of the partnership, in discharge of his own debt, and with the intention to defraud his former partners. In the cases that have heretofore come before this court, the witnesses proved in advance that they gave credit to the paper by signing their names; and that they were, beyond dispute, parties to it, as well as the defendant.

§ 1593. *Rules for the admission of evidence; state laws.*

The principle assumed in *Walton v. Shelley* is in violation of one of the most familiar and general principles of evidence known to courts of justice; that is to say, that any person of sufficient age and sanity can be a competent witness to depose in any cause where he is not directly interested in the event of the suit. To this rule there are exceptions, but they are almost uniformly favorable to the admission of the testimony, are of comparatively recent origin, founded on experience, and conducive to the due administration of justice in a high degree. Again, the act of May 19, 1828 (4 Stats. at Large, 278), declares that "the forms and modes of proceeding in suits in the courts of the United States (in states admitted into the Union since 1789), in those of common law, shall be the same in each of those states respectively as are now used in the highest court of original and general jurisdiction of the same." That the court below proceeded, in the admission of *Strader* as a witness, according to the modes of proceeding in the circuit courts of the state of Alabama, is not questioned. The method and manner of administering justice in the state courts is the mode referred to in the act of congress, as I understand it; and I cannot resist the conclusion that the modes prescribed by the act of congress to the federal courts held in that state embrace the rules in regard to the com-

petency of evidence; without evidence there can be no proceedings; rules for its admission are indispensable; these rules must be derived from some authority; from statutes they cannot be, and therefore congress has said the state courts shall furnish them to the foreign tribunals administering the laws there, and this for the plain reason that the measure of justice shall be the same in the foreign that it is in the domestic tribunals, and evidence is the measure of justice in great part. There can be no objection to the competency of Strader because he was a party of record. The original writ issued against him and Perrine jointly; but Strader was not found, and a *nolle prosequi* was entered as to him, and Perrine was declared against alone. I concur that the charge of the circuit court was erroneous in so far as it assumed that the instruments sued on were subject to the same equities in the hands of Smyth that they were when held by Stinson and Campbell. The courts of Alabama have construed the statutes of that state affecting negotiable paper, and held they did not apply to notes payable in bank; of which description are the ones sued on. The charge, therefore, violated the commercial rule that the innocent indorsee takes the paper discharged of a previous infirmity.

§ 1594. Drawing and accepting bills.—A member of a trading firm may draw bills of exchange, although the firm are also engaged in farming. *Kimbrow v. Bullitt*, 22 How., 256.

§ 1595. Where an acceptance is made in a firm name by one member of the firm, without the knowledge or privity of his copartners, a taker of such bill, with notice of this fact, cannot sue the partners jointly; but he may sue the one who accepted the bill, and he may sue all if he has no notice of the partner's want of authority to bind the firm. *City Bank of Columbus v. Beach*, * 1 Blatch., 438.

§ 1596. Bona fide holder's rights.—If the indorsee of a bill receive it before due, and without notice of the fact that it was drawn by the payee, who was a partner in two firms, in the name of one of the firms, and accepted by the payee, in the name of the other firm, for his individual debt, the holder may recover from either the drawers or the acceptors. *Babcock v. Stone*, 8 McL., 172.

§ 1597. Right to sue firm for partner's note.—A person who advances money upon a note signed by one of several partners, knowing that it is for the use of the firm, cannot, on this ground, sue the other partners. *In re Herrick*, * 13 N. B. R., 312.

§ 1598. Ratification by firm.—A bill was drawn by A., charged to a firm of which he was a member. *Held*, that if A. exceeded his authority at the time of drawing, a subsequent ratification by the firm would inure to the benefit of persons who had advanced money or acted on the faith of A.'s representations. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 1599. Unauthorized accommodation note of firm not provable against its assets in bankruptcy.—An accommodation note indorsed by a partner in his firm's name for the benefit of the maker, but without the consent of the firm, is not provable against the assets of the firm. *In re Irving*, * 17 N. B. R., 22.

§ 1600. Renewal note.—A note given by a partner in the firm name after dissolution, but in renewal of a note given during the existence of the firm, is valid. *Greatrake v. Brown*, 2 Cr. C. C., 541.

§ 1601. Notes given creditor by partners; firm liability.—The creditor of a firm of three persons took the notes of the firm, indorsed by one of the partners, for a part of his debt, and for the balance took three several notes, each made by one of the copartners, and indorsed by the other two. The firm was adjudicated bankrupt. The creditor proved his debt against the makers of the four notes. *Held*, that he had a right to dividends as against the joint and separate estates of the bankrupts, and that the partners, in respect to the notes made and indorsed by them in their individual names, were accommodation makers or indorsers for the firm, which, as between the copartners and in equity, was the principal debtor. *Mead v. National Bank of Fayetteville*, 6 Blatch., 180.

§ 1602. Misappropriation by partner.—The right of an innocent holder of a firm note or bill is not affected by the fact that one of the partners misappropriated the proceeds. *Kimbrow v. Bullitt*, 22 How., 256; *Winship v. United States Bank*, 5 Pet., 529.

§ 1603. Retired partner.—After the dissolution of a firm the partner who assumed the business and liabilities executed his draft and applied the proceeds to pay the firm debts. *Held*, that a holder of the draft could have no claim upon it against the retired partner on

account of the use to which the proceeds of the draft were put. *Le Roy v. Johnson*, 2 Pet., 186.

§ 1604. *Liability of firm on partner's draft.*—Where one of several partners was authorized by the firm, if he should be deficient in funds for certain purposes, to take up money on the joint account of the firm, and, if necessary, to draw upon C., in Amsterdam, and bills were drawn by the partner, signed by himself, but directing the amount to be charged to the firm, *held*, that in equity one who advanced money on the faith of the joint credit was entitled to recover against all the partners. *Van Reimsdyk v. Kane*, 1 Gall., 680.

§ 1605. *Indorsements.*—Evidence that by the articles of copartnership one partner has no authority to bind the firm by indorsing commercial paper is not admissible to defeat a *bona fide* holder, for value and without notice of such articles, of a note indorsed in the firm name by one of the partners. *Michigan Bank v. Eldred*, 9 Wall., 544 (§§ 250-255).

§ 1606. Notes indorsed in the firm name are presumed to have been drawn on account of the firm, and a bank that discounts them in good faith can collect them of the firm, even if they were made by one partner without authority, unless the bank has notice of the excess of authority. *Lemoine v. Bank of North America*, 3 Dill., 44 (§§ 428-431).

§ 1607. *Note of partner held his individual note.*—A silent partner in a firm advanced money to the active partner, took his demand notes therefor, and indorsed and delivered them to a third party who furnished the funds advanced by the silent to the active member. The firm became insolvent and was dissolved, the active partner taking the stock and assuming all liabilities. The third person then gave up the notes to the active partner and took from him renewal notes secured by mortgage on the stock. *Held*, that the first notes given by the active partner were his separate notes, and that, being payable on demand, were subject to the same equities in the hands of the indorsee as in the hands of the payee. *In re White*, 1 Low., 207.

§ 1608. *Diligence.*—A partner of the payees of a bill is not personally bound to active diligence to collect it, although he has funds of the drawee in his possession. *Barnes v. Ryder*,* 3 McL., 374.

XII. EXCHANGE AND DAMAGES.

SUMMARY — *Depreciated currency*, § 1609. — *How exchange to be measured*, § 1610. — *On promissory notes*, § 1611. — *Damages in lieu of exchange*, § 1612. — *Payee of bill paid supra protest*, § 1613. — *Liability of United States*, § 1614. — *Draft drawn on a foreign government*, § 1615. — *Draft on the government*, § 1616. — *Bill payable out of the state*, §§ 1617, 1618. — *Lex loci*, § 1619.

§ 1609. Action on a note given at a time when the bank at which it was payable, and all other banks in the state, redeemed their notes in specie. When judgment was rendered specie payment had been suspended. *Held*, that the rate of exchange should not be the difference between the depreciated currency of the state and funds in New York, but must be the ordinary rate of exchange between specie or its equivalent and funds in New York. *Balch v. Colman*, §§ 1620, 1621.

§ 1610. Exchange is not to be measured solely by the expense of transporting the money between the points named. *Ibid*.

§ 1611. On a promissory note made in one state, payable at no particular place, containing no stipulation to pay exchange, and declared upon in another state without any averment as to exchange, exchange cannot be recovered. *Weed v. Miller*, §§ 1622, 1623.

§ 1612. Damages allowed by statute on the dishonor of a bill of exchange are in lieu of re-exchange and are not a penalty. *Bank of United States v. United States*, §§ 1624-1629.

§ 1613. A foreign bill of exchange, being dishonored, was paid *supra* protest, for the honor of the payee, who repaid it, with cost of protest and commissions, to the party who took it up. *Held*, that the payee thereby became a holder of the bill and entitled to damages for its non-payment by the drawee. *Ibid*.

§ 1614. The United States is liable the same as an individual for damages for the non-payment of its bill of exchange. *Ibid*.

§ 1615. A draft of one government upon another is not a bill of exchange, although written in the form of one, and it is not subject to damages for non-payment. *United States v. Bank of United States*, §§ 1630-1632.

§ 1616. A statute providing for damages on the dishonor of a bill of exchange drawn "on any person, corporation, company, or society," does not apply to a draft on the government of France. *Ibid*.

§ 1617. By the law of Kentucky a bill of exchange drawn and accepted by residents of that state, but upon its face payable at a place out of said state, is not entitled upon protest to ten per cent. damages. *Bank of United States v. Daniel*, §§ 1633-1638.

§ 1618. A bill of exchange drawn by one resident of a state and accepted by another is, if payable out of the state, a foreign bill, and the holder is entitled to re-exchange or damages in lieu thereof, by the law merchant, in case it be not paid. *Ibid.*

1619. A. at Boston drew bills of exchange on London payable to his own order. He indorsed and negotiated them in New York. *Held*, that interest and damages were to be computed according to the laws of Massachusetts, because the paper was payable in Boston. The law of the place of performance (payment) regulates interest and damages on protested bills of exchange. *Ex parte Heidelberg*, §§ 1639-1645.

[NOTES.— See §§ 1646-1657.]

BALCH v. COLMAN.

(Circuit Court for Indiana: 2 McLean, 85-87. 1840.)

Opinion by the COURT.

STATEMENT OF FACTS.—This action was brought on a promissory note for \$536, payable at the Lafayette Bank, with the rate of exchange between the place of payment and the city of New York.

§ 1620. *Exchange to be estimated with reference to specie values.*

At the time the note was given the Lafayette Bank, and the other banks of Indiana, redeemed their notes with specie; but having suspended specie payments for some months past, a question was raised, what shall be the rate of exchange which the plaintiff has a right to demand. Shall it be the present rate of difference between the depreciated currency of the state and funds in New York; or, shall it be the ordinary rate of exchange between specie, or its equivalent, at Lafayette, and funds in the city of New York? The judgment of this court is not given to be discharged in depreciated currency. The plaintiff has a right to demand specie, or its equivalent; and we cannot regard the amount, which he has a right to recover by way of exchange, as of less value than specie.

§ 1621. — *not to include solely the expense of transportation.*

When the contract to pay the exchange was made, both parties, no doubt, looked to a sound circulating medium, convertible into specie, and, of course, of value equal to specie. And in such a state how is the rate of exchange to be ascertained? It is clearly not by ascertaining what would be the expense of transporting specie from the place of payment to the city of New York. This, undoubtedly, enters into the general calculation on the subject and has great influence in fixing the rate, but there are other ingredients which must be looked to in making an estimate. Specie is not transported at the same rate as other merchantable commodities. There is the risk, the insurance, the delays, and other contingencies which are taken into the account; and, not unfrequently, the scarcity or abundance of specie at the place of remittance has an important effect on the price of exchange. The only correct rule, therefore, is to ascertain the ordinary rate of exchange between the two places; to be established by evidence, the same as the value of any other thing. The inquiry of the jury should be, what was the current price of drafts in specie or its equivalent, on New York, at Lafayette, at the time this note became payable. This must give the rate of damages which the plaintiff claims for the difference of exchange between the two places.

WEED v. MILLER.

(Circuit Court for Indiana: 1 McLean, 423-426. 1839.)

Opinion by the Court.

STATEMENT OF FACTS.—This action is brought on a note given at New York, without stating where payable, and suit being brought in this state, the plaintiffs contend that they are entitled to recover, in addition to the amount specified in the note and interest, the difference in exchange between this state and New York. It is admitted that the rate of exchange is two per cent. The declaration does not allege that the note was payable in New York, nor is there any count on the rate of exchange. The note is dated at New York, and from this it is contended that it was payable there.

§ 1622. *What necessary for the recovery of exchange on bills of exchange.*

There can be no question that the rate of exchange may be recovered on a bill of exchange payable at a particular place, where the declaration contains the necessary averment, but the instrument now under consideration is not a bill of exchange, and the declaration is in the common form. In the case of *Andrews v. Pond*, 13 Pet., 65, the court held that the indorsee of a bill of exchange payable in New York properly included the rate of exchange in a second bill payable at Mobile, given in payment of the first bill, if the transaction was fair and not designed as a cover for usury. And in *Story's Conflict of Laws*, page 225, it is laid down as a general principle that where a debt payable at a particular place is paid elsewhere, the rate of exchange ought to be included, and is recoverable. But in such cases, the place of payment must not only appear upon the face of the instrument, but the declaration must contain the necessary averments. In the case of *Adams v. Stimpson*, where a foreign creditor sues for his debt, the court say (8 Pick., 260) that in that state he will recover, in the case of a bill of exchange, at the par of exchange. And in 4 John., 125, *Martin v. Franklin*, "the plaintiffs were merchants in Liverpool, and it was admitted the debt was contracted in Great Britain, that the account between the parties is in sterling, and that the interest is calculated at five per cent., the legal rate of interest in Great Britain. In the declaration all the counts, except the last, state the defendants as being indebted to the plaintiffs in the city of New York, and the last count lays the venue in New York, but does not mention any particular place at which the defendants were indebted. And the court held that the debt was to be paid according to the par and not the rate of exchange. It is recoverable, say they, and payable here to the plaintiffs or their agents, and the court are not to inquire into the disposition of the debt after it reaches the hand of the agent; he may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries on the same account; we cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask is their debt justly liquidated and paid in the lawful currency of the United States."

And in the case of *Hendricks v. Franklin*, 4 John., 122, the court remark, "in this case the question is what damages the plaintiff, who is indorser of a foreign bill of exchange, of which the defendant is the drawer, and which was returned protested for non-acceptance and non-payment, is entitled to recover; the plaintiff contending that he has a right to recover as well the principal and interest as also twenty per cent., damages, and an additional two per cent., as

the difference of exchange. The payment of this two per cent. the defendant resists." "The right to recover twenty per cent. on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions." The two per cent. for difference in exchange was not allowed. And the court, in 8 Pickering, say, "We subscribe to this doctrine, and are satisfied, when the suit is brought in this commonwealth, by a foreign creditor, who sues here on the trustee process, the judgment can only be for the amount due at the par value of lawful money for sterling." In the case of *Schofield v. Day*, 20 John., 102, which was an action of *assumpsit* on a promissory note made by defendants at Montreal, in Lower Canada, payable to the plaintiffs, who resided in England, or to their order with interest, until paid in England, the court say, "the plaintiffs are entitled to English interest, and not to the rate of interest in Lower Canada. And the interest is to be calculated up to the time of the judgment, not to the time when the money might, in the ordinary course of business, be remitted to England. The plaintiffs are not entitled to any allowance on account of the difference of exchange with England." In the case of *the United States v. Barker*, 1 Paine, 156, the court decided that the holder of a bill is entitled to recover at the rate of exchange at the time notice of the protest is given; and that such was the settled law in New York. And in the case of *Cropper v. Nelson*, 3 Wash., 125, the court held where the money stated in the bill is sterling money, the jury are to settle the amount according to the rate of exchange at the time of the trial.

§ 1623. *Necessary averments to recover exchange on notes.*

From these authorities, the law would seem to be settled that on a foreign bill of exchange, under the commercial usage that obtains, the rate of exchange may be recovered. At all events, that the rate of exchange is not recoverable on a note of hand where the declaration lays the venue in the state where the suit was brought, and there is no count nor allegation to cover the difference of exchange. This is a matter which depends upon authority founded on commercial usage. And under the circumstances of this case we think the plaintiff is not entitled to the two per cent. claimed, admitted to be the difference of exchange between this state and New York.

BANK OF UNITED STATES v. UNITED STATES.

(2 Howard, 711-743. 1844.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—A writ of error brings this case before the court from the circuit court for the eastern district of Pennsylvania. On the 7th of February, 1833, the secretary of the treasury of the United States drew the following bill on the minister and secretary of state for the department of finance of the French government: "Sir: I have the honor to request that at the sight of this, my first bill of exchange (the second and third of the same tenor and date unpaid), you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of 4,856,666 francs and 66 centimes; which includes the sum of \$3,916,666.66, being the amount of the first instalment to be paid to the United States under the convention concluded between the United States and France, on the 4th of July, 1831 (8 Stats. at Large, 430) (after deducting the amount of the first instalment to be reserved to France under the said convention), and the additional sum of 940,000 francs,

being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was purchased by the bank and indorsed by it to Messrs. Baring, Brothers & Co., of London, and by them for value was indorsed, pay the order of N. M. Rothschild, Esq.; and by him it was directed to be paid to Messieurs De Rothschild, Brothers, or order, of Paris, for value in account. This bill, on presentation, not being paid, was protested, and was afterwards taken up on account of the first indorser by Hottinguer & Co., who also paid the costs, etc., and charged the whole sum to the Bank of the United States. Notice of the non-payment of this bill was given, in due time, to the drawer; and also that the bank claimed of the government interest, costs and fifteen per cent. damages on the bill. The government accounted to and paid the bank the principal of the bill and the costs, but refused to pay the damages. Sometime after the protest, a dividend on the stock held by the United States having been declared by the bank, it retained a part of the dividend to cover the above damages. A suit being brought against the bank by the government to recover the dividend thus withheld, the bank set up as an offset the fifteen per cent. damages, claimed on the above bill. On the trial, the court held, and so instructed the jury, that the action was maintainable. That the set-off or credit claimed by the defendants was governed by the statute of Maryland. That if the bank had been the holder of the bill, at the time of the protest, it would, under the statute, be entitled to the damages claimed; but that it must be viewed as indorser, and consequently could not recover such damages unless upon proof that they had been actually paid by the bank. To this charge the defendant's counsel excepted, and this brings before the court the questions for consideration.

§ 1624. *Whether the instrument is a bill of exchange.*

Before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel; though not having been excepted to by the government, it is not a matter for decision. It is supposed not to be a bill of exchange, as it was drawn payable out of a particular fund. This seems not to be the character of the bill. It was drawn for a certain sum, and the drawer then states on what account such sum was due from the French government. But there was no restriction as to what moneys or appropriation out of which the bill should be paid. This could in no sense restrain the negotiability of the instrument. It has the frame, character and effect of a bill of exchange. It was so called and treated by the secretary of the treasury, who drew it; by his successor, who had some correspondence in regard to it; by the attorney-general, to whom it was submitted for his opinion, by congress; and by the eminent bankers in Europe, through whom it was negotiated and paid. That the United States can sustain an action against the bank, to recover a dividend declared in their favor, is undoubted. This seems to have been doubted by the counsel for the bank in the circuit court, but the objection has been abandoned in this court. Nor can there be any question of the right of the bank to set up, in this case, by way of offset, the damages in controversy, if the claim for damages be sustainable. This right is not contested by the attorney-general.

§ 1625. *The Maryland statute on bills of exchange.*

The main point in the case depends upon the construction of the Maryland statute, which applies to this district. It is singular that this statute, which

was enacted in 1795, in regard to the question now before us, has never been construed by the local courts. And the same may be said of other and prior statutes of Maryland containing similar provisions. The first section of the act provides "that upon all bills of exchange hereafter drawn in this state, on any person, corporation, company or society, in any foreign country, and regularly protested, the owner or holder of such bill, or the person or persons, company, society or corporation, entitled to the same, shall have a right to receive or recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of protest, until the principal and damages are paid and satisfied; and if any indorser of such bill shall pay to the holder, or the person or persons, company, society or corporation, entitled to the same, the value of the principal, and the damages and interest as aforesaid, such indorser shall have a right to receive and recover the sum paid, with legal interest upon the same, from the drawer, or any other person or persons, company, society or corporation, liable to such indorser upon such bill of exchange."

§ 1626. — *as to the recovery of interest and damages.*

That the holder of a foreign bill, or other person entitled to it, may recover, under this statute, from the drawer, in case of protest, a sum that will purchase a similar bill of the same amount, together with fifteen per cent. damages on the principal sum, is admitted. But it is insisted that the bank paid the bill as indorser; and that, as there is no proof that it paid the fifteen per cent. damages, they are not recoverable under the statute. The first part of the section gives to the holder of a protested bill its value at the place drawn, the fifteen per cent. damages, and interest upon the value of the principal sum. The latter part of the section gives to the indorser, who has paid to the holder the value of the principal, the damages and interest on the entire sum paid with legal interest. So that while the holder of the bill recovers only interest upon the principal sum, the indorser is entitled to interest on the whole sum paid by him. And to give interest on this sum, seems to have been the object of the latter clause of this section. Had the bank retained the bill until its presentation and protest, there could be no question of its right, as holder, to the damages claimed. It indorsed the bill to Baring, Brothers & Co., and they to Rothschild, who indorsed it to De Rothschild and Brothers. These last were the holders; and had not the bill been paid, *supra protest*, on account of the bank, as first indorser, they would have been entitled to the damages. Hottinguer & Co., having paid the bill for the honor of the bank, became the holders, and could recover the damages from it or the drawer. But they being the depositaries of the bank, charged it with the amount they paid, by which the bank was remitted to its original character as payee and holder of the bill. In this light the bank was viewed and treated by the government, for it paid not only the principal sum and interest to the bank, but also the costs of protest and other expenses chargeable under the laws of France. But the damages allowed by the statute were refused.

§ 1627. *Damages not a penalty.*

It has been intimated that these damages must be considered as a penalty, and not as a part of the bill. This is a mistaken view of the subject. Had there been no statute, the bank, as the holder of the bill, would have been equally

entitled to damages. They would have been claimed on a different principle, and might have been of a greater or less amount, according to circumstances. The origin and character of a bill of exchange are found in the law merchant; that law which pervades the commercial world, and which, though founded on usage, has become as fixed and definite as any other branch of the law. Under this law, the drawer of a bill in this country, payable in a foreign country, is liable, should such bill be protested, not only for the costs of protest and other incidental charges, but also to re-exchange on the bill. The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the countries where the bill is drawn, and where it is made payable. Between this country and France, the exchange is often, if not generally, by the way of London.

§ 1628. *The doctrine of re-exchange.*

The bill under consideration having been protested at Paris for non-payment, the holder under the general commercial law was entitled to a bill drawn at that place, payable in this city, for such sum as would pay the original bill at Paris, including costs of protest and other legal charges. This is re-exchange, and it varies, as must be seen, with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, re-exchange has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages, and one so difficult to establish by evidence, the state of Maryland, and almost all the other states of the Union, have fixed by legislation a certain amount of damages on protested foreign bills, in lieu of re-exchange. Experience has shown that this is a judicious regulation. It relieves the parties to the bill from uncertainty, and promotes punctuality by showing the drawer what damages he must pay on the dishonor of his bill. Fifteen per cent. on the principal sum, which the statute adopts, may be greater than the actual re-exchange in the present case. But whether this be so or not, is not open for inquiry. It is believed that if this per cent. excluded the re-exchange, at the time this bill was protested, there are many other cases in which it would fall short of that charge. The statute has, probably, fixed an amount which would be an average charge for re-exchange. This being the basis of the act, the damages cannot be considered as a penalty. The damages given by the statute are as much a part of the contract as the interest. On this point there is believed to be no difference of opinion among enlightened courts or commercial men. The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable at Paris, in France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris, and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed. The statute of Maryland, then, is founded on equitable considerations, although the rule of damages may be considered arbitrary, as it does not yield to circumstances.

§ 1629. *Allowance of damages for non-payment of bill of exchange—government liable for.*

In this case the bank purchased the bill from the government, and paid for it. It was sold and transferred by the bank. But the bill not being paid to the holder, the bank paid the amount of it, including the costs of protest and other charges, to Hottinguer & Co., at Paris, who had taken it up *supra protest*, for the honor of the first indorser. The bank in this manner came again into possession of the bill, the indorsements, in effect, being stricken out. In a commercial and legal sense, then, the bank is the holder of the bill, and has the same claim for damages as if it had never been indorsed. Had the government been suable by the bank, it must have declared and recovered as payee and holder, and not as indorser of the bill. No objection is taken in the bill of exceptions as to the liability of the government to damages on a protested bill of exchange drawn by it, the same as an individual. No such question, therefore, arises in this case. As the holder of a protested bill, the government exacts damages; it would seem to be equitable, therefore, that, as drawer, under like circumstances, it should pay them. Upon the whole, we think that, in view of the circumstances of this case, the bank is entitled to the fifteen per cent. damages, under the Maryland statute, and that, consequently, the instructions of the circuit court were erroneous. The judgment of that court is, therefore, reversed, and the cause is remanded to that court, and a *venire de novo* is awarded, etc.

Mr. Justice WAYNE concurred in reversing the judgment, but not for the reasons stated by the court. Mr. Justice CATRON dissented, holding that the bank was not within the first class of cases provided for by the statute (owner or holder), and that the instruction given by the court below was proper.

UNITED STATES v. BANK OF UNITED STATES.

(5 Howard, 382-410. 1846.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The United States sued the Bank of the United States for a dividend on stocks held by the government in the bank, and the defendant pleaded and relied in defense on a set-off, being the damages claimed by the defendant of fifteen per cent. on a protested draft in the form of a bill of exchange, drawn by the government of the United States on the government of France, for a sum of money due from the latter government to the former, by treaty stipulations, to obtain possession of which the draft was drawn. The bank was the payee and original holder. The holders at the time of protest (Messrs Rothschilds, of Paris) caused it to be protested for non-payment; and Hottinguer & Co. intervened immediately after, and took up the draft for the honor of the bank. The corporation refunded to Hottinguer & Co. the amount advanced, including interest and charges, together with one-half per cent. commissions, and thus again became possessed of the draft.

The circuit court, on a former trial, held that the damages claimed as a set-off depended on a statute of Maryland of 1785; that by the statute the holder, at the time of protest, alone could demand damages from any previous party to a bill; and that, if he failed to do so, and recovered less from any previous

indorser, the latter could only recover the amount actually paid (with interest and charges accruing subsequently) from the drawer; and therefore the bank could set up no claim by force of the statute of Maryland, taking its own assumption to be true, that this was a legal bill of exchange, and properly subject to protest. This instruction altogether rejected the defense relied on, and the jury found for the plaintiffs; and from that decision the defendants prosecuted a writ of error to this court. When the cause came before us in 1844, 2 How., 711, this single question was presented for our determination; nor could this court decide any other question; and such was the unanimous opinion of the court, although the judges then present differed as regarded the true construction of the statute of Maryland; the majority holding the construction of the circuit court to have been erroneous, and that the bank, as payee, on taking up the draft from Hottinguer & Co., had the same right to demand damages under the statute that the holder had at the time of protest. The court, however, when giving its opinion, threw out some suggestions on the structure of the bill; first remarking that, "before we consider the rulings of the court excepted to, it may not be improper to notice the structure of the bill, which has been much commented on by the counsel, though, not having been excepted to by the government, it is not a matter for decision." The instruction given cut off every other question the government might have raised in opposition to the set-off claimed; and as this court, when acting as a court of errors, can only legitimately revise the questions of law that have been raised and decided in the circuit courts, it must of necessity, on a second writ of error being prosecuted, have power to revise such rulings of the court below on the second trial as affect the merits of the controversy, and to pass on the questions not previously presented, as open questions, in the particular cause. However high the regard of judges that did not concur may be for the views entertained and expressed by other judges on a question of law not brought up for decision, still it is impossible to recognize such views as binding authority, consistently with the due administration of justice; as by doing so the merits of the controversy might be forestalled, without proper examination. We, therefore, feel ourselves at liberty to treat of the structure and character of the instrument before us as an open question. And so, also, we deem the question open, whether the statute of Maryland subjected to protest and damages a government. The statute provides: "That upon all bills of exchange hereafter drawn in this state on any person, corporation, company or society in any foreign country, and regularly protested, the owner or holder of such bill shall have a right to so much money as will purchase a good bill of the same time of payment, and upon the same place, at the current rate of exchange of such bills; and also fifteen per cent. damages upon the value of the principal sum mentioned in such bill, with costs of protest, together with legal interest," etc. The United States refunded to the bank, on the return of the draft, the principal sum, together with all the charges actually incurred by the bank, and the interest accruing from the date of drawing to the time when the money was refunded; but refused to pay the fifteen per cent. damages claimed by the bank. This refusal was not founded on the true construction of the Maryland statute; the government insisting it had no application to the transaction, but that the drawing was of nation upon nation, and not governed by the law merchant; and that the form of one of the instruments making up the transaction did not and could not alter its character or legal effect, so as to bring it within the law merchant; that the government was only bound to do equity to the

bank to the extent of the amount refunded to Hottinguer & Co. And these conflicting assumptions make up the question we are now called on to determine, as will be seen by referring to the third and fourth instructions asked to be given to the jury, on part of the plaintiffs, on the second trial; they are as follows:

"3. That the bill in question, being drawn by one government upon another, and upon a particular fund, is not a bill of exchange within the legal meaning of the terms, and is not embraced by the statute. 4. That the defendants, being indorsers of the bill, and not the holders or owners at the time of protest, are not entitled to the damages, since they have not paid them."

Being refused, the judge stated to the jury that "these questions appear to me to have been determined by the supreme court of the United States in the present cause in favor of the defendants;" and further remarking, that "if I am mistaken in their views on this, it will be corrected by a re-examination of the cause in that court." That the judge was mistaken as regarded the questions arising on the third instruction, we have already stated; but in regard to the fourth instruction the charge was proper, as the question presented by it had been decided.

§ 1630. *The Maryland act allowing damages for dishonor of foreign bills does not apply to bills drawn on a foreign government.*

Suppose, then, a bill of exchange could be drawn by the government of Maryland, or by the government of the United States in this District, as the successor of Maryland, on the government of France; would the statute of Maryland give damages to a holder in case the bill was dishonored by France, and formally protested? The statute provides for damages upon all foreign bills drawn in that state "on any person, corporation, company or society." Is the government of France either a person, corporation, company or society, within the meaning of the act? If it is, and was indebted, and could be drawn on and protested, then it follows that the drawer of the bill in such an instance as this, on taking it up and paying the damages, could lawfully demand from France, as drawee, the damages paid, and rightfully enforce the demand by the sword, if payment was refused; as the demand would be a perfect right, and this the ultimate remedy. In our opinion, Maryland, by her act of 1785, never contemplated the idea that a foreign government should be subject to be drawn upon by bills of exchange, and to protest and damages as incidents, like individual persons, or trading companies, or corporations; but that the statute had reference to the latter only; and that, therefore, this bill, on its face, "is not embraced by the statute," in the language of the rejected instruction.

§ 1631. *Draft on a foreign government held not a bill of exchange.*

The second consideration arising on the instruction involves the structure and character of the instrument, not so much in form as in substance; for the name of the instrument cannot change its nature and character. The draft was drawn by one government on another, and of necessity accompanied by other documents, and the question is, Was it a negotiable bill of exchange, in the legal meaning of the terms? The circuit court held that it was; and this is the prominent legal point in the cause, or at least has been so treated at the bar, and on which this court has bestowed much consideration. A bill of exchange is an instrument governed by the commercial law; it must carry on its face its authority to command the money drawn for, so that the holder or the notary acting as his agent may receive the money and give a discharge on presenting the bill and receiving payment; or, if payment is refused, enter a protest, from which follows the incident of damages; but if no demand

can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill and be presented with it, it cannot be a simple bill of exchange that circulates from hand to hand as the representative of current cash. The draft in question was drawn for 4,856,666.66 francs, being moneys owing and shortly to become due from France to the United States, according to a treaty stipulation (8 Stats. at Large, 430); and these facts are distinctly set forth on the face of the draft, and by indorsements on it. The paper was signed by the secretary of the treasury of the United States, and addressed to the minister and secretary of state for the department of finance of the kingdom of France, and was payable to the order of Samuel Jaudon, cashier, etc. The mere signature of our secretary of the treasury could not be recognized by the French government as conferring authority on the holder to demand payment. The transaction being one of nation with nation, he who demanded payment must have had, not only the authority of this nation, before he could have approached the French government, but that authority must have been communicated by the head of this government through the proper department carrying on our national intercourse, which was the state department. Accordingly, of even date with the draft, 7th February, 1833, an instrument was drawn up reciting the fact of indebtedment and cause thereof, the amount due, the authority conferred by an act of congress (4 Stats. at Large, 574) on the secretary of the treasury to apply for the money in such manner as he might deem best; the fact and manner of drawing for it, and then comes the official authority to the payee to receive the money, in these terms:

"Now, therefore, be it known that I, Andrew Jackson, president of the United States, do ratify and confirm and approve the drawing of the said bill by the secretary of the treasury aforesaid, and do hereby authorize the said Samuel Jaudon, or his assignee of the said bill, to receive the amount thereof, and on receipt of the sum therein mentioned to give full receipt and acquittance to the government of France for the said first instalment, and the interest due on all the instalments, payable on the said 2d day of February, by virtue of the said convention; and I, Andrew Jackson, president as aforesaid, do hereby ratify and confirm all that may be lawfully done in the premises.

"In testimony whereof, I have caused the seal of the United States to be hereunto affixed. Given under my hand at the city of Washington, [L. s.] the seventh day of February, in the year one thousand eight hundred and thirty-three, and of the independence of the United States of America the fifty-seventh.

ANDREW JACKSON.

"By the President:

"EDW. LIVINGSTON, Secretary of State."

This accompanied the draft, and was placed in the hands of the payee, and, no doubt, passed through the hands of the different indorsees. Still, neither the power, more than the draft, could be presented to the French government by a mere individual who was holder or by a notary public, and therefore, on the next day after the draft and power bear date, the secretary of state of our government addressed a dispatch to our *chargé d'affaires* and representative at the French court in the following terms:

"DEPARTMENT OF STATE, WASHINGTON, 8th February, 1833.

"*Nathaniel Niles, Esq., Paris:*

"SIR:—The secretary of the treasury, in conformity with the provision of a law of the last session of congress, yesterday drew a bill upon the minister of

state and finance of the French government for the first instalment and interest thereupon and for the interest upon the remaining instalments, which interest is stipulated to be paid by that government to this in twelve months from the date of the exchange of the ratification of the late convention between the United States and his majesty the king of the French. The bill is drawn in favor of Samuel Jaudon, cashier of the Bank of the United States, or order, and will go accompanied, to the assignee thereof in France, by a full power from the president authorizing and empowering him, upon the due payment of the same, to give the necessary receipt and acquittance to the French government, according to the provision of the convention referred to.

"You will take an early opportunity, therefore, to apprise the French government of this arrangement.

"I am, sir, respectfully your obedient servant,

"EDW. LIVINGSTON."

§ 1632. *Transaction with a foreign government not governed by the commercial law.*

Until the French government was thus officially advised, the bill and accompanying power combined were valueless in the hands of the holder, as against France. It follows, as we suppose, from the character of the drawer and the drawee, and the nature of the fund drawn upon, that this transaction could not be governed by the commercial law, much less by a statute of Maryland, which happened to be in force in the District of Columbia, where the draft was drawn. But it is insisted, and with much plausibility, that as between the bank as payee, and the United States as drawer, no such objections can be alleged by the United States; they having assumed the draft to be a bill of exchange, and dealt with it as commercial paper, are bound by the assumption. Still, the question meets us, that no form of draft could authorize a legal demand upon the drawee (France) on the face of the draft. So far from being a simple paper, carrying its authority to receive the money with it, the parties now before the court conceded, at the time the drawing took place, by obtaining the power, that the right to receive the money did mainly depend, and must depend, on the power signed by the president, and countersigned by the secretary of state, with the seal of the United States attached, and the communication of the facts in official form, and through the proper channel, to the government of France, that is, through its department of foreign affairs. These were the conditions and contingencies with which the draft was incumbered. They were legal consequences, apparent on its face, and are yet more apparent by the accompanying facts that took place at the time of drawing.

Again: This controversy is between the original parties; the law governing the dealing, each was bound to know; the facts they did know equally well; and if a mutual mistake was made in supposing that a negotiable commercial instrument could be founded on our claim against France, this mistake cannot change the commercial law, which, in our opinion, could not be made to apply to the subject matter of drawing, nor in any form of instrument founded on the subject matter.

The principal argument adduced to sustain the set-off claimed is founded on the fact that, by an act of congress, the secretary of the treasury had a discretion to adopt any appropriate means to obtain the money, and that a bill of exchange was an appropriate means. To this assumption it may be answered that France was not bound by the act of congress, but by the treaty; it stipulated "that the indemnity of twenty-five million francs should be paid in six

annual instalments, into the hands of such person or persons as should be authorized to receive it." We repeat, that this authority was to come from our government to the French government; was to pass through the department of state here, and through the department of foreign affairs there, and thus only could it reach the minister of finance, M. Humann. Our secretary of the treasury could not communicate with the minister of finance, nor with any other functionary of the French government, and, therefore, the bill drawn by Mr. McLane on M. Humann, standing alone, was idle as waste paper, notwithstanding the act of congress, in so far as the French government was concerned. Nor had M. Humann any power to pay the money had it been in the treasury, until instructed to do so by the department of foreign affairs.

1. For these reasons we are of opinion that the question on the structure of the bill is an open question, because for the first time presented to this court for decision.

2. That the statute of Maryland of 1785 in its terms does not embrace a bill of exchange drawn on a foreign government.

3. That a bill of exchange in form, drawn by one government on another, as this was, is not, and cannot be, governed by the law merchant; and that therefore it is not subject to protest and consequential damages.

And on these grounds we order that the judgment of the circuit court be reversed, and that the cause be remanded to that court for another trial thereof, on the principles stated in this opinion.

TANEY, C. J., filed a memorandum, stating his concurrence in the decision, and, also, his withdrawal from the bench on account of an official opinion rendered by him as attorney-general. WOODBURY, J., also withdrew from the bench on account of an opinion rendered by him as secretary of the treasury. Justices WAYNE and McLEAN dissented, the latter holding that the instrument was a bill of exchange, and that damages were recoverable under the statute of Maryland. (*Chitty on Bills*, p. 27; *East India Co. v. Tritton*, 3 Barn. & Cress., 280; *United States v. Barker*, 12 Wheat., 559; *United States v. Bank of Metropolis*, 15 Pet., 392; *Jenny v. Herle*, 2 Ld. Raym., 1361; *Burchell v. Slocock*, 2 Ld. Raym., 1545; *Haussoullier v. Hartsinck*, 7 Term R., 733, cited.)

BANK OF UNITED STATES v. DANIEL.

(12 Peters, 32-58. 1838.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—To a just comprehension of the legal questions arising in this cause, it becomes necessary that the facts be stated in the form and sense they present themselves to the court. The first transaction giving rise to the controversy was a bill of exchange in the following words:

"Exchange for \$10,000.

LEXINGTON, October 12, 1818.

"One hundred and twenty days after date, of this my first of exchange, second and third of same tenor and date unpaid, pay Henry Daniel, or order, ten thousand dollars, at the office of discount and deposit of the Bank of the United States, in New Orleans, for value received of him, which charge to the account of yours, etc.

ROBT. GRIFFING.

"To *Mr. James Daniel*."

James Daniel duly accepted the bill, and it was indorsed by Henry Daniel, Isaac Cunningham and Samuel Hanson, to the president, directors and company of the Bank of the United States. When it was made and accepted, the drawer, Griffing, and James Daniel, the acceptor, resided and were in Kentucky, where the transaction took place. The indorsers, Henry Daniel, Cunningham, and Hanson, also resided there. The bill was transmitted to New Orleans for payment; but not being paid, it was regularly protested and returned, and the bank looked to the drawer, acceptor and indorsers for the payment of principal and interest thereon, from the 9th February, 1819, the time it fell due, together with the charges of protest, and ten per centum damages on the principal. Griffing, the maker, and James Daniel, the acceptor, believing the claim for damages to be legal, paid the bank, July, 1819, the sum of \$3,330.67 on account of the aggregate amount due and supposed to be due, and, for the balance, Griffing and James Daniel executed their negotiable note for \$8,000, payable sixty days after date, to William Armstrong, to which Cunningham, Hanson and Henry Daniel were parties, either as co-drawers or indorsers, and which was discounted by the office of discount of the Bank of the United States at Lexington, for the benefit of Griffing and James Daniel, upon the express agreement between the parties making and indorsing the note with the bank, that the proceeds should be applied to the payment of the balance due on the bill. Griffing and James Daniel were the principal debtors, and Cunningham, Hanson and Henry Daniel sureties. The principals paid \$500 in part discharge of the note; and in August, 1820, Griffing, James Daniel, Henry Daniel, Cunningham and Hanson executed their joint note to the bank for \$7,500, payable sixty days after date, for the balance. Griffing having died, and the note for \$7,500 not having been discharged when due, the bank sued James Daniel, Cunningham, Henry Daniel and Hanson, in the circuit court of the United States for the district of Kentucky, and recovered a judgment at law for the principal and interest, at what time does not precisely appear.

In 1827, the defendants to the judgment at law filed their bill in equity in the same court; and, after setting out the facts substantially as above, further alleged, "they were advised the bank was not entitled to ten per centum damages on said protested bill of exchange, inasmuch as the drawer and acceptor thereof both lived in Kentucky at the date and maturity of said bill; and that therefore so much of said \$8,000 note as exceeds the balance due on said bill, for principal, interest and damages (after deducting said payment of \$3,330.67), was included in said note by mistake; as to the legal liability of said Griffing and James Daniel for said ten per cent. damages, and as to said excess, said note was executed without any consideration whatever." The complainants also alleged that the failure of consideration, on which the note for \$7,500 was founded, being partial, relief against the excess in the note and judgment could only be had in a court of equity, and prayed the bank might be restrained by injunction from the collection of \$1,515, the excess that entered into the judgment, because of the mistake. At the November term, 1827, an injunction was ordered by the court, restraining the bank from proceeding to collect \$1,515, part of the judgment, until the hearing. The bank answered, admitting the statements of the complainants in reference to the liquidation of the bill of exchange, and the part payment and renewal of the \$8,000 note; and further averred that, on the return of the protested bill, the sum of \$1,000, being ten per cent. on the amount thereof; was claimed by the respondents as their damages; and the claim was assented to by the complainants, with a full knowledge

of the facts upon which it was founded, and all the principles of law upon which it was asserted; and, in pursuance of such assent, the amount of said bill, with interest, and the \$1,000 damages, was liquidated and discharged by complainants in manner alleged, but aver respondents cannot admit "this was done under any mistake, either as to fact or law; indeed, two of complainants were lawyers of celebrity, and of deservedly high rank; and respondents cannot impute to them ignorance of the law; and ignorance of the facts is not pretended." The respondents further alleged that, by a statute of Kentucky, bills of exchange drawn by a person in that state on another out of the state, when returned protested, bore ten per cent. damages, besides interest; and, independently of the statute, the bill for \$10,000 was subject to damages for re-exchange and expenses; that the effect of the statute was to reduce to uniformity and certainty the amount to which holders were entitled in consequence of the money not being paid at the place agreed upon, and the loss arising from difference of exchange and expenses. It is insisted the claim for damages comes within the statute; yet, if not within it, that respondents are entitled to equal damages with those given by the statute, their risk and loss being the same.

In bar of the claim, the respondents say that all the grounds of equity alleged in the bill accrued to complainants more than five years next before the commencement of the suit, and are barred by the lapse of time; they further allege that the damages were liquidated, assented to and discharged more than five years next before the commencement of the suit; and all claim to relief is barred by the statute of limitations. The allegations in the complainants' bill, not responded to, are admitted. To the answer a general replication was filed. The only evidence in the cause was an agreement of facts entered into by the parties, to wit: "It is agreed that the statements contained in said bill, as to liquidation of the bill of exchange of \$10,000, are true. It is also agreed that this liquidation was on the 8th day of July, 1819, and that no interest was charged up to that time, except upon \$10,000. It is also admitted that such renewals of the \$8,000 note were made, as are stated in said bill, and that the judgment at law was on one of the notes given in renewal." Upon the pleadings and admissions, the court proceeded to a hearing of the cause at the November term, 1836, and decreed: "That a credit be entered on the judgment at law obtained by the defendants against the plaintiffs, as set forth in the bill for \$1,000, the amount of damages charged on the protested bill, with all interest charged on said sum up to the time of the judgment; and that the defendants be perpetually enjoined from taking out execution on said judgment for the sum thus decreed to be credited; but the decree not to affect the balance of the judgment. From which decree the president, directors and company of the bank of the United States appealed to this court.

§ 1633. *An appeal may be taken to this court if the sum in controversy exceeds \$2,000 at the hearing of the cause, though part of that sum be interest.*

The first question raised on the facts, and in advance of the merits, is whether the matter in controversy in the circuit court was of sufficient dignity to give this court jurisdiction by appeal. The act of congress (2 Stats. at Large, 244) provides that appeals shall be allowed to the supreme court from final decrees rendered in the circuit courts, in cases of equity jurisdiction, where the matter in dispute, exclusive of costs, shall exceed the sum or value of \$2,000. The expression, sum or value of the matter in dispute, has reference to the date of the decree below, alike in case of appeals in equity and writs of error at law; they are each grounded on the original process of this

court, operating on the final decree or judgment, and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any. The matter in dispute below was a claim to have deducted from the judgment at law \$1,000, with interest thereon, after the rate of six per centum, from the 8th day of July, 1819, up to the date of the decree, in November, 1836, being upwards of seventeen years; and the circuit court decreed the reformation to be made of the judgment at law, by expunging therefrom, and as of its date, the \$1,000 with the interest. The effect was to cut off the interest that had accrued on the \$1,000 from the date of the judgment in 1827, to that of the decree in 1836; interest on the principal sum recovered being an incident of the contract by the laws of Kentucky, as well after judgment as before. The practical consequence of the decree will immediately be manifest when the bill is dismissed by the order of this court; the appellants will then issue their execution at law, and enforce the \$1,000 with the accruing interest from the 8th day of July, 1819, until payment is made; it follows that, upon the most favorable basis of calculation, and disregarding the statute of Kentucky of 1789, giving ten per cent. damages in addition to legal interest on sums enjoined, the amount to which the decree below relieved the appellees and deprived the bank of the right of recovery was \$2,040; that is, \$1,000 principal, with seventeen years and four months of interest; this being the aggregate amount in dispute, and enjoined by the decree, of course, the supreme court has jurisdiction.

The second question raised by the record rests mainly on the pleadings in the cause. It is alleged the bank was not entitled to ten per cent. damages on the protested bill, inasmuch as the drawer and acceptor both resided in Kentucky; that the \$8,000 note included the damages of \$1,000 through mistake; and so far it wanted consideration. The defendants deny this was done through either mistake of the fact or law; insist they were entitled to ten per cent. damages by the statute of Kentucky; but if the statute did not apply, they were entitled to damages for re-exchange and charges; and that the statute was justly referred to for the rule settling the measure of compensation. As no mistake of the facts is positively alleged, and, if impliedly stated, is directly and positively denied, we must take it no such mistake existed; and such is manifestly the truth. In regard to the mistake of law, however, the pleadings can settle nothing; they make an issue, and refer it to the court for decision, on the local and general laws governing damages on bills of exchange of the character of the one set forth.

§ 1634. *Law of Kentucky as to damages, where drawer and acceptor reside in the state.*

The statute, by force of which the bank claimed damages, declares: "If any person or persons shall draw or indorse any bill or bills of exchange upon any person or persons, out of this state, on any person or persons within any other of the United States of North America, and the same being returned back unpaid, with legal protest, the drawer thereof, and all others concerned, shall pay the contents of said bill, together with legal interest from the time said bill was protested, the charges of protest, and £10 per cent. advance for the damages thereof; and so proportionably for greater or smaller sums." In 1821, the court of appeals of Kentucky gave a construction to their statute in the case of *Clay v. Hopkins*, 3 A. K. Marsh., 488, where it was holden that where the drawer and acceptor were both of Kentucky, and the transaction took place there, the statute did not apply, although the bill was made payable in Balti-

more. That and this case are alike in all their features. In a subsequent cause of *Wood v. Farmers' & Mechanics' Bank of Lexington*, 7 Mon., 284, the same court held that a bill addressed to "Mr. J. J. Wood, New Orleans," was within the statute, and drew after it ten per cent. damages on protest; distinguishing Wood's case from that of Clay and Hopkins, because the acceptor was addressed at the foot of the bill as of New Orleans, although in fact he was of Kentucky.

§ 1635. *Supreme court follows state construction of state statutes.*

This court, in accordance to a steady course of decision for many years, feels it to be an incumbent duty carefully to examine and ascertain if there be a settled construction by the state courts of the statutes of the respective states, where they are exclusively in force; and to abide by and follow such construction, when found to be settled. Looking to the two adjudications in Kentucky, on the construction of the statute of 1798, in the spirit of the rule we have laid down for our government, and without any reference to the misgivings we may entertain of the correctness of the construction declared to be the true one in *Clay v. Hopkins*, 3 A. K. Marsh., 488, we have come to the conclusion that Wood's case, 7 Mon., 281, did not overrule the former. It is therefore declared by this court that the bill of exchange for \$10,000, drawn by Robert Griffing, although payable at a bank in New Orleans, did not, by force of the statute of Kentucky, subject the drawer or others bound to take it up, to the payment of ten per cent. damages.

§ 1636. *Where a bill of exchange is payable out of the state in which it is drawn, the holder is entitled to damages.*

Not having been entitled by the statute, the appellants insist they were authorized to charge damages by commercial usage, and that the statute prescribed a fair measure. The assumption that the holder could lawfully demand damages depends on the fact whether the bill was foreign or inland; if foreign, then the bank had the right to redraw from New Orleans to Lexington for such amount as would make good the face of the bill, including principal, re-exchange and charges, with legal interest; the law does not insist upon actual redrawing; but the holder may recover the price of a new bill at the place of protest. Had a jury been called on to assess the amount due, proof of the exchange against Lexington would have been necessary to the recovery of damages on the ground of re-exchange; but the parties themselves having liquidated them at the rate the statute of Kentucky allowed, in cases very similar, we must presume, at this distant day, aside from any proof to the contrary, that ten per cent. was fair compensation; it may have been less; of this, however, the parties were the proper judges. Kent's Com., Lecture 44. Whether a bill of exchange, drawn in one state of this Union, payable in another, is a foreign bill, involves political considerations of some delicacy, although, we apprehend, of no intrinsic difficulty at this day. The respective states are sovereign within their own limits, and foreign to each other, regarding them as local governments. 2 Pet., 586. Kentucky and Louisiana, as political communities, being distinct and sovereign, and consequently foreign to each other in regard to the regulation of contracts, it follows, a bill drawn in one, payable in the other, is a foreign bill; and so this court adjudged in the cause of *Buckner v. Finley*, 2 Pet., 586 (§ 941, *supra*). The bill, in that case, was drawn at Baltimore, by citizens of Maryland, on Stephen Dever, at New Orleans; whereas, the one in this case was drawn and accepted in Kentucky, but payable at a bank in New Orleans. Yet, we think, the place of payment, being within a jurisdiction

foreign to Kentucky, subjected the acceptor, James Daniel, to the performance of the contract, according to the laws of Louisiana, to every extent he would have been had he become a party to the bill at New Orleans; and that the effect of the contract, on all the parties to it, does not vary from the one sued on in *Buckner v. Finley*, 2 Pet., 586; *Story's Conflict of Laws*, §§ from 281 to 286. Being a foreign bill, and not having been affected by the statute of Kentucky, of course, the holders, by commercial usage, were entitled to re-exchange when the protest for non-payment was made; and those bound to take it up having paid, or agreed to pay, the damages, with a full knowledge of the facts, and a presumed knowledge of the law, voluntarily giving the bank a legal advantage, it would be going far for a court of chancery to take it away; the equities of the parties being equal, to say the least, it cannot be against conscience for the appellants to retain their judgment.

§ 1637. *Mistake or ignorance of law affords no ground of relief from contracts fairly entered into, with a full knowledge of the facts.*

The main question on which relief was sought by the bill, that on which the decree below proceeded, and on which the appellees rely in this court for its affirmance, is, Can a court of chancery relieve against a mistake of law? In its examination, we will take it for granted, the parties who took up the bill for \$10,000 included the damages of \$1,000 in the \$8,000 note, and did so believing the statute of Kentucky secured the penalty to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply; indeed, the remedial power, claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable is well established, as was declared by this court in *Hunt v. Rousmaniere*, 1 Pet., 15; and we can only repeat what was there said: "That whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character," and to involve other elements of decision. What is this case, and does it turn upon any peculiarity? Griffing sold a bill to the United States Bank, at Lexington, for \$10,000, indorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky, when the bill was made, and there accepted it; at maturity it was protested for non-payment, and returned. The debtors applied to take it up, when the creditors claimed ten per cent. damages, by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing (as in all probability most others believed at the time) that the ten per cent. damages were due by force of the statute; and influenced by this opinion of the law, the \$8,000 note was executed, including the \$1,000 claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief. Testing the case by the principle "that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with a full knowledge of the facts," and under circumstances repelling all presumptions of fraud, imposition, or

undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is, Were the complainants entitled to relief? To which we respond decidedly in the negative.

§ 1638. *Recovery of money paid by mistake to take up a bill; limitation.*

Lastly, the appellants rest their defense on the statute of limitations. If the \$1,000 claimed as damages were paid to the bank at the time the bill of exchange was taken up, then the cause of action to recover the money (had it been well founded) accrued at the time the mistaken payment was made, which could have been rectified in equity, or the money recovered back by a suit at law. The courts of law and equity have concurrent jurisdiction; and the complainants having elected to resort to equity, which they had the right to do, were as subject to be barred by statute in the one court as in the other. In such cases the courts of equity act in obedience to the statute of limitation, from which they are no more exempt than courts of law. This suit having been brought more than five years after the bill was taken up, to apply the bar, it becomes necessary to inquire whether the damages were then paid. The complainants allege that they paid in July, 1819, \$3,330.67, on account of the whole amount due, consisting of principal, interest, charges and damages; and for the balance of the amount of the bill, Griffing and James Daniel executed their negotiable note for \$8,000, payable sixty days after date, to William Armstrong, to which Cunningham, Hanson and Henry Daniel were parties as indorsers or co-drawers; which note was discounted by the bank for the benefit of Griffing and James Daniel; and upon the express agreement between them and the bank, and the other parties to the note, that the proceeds of said \$8,000 note should be applied to the payment of the balance due on said bill of exchange. The parties to this suit agreed in writing that the statement above set forth was true; and the bill was liquidated by the proceeds of the note, and the \$3,330.67. If the pre-existing debt due the bank, and evidenced by the bill of exchange, was extinguished when the bill was taken up, then the remedy of the bank was gone, and the right to recover the \$1,000 of excess arose. It is generally true that the giving a note for a pre-existing debt does not discharge the original cause of action, unless it is agreed that the note shall be taken in payment. 6 Cranch, 264. In reference to this principle, it is insisted for the appellees that the \$8,000 note given to the bank, and the renewals of it afterwards, furnished mere evidence of the continuance of the original liability, from which they should be relieved; because the notes covered too much by \$1,000 with interest, so the court below thought, and decreed the abatement. This court thinks the facts do not involve the principle referred to. We are not told by the appellees that the \$8,000 note was taken in payment of the balance of the bill of exchange, but that \$3,330.67 in cash was paid, and the note discounted, the money obtained upon it, and "by express agreement applied to the payment of the balance due on said bill of exchange." The debtors raised the cash, and paid the bill, nor did the \$8,000 note enter into the transaction, further than that the proceeds were applied to the extinguishment of the pre-existing debt. Payment was, therefore, made on the 8th of July, 1819, and the \$1,000 could have been sued for then as well as in 1827, when the bill of injunction was filed. It follows, the act of limitations is a bar to the appellees, aside from any other grounds of defense.

EX PARTE HEIDELBACK.—RE GLYN.

(District Court for Massachusetts: 2 Lowell, 526-537; 15 N. B. R., 495. 1876.)

STATEMENT OF FACTS.—The bankrupt drew bills of exchange at Boston on London, to his own order, and indorsed and negotiated them in New York. They were protested. The question was, whether the rate of damages and interest was governed by the law of Massachusetts or of New York.

§ 1639. *Authorities as to conflict of laws as to commercial paper.*

Opinion by LOWELL, J.

The principles of law upon which this case must be decided have been thus laid down by the supreme court in *Scudder v. Union Nat. Bank*, 91 U. S. (1 Otto), 406 (§§ 158-162, *supra*): Matters pertaining to the execution, validity and interpretation of a contract are determined by the law of the place where it is made; those connected with its performance, by the law of the place of performance; those respecting the remedy, by the *lex fori*. The distinction between the law applicable to the validity and that governing the performance was first clearly announced in this country, I believe, in the very able opinion of the court in *Depeau v. Humphreys*, 20 Martin (La.), 1. A bill of exchange given in Louisiana for money advanced in that state, with a reservation of interest lawful there, but usurious in New York, was held to be valid though the payment was to be in New York. This decision is criticised by Judge Story, who inclines to refer all contracts, even as to their validity, to the place of performance. *Conf. Laws*, § 304. Judge Curtis, in arguing the important case of *Carnegie v. Morrison*, 2 Metc., 381, assailed the same case, and maintained the doctrine of Story; but the court decided that the contract, which was a letter of credit issued in Boston, authorizing bills of exchange to be drawn at Gottenburg in Sweden on London, was to be governed, as to its validity and effect between the original parties, by the law of Massachusetts, though the bills drawn under it must conform to the law of Sweden, and the acceptance of the bills to the law of England; which is precisely the doctrine of *Depeau v. Humphreys*, and *Scudder v. Union Bank*, above cited. Mr. Wharton, in his valuable work on the Conflict of Laws, § 401, proposes as a rule which best harmonizes the authorities, one substantially like that of the decisions above referred to, though carrying the division one step further: "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

§ 1640. *By what law the drawer is bound.*

In the case of a bill of exchange, the contracts of the various parties are distinct, and the drawer is bound, generally speaking, according to the law of the place where the bill is drawn, which is in most cases the same as that in which it is to be paid by him, if he pays it. Still he is to a certain extent involved in the same law with the acceptor, because upon due protest, demand and notice, he is bound to make good to the holder what the acceptor ought to have paid at the place where he was to pay, which makes it necessary to ascertain what that amount was by the law of that place, and whether by the same law due demand was made of the acceptor and due protest upon the dishonor. What the drawer should pay as interest, *ex mora*, or as damages, does not depend upon the law of the place where the acceptor was to pay the bill, if that is dif-

ferent from the place where the drawer's contract is to be performed. So far the parties to this petition are agreed, and I have therefore cited no authorities for some of my positions; but here they divide. The general creditors contend that the law of Massachusetts governs this matter of damages in the present instance, because the remedy is sought here; and, if that be not so, because Boston is the place of performance. The petitioners maintain that the law of New York is to be followed, because the bill was negotiated there and the first holder lived there.

§ 1641. *State laws not binding on commercial questions, or in case of a conflict.*

I am of opinion that the Massachusetts law governs, not because the damages are part of the remedy, which they are not, but because Boston was the place in which the drawer undertook to perform his contract. In Massachusetts it is held that the rate of interest to be recovered, *ex mora*, for default in paying a promissory note, is a mere matter of remedy. The decisions which establish this point, if applicable to bills of exchange, are not binding on this court, because the law of bills of exchange is part of general commercial jurisprudence, and not of local law or usage: *Swift v. Tyson*, 16 Pet., 1 (§§ 382-386, *supra*); *Watson v. Tarpley*, 18 How., 517 (§§ 1174-77, *supra*); and so is any question of the conflict of laws. When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.

§ 1642. *Rule that the contract is governed by the place of performance.*

In most cases the place where a note is made or a bill is drawn, indorsed or accepted is, in fact, the place where the parties respectively undertake to pay it; and therefore questions rarely come up of any distinction between the law of the contract and that of the performance; and the courts, in pronouncing on such cases, have had no such distinction in mind, and any general statements as to the contract being governed by the law of the place where it is made or is to be performed must be taken with that allowance. When they say that a bill is to be paid by the acceptor at the place where he accepts, and by the drawer where he draws, they are stating the general presumption of fact that a bill or note is probably dated at the place where the party intends to pay it. The petitioners do not deny that it is the place of performance whose law must govern the decision of this controversy if that is a different place from the place of entering into the contract; but they insist that unless the contract provides expressly for a different place, that of making the contract is conclusively, and always, the place of performance, and that a contract is made where it is delivered.

§ 1643. *What is the place of performance where none is mentioned.*

My opinion is, that where no place of performance is mentioned in a note or bill, it is to be paid by each person liable upon it at the place of his own domicile, using that word in a sense large enough to include an established place of business as well as one of residence. Mr. Justice Story, *Conf. of Laws*, § 293 *c*, note 3, says that if a note is made in one state, and negotiated to an indorser in another, the contract of the maker with the indorsee takes effect as a promise in the state where the note was made, and not where it was indorsed. It will be recollected that Judge Story refers all contracts to the place of performance, and therefore his meaning here is that the maker of a note is to pay it at his own home. So Westlake (§ 235) affirms that the acceptor promises to pay the bill, if no place of payment is named, at the known place of business from which

he dates his acceptance. And Wharton (§ 451) says that if an indorser indorses a note when casually absent from his domicile, it is the law of such domicile that binds, that being construed to be the place, so far as he is concerned, of payment. The eminent jurist Savigny, as quoted by Mr. Wharton (§ 426), gives several rules of law on this subject, of which two are pertinent to this case. One is, that the seat of a continuous business supplies its local law to all obligations emanating from him who conducts the business; and the other, that the debtor's domicile supplies the law to his obligations emanating from the domicile. These remarks agree with the general opinion of business men, as I suppose. I take it that if a banker issues bills or notes to circulate as money, there is no doubt that his undertaking is to pay them over his counter. I take it that this bill would be called a Boston bill on London, and that all merchants would understand that the drawer's undertaking is to pay in Boston if the drawee shall not do so in London, and he is duly notified thereof in Boston. Boston bills on London are bought in large quantities by merchants in New York, sometimes in Boston by agents of the buyers, and sometimes in New York from agents of the sellers, and sometimes, I dare say, on the cars between the two places. Now, it seems to me inadmissible to say that the same apparent contract between the same parties may have three different modes of performance, according as it is delivered in one place or another. It is true that all contracts take effect from delivery, but the question in every case is, what does the contract mean after it has been delivered? And I am of opinion that a banker's draft, dated at his usual and only place of business, is payable there on the default of the drawee by the implied terms of the contract itself, and by the usage of merchants and by law.

§ 1644. — *authorities reviewed.*

Let us look now at some of the decisions. It is well settled that, in order to hold the indorser of a note not by its terms payable at any place, demand must be made upon the maker at his domicile; that the date of the note is presumptive evidence of the domicile, and in Massachusetts, at least, the date proves the domicile for the purposes of demand and notice, unless the holder knows of some other. But if the holder knows the real domicile, payment must be demanded there. If the promisor has changed his domicile after the note is made, the holder is not obliged to follow him beyond the jurisdiction; but if his new domicile is within the same jurisdiction, he must demand payment there. *Fisher v. Evans*, 5 Binn., 541; *Stewart v. Elen*, 2 Caines, 127, per Livingston, J., explained in *Anderson v. Drake*, 14 Johns., 114; *Woodworth v. Bank of America*, 19 id., 391; *McGruder v. Bank of Washington*, 9 Wheat., 598 (§§ 801, 802, *supra*); *Reid v. Morrison*, 2 Watts & S., 401; *Taylor v. Snyder*, 3 Denio, 145; *Smith v. Philbrick*, 10 Gray, 252; *Bank of Orleans v. Whittemore*, 12 id., 469; *Pierce v. Whitney*, 22 Me., 110; 29 id., 188. The meaning of these rules is that the contract of the maker of a note is to pay it at his domicile, no matter where he makes or negotiates it; that the domicile being usually the same as the date, he may be held to the latter as his domicile, if he has not notified the taker or holder of his note to the contrary; that the domicile, so far as jurisdiction is concerned, is that which he had when the debt was contracted, and his contract is not to vary with every removal which he may make. Many of the cases turn on due diligence; but diligence in what? In demanding payment of the note at the place where the maker of it is bound and is presumed to be ready to pay it; that is to say, the place of performance. The decisive proof of this is, that if a place is agreed on for the

performance, no demand need be made elsewhere; so that actual diligence and actual demand are not the important things, but a compliance with the law which requires demand to be made at the place of performance.

Coming now to decisions of particular cases more or less like that at bar, the first which I shall cite is a leading Scotch decision, which is given at large by two learned writers on the Conflict of Laws,—Sir R. Phillimore, vol. iv, p. 612 (1st ed.), and Mr. Wharton, § 452. In that case a Scotchman residing in Edinburgh made a note payable to a banker, named and described as manager of the British & Australian Bank, 55 Moorgate street, London. This was held to be a Scotch debt; nothing was proved about the place of delivery or of negotiation, from which we may infer that they were not considered important. In *Hicks v. Brown*, 12 Johns., 142, A. drew at New Orleans a bill on B. in Pennsylvania in favor of C. in Tennessee, and it was held that the law of the drawer's contract was that of Louisiana. That is precisely this case; the bill taking effect when it reached the hands of the person who had given consideration for it in a state other than that in which it was drawn. In *Pine v. Smith*, 11 Gray, 38, a citizen of Massachusetts negotiated in New York for a loan from a citizen of that state, at eight per cent. interest, which would make the contract void for usury in New York, and this was secured by note, with a mortgage of land in Massachusetts. *Held*, a Massachusetts contract; not, however, by reason of the mortgage, which is not once mentioned in the opinion of the court. The case of *Grimshaw v. Bender*, 6 Mass., 319, goes much beyond the present. There, a bill was drawn in England upon a firm whose domicile was in Boston; but the bill was payable in London, and was accepted in England by a member of the Boston house who happened to be there. The bill not having been paid, was sued against the acceptors in Boston, and the court held that the measure of damages was regulated by the law of Massachusetts, because that was the domicile of the acceptors. That case is not considered sound by Judge Story. *Conf. Laws*, § 419; Mr. Wharton cites both the case and the criticism, without giving his own opinion. *Conf. Laws*, § 451, note *a*. The bill was expressly made payable in London, and of course the acceptors should pay in Boston what would have produced the amount of the bill in London, which, in the absence of statute or local usage, is exactly what a drawer in Boston would be obliged to pay, and, therefore, the substance of the decision is sound; but in making the acceptors technically drawers in Boston, and liable to damages as such, the court overlooked the circumstance that they were not the drawers, but stood as London acceptors casually sued in Boston. After this allowance is made, the case remains a high authority for holding the domicile to be the place of performance, when none other is appointed by the contract itself.

It has been twice held in England that a bill drawn abroad and filled up and negotiated in England is valid, if sufficiently stamped according to the law of the place of apparent drawing, though not sufficiently by the law of England. *Snaith v. Mingay*, 1 Maule & S., 87; *Baker v. Sterne*, 9 Ex., 684. These decisions have been supposed to depend upon an estoppel worked by the negotiation of the bills to innocent holders; but this explanation is not sound; they are put by the judgments upon the plain and simple reason that the contract of the drawer was made abroad; and not only so, but estoppel does not avail against the stamp laws of England. *Steadman v. Duhamel*, 1 C. B., 888. In Pennsylvania, too, it was decided that the drawer of a bill, signed by him in blank as to amount, etc., in that state, though filled up and passed in Eng-

land, must pay damages according to the law of Pennsylvania at the date of the drawing, and this though the rate of damages had been diminished by a statute passed before the bill was actually negotiated. *Lennig v. Ralston*, 23 Penn. St. (11 Harris), 137. In *Campbell v. Nichols*, 4 Vroom, 81, the precise distinction is taken that the validity of an acceptor's contract depends upon the law of the place where the bill is negotiated and first becomes a contract, but that in all matters concerning the interest to be paid by him, upon that of the place where he undertook to pay. In a later case, cited by the petitioners here, the same court, citing *Campbell v. Nichols*, say, though they do not decide, that a drawer's contract may differ from an acceptor's in this respect (*Freese v. Brownell*, 6 Vroom, 235); but there is neither reason nor authority for any distinction; each is liable to make good his promise when and where he undertook to make it good, as I have already shown; and if that means at the acceptor's domicile for his part, it means at the drawer's for his. In *Van Zant v. Arnold*, 31 Ga., 210, the maker and the indorser of a note both lived in Georgia, but they made and indorsed it in Tennessee, where it took effect as a contract by being delivered to an agent of a creditor of the maker who lived in New York. It was held to be a contract governed by the law of Georgia as against the indorser, because he was domiciled there.

§ 1645. *Lex loci contractus* the place where the bill is negotiated — exceptions.

Many cases are cited by the petitioners to prove that the *lex loci contractus* is where the bill or note is actually negotiated. I have assumed that to be the general rule; though, if it were needful, I could point out many exceptions to it. It is not necessary, because every case but one which touches that point turns upon the validity of the contract, and not upon the mode of performance, nor upon the damages for a breach. Thus in *Tilden v. Blair*, 21 Wall., 241 (§§ 389, 390, *supra*), a bill for \$5,000 was drawn in Illinois and accepted in New York, and then sent back to Illinois, where it was indorsed and negotiated at a rate of interest which would be usurious in New York, and avoid the contract. The acceptor was sued in the circuit court of the United States sitting in New York; and the court held that the validity of the acceptance depended upon the place of negotiation, and gave judgment for the plaintiff for an amount which it considered the law of Illinois made the contract available for, in its inception. The supreme court said that the bill was good for its face, and that the only error was in not giving judgment for the whole \$5,000 and interest. They could not correct the error, nor say whether the interest should be reckoned at the legal rate in Illinois or in New York, because the plaintiff had acquiesced in the ruling below. The only point in this case, therefore, is not reached by that decision. All the other cases cited are open to a similar remark, excepting *Cook v. Moffat*, 5 How., 295, which is said to be decisive of this question in favor of the petitioners. I do not so understand it. That case was, that A., in New York, sold goods there to B., of Baltimore, who gave his note for the price, and afterwards took the benefit of the insolvent law of Maryland. The court held that the discharge in Maryland did not release the debt due to A. Mr. Justice Grier, in delivering the opinion of the court, says that the notes, being delivered in New York in payment of goods purchased there, were, of course, payable there, and governed by the laws of that place, citing *Boyle v. Zacharie*, 6 Pet., 635; *Story, Confl.*, § 287. The case cited decides that advances made by a factor are to be reimbursed to him at the place where he makes them; and Judge Story, at the place cited, repeats the same doctrine. I cannot suppose that Mr. Justice Grier intended to over-

rule all the cases and opinions which I have cited above. There is undoubtedly much authority for the proposition, that the whole contract of sale of goods, including the payment, is governed by the law of the place of sale; this is to say, the buyer is to seek out and pay the seller if the goods are sold on credit, and if for cash, he must pay him on the spot. By the law both of New York and of Maryland, the note given for the price of goods is merely security for the payment; and on surrender of the note an action for the price of the goods may be maintained. If, therefore, an action for goods sold would not be barred by a discharge in Maryland, because its performance was to be in New York, the security ought not to be destroyed thereby. This is what I understand Mr. Justice Grier to mean in the brief remarks above quoted, though he speaks in the popular way of the note being given in payment for the goods. There are, likewise, I believe, decisions that an ordinary loan is to be reimbursed where it is made, at least if no note or bill is given for it, though the cases are, perhaps, not reconcilable on this point.

This transaction was not a sale of goods nor a loan of money, but the transfer of a credit. The undertaking of Glyn was, that if Benson & Co. should not accept or should not pay in London, and due demand and protest were made there, he would pay in Boston, on due notice and demand here.

The interest and damages to be proved against Glyn's estate are to be assessed by the law of Massachusetts.

§ 1646. **Waiver; interest recoverable.**—In an action by the United States against A., upon a bond conditioned to comply with an agreement to pay a certain sum of money on or before the 1st of March at Amsterdam, and, in case the sum was not paid at the time and place mentioned, then to repay the United States the value of the sum to be paid, at the rate of exchange current in Philadelphia, at the time the demand of payment was made, together with damages at twenty per cent. in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment which may take place after the demand, and the sum was received by an agent of the United States on the 13th day of May instead of March, without any stipulation respecting that receipt upon the agreement with A., *held*, that this acceptance was a waiver of the claim of damages, but that the United States might recover interest on the amount due from the 1st of March to the 13th of May. *United States v. Gurney*, 4 Cr., 333.

§ 1647. **Court may assess.**—Bills of exchange were drawn in Rhode Island upon parties in London and went to protest. *Held*, damages recoverable, and that the court could assess them. *Brown v. Van Braam*, 3 Dal., 344.

§ 1648. **Costs of protest.**—The holder of a promissory note may recover the costs of protesting it in a suit against an indorser of it, who, when sued, makes default. *Doughty v. Hildt*, * 1 McL., 334.

§ 1649. **Damages on a protested bill should include re-exchange.** *Russell v. Wiggin*, 2 Story, 214 (§§ 154-157).

§ 1650. **In Virginia.**—In Virginia, in an action by indorsee against indorser on a foreign bill, the defendant is liable for damages at the rate fixed by the statute of Virginia, the contract of indorsement having been made there. *Slocum v. Pomeroy*, * 6 Cr., 224.

§ 1651. **In New York.**—The holder of a bill of exchange, when returned under protest, is entitled in New York not only to the amount of the bill, but to twenty per cent. damages besides, as compensation for his disappointment, although the action is brought on a protest for non-acceptance, and before notice to the drawer of a protest for non-payment. *United States v. Barker*, 2 Paine, 340 (§ 1011).

§ 1652. **In Alabama.**—The Alabama statute allows ten per cent. damages against an indorser upon the non-acceptance of the bill. *Evans v. Gee*, 11 Pet., 80 (§§ 1178-82).

§ 1653. **Exchange on a note.**—Exchange provided for in a note may be recovered in an action upon it. *Grutacap v. Woulluisse*, * 2 McL., 381.

§ 1654. **How computed.**—Exchange is to be computed at rates ruling at the maturity of the note, not at those ruling at the time of the trial. *Price v. Teal*, * 4 McL., 201.

§ 1655. **Indorser cannot recover, when.**—An indorser cannot recover of the drawer damages for the non-acceptance of a bill which the indorser has neither paid nor is liable for. *Kingston v. Wilson*, 4 Wash., 310.

§ 1656. *Special indorsement; no damages allowed.*— A special indorsement of a bill “for the use” of the indorser releases him from liability to pay damages for its non-payment, although the indorsee be in fact a holder for a valuable consideration. *Brown v. Jackson*, * 2 Wash., 24; S. C., 1 Wash., 512.

§ 1657. *Damages; how assessed.*— When notice was given defendant of the protest of his bill for non-acceptance and non-payment, American bills of exchange on England could be bought in specie fifteen per cent. below par. *Held*, that this fact might be shown in evidence, and that damages should have been assessed not on the par, but upon the specie of the bill. *United States v. Barker*, 2 Paine, 340 (§ 1011).

XIII. MEASURE OF RECOVERY.

SUMMARY — *Breach of guaranty*, §§ 1658, 1659.

§ 1658. The measure of damages in actions by indorsees against indorsers or guarantors of commercial paper is the amount paid by the indorsee to the indorser or guarantor, with interest. *Head v. Green*, § 1660.

§ 1659. On a special guaranty that a certain amount is due on a note, the measure of damages is that amount. *Ibid*.

[NOTES.— See §§ 1661-1673.]

HEAD v. GREEN.

(Circuit Court for Illinois: 5 Bissell, 811-814. 1873.)

STATEMENT OF FACTS.— Action on the following guaranty: “I hereby guaranty that there is now due and unpaid on the within note the original sum of \$500 and interest, except the \$100 indorsed. But it is expressly understood that this guaranty is without liability of any kind on the undersigned, except as above, as to amount due. (Signed) Harley Green.” Verdict for plaintiff. Motion for a new trial.

§ 1660. *Measure of damages on breach of guaranty.*

Opinion by BLODGETT, J.

The only question now made is as to what is the true measure of damages. The well established rule in actions by indorsees against indorsers or guarantors of negotiable paper is, that the measure of damages is the amount paid by the assignee or indorsee to the guarantor or indorser, with interest. But this rule has been only applied, so far as my examination has gone, to cases where there was either an express or implied guaranty of payment or collectibility, and I have been unable to find from any research of my own, nor has the industry of counsel on either side furnished me with any adjudged case, or even the dictum of a court or text writer, as to what is the true measure of damages on the breach of a guaranty like this. On a guaranty of payment or collectibility, the holder knows that if he take the necessary steps to fix the liability of the guarantor, he can recover back at least the amount paid for the note, with interest; but in a guaranty like this, he has no such redress. Here the holder of the guaranty takes all the chances of the collectibility of the demand. There is no liability even by the guarantor in case the maker of the paper proves insolvent, but the holder must lose all he has paid unless he can collect from the maker. And it seems to me that the measure of his damages, in case of a breach of the contract as to the amount due, is what plaintiff has lost by that breach; which in this case should be the whole amount due on the note at the time suit is brought. And it appears to me that one weighty reason why this rule should be applied to a guaranty like this, is that the holder of notes or bills who attempts to negotiate them after due must be presumed to know (and

he alone) whether there are any legal or equitable defenses to the paper he purposes to transfer to another. And if he assumes no risk in regard to the collectibility of the debt, he should at least be held to make good his express undertaking that the paper represents an honest demand for what purports to be due thereon. Can it be supposed that any person would buy a note with such a guaranty unless he understood that the guarantor was holden to make good the pledge he gives. And here it appears that the judgment would have been worth the full amount, if it had been obtained. Motion for new trial overruled, and judgment for plaintiff.

§ 1661. In general.—The production of negotiable paper by plaintiff suing upon it, with proof or admission of the genuineness of the signatures and of the indorsement, entitles him to recover from the parties the full amount of it with interest, unless a satisfactory defense is interposed. *Waynesville Nat. Bank v. Irons*, 8 Fed. R., 1 (§§ 1533-38).

§ 1662. Recovery on a note is limited to the principal sum demanded; but interest may be added if *ad damnum* is high enough to cover it. *Mills v. Bank of United States*, 11 Wheat., 431 (§§ 958-963).

§ 1663. If no averment as to interest is made in the declaration, only the debt and interest from maturity are recoverable. *Chinn v. Hamilton*, Hemp., 438.

§ 1664. Where the full amount of a note is due at time of verdict, but not when suit commenced, verdict for full amount is good. *State Bank of Ohio v. Fox*, 3 Blatch., 431.

§ 1665. By indorsers and indorsees.—Indorsees are entitled to recover full amount of the paper they hold, although they may hold a part of it as trustee for third parties. *Ibid*.

§ 1666. The indorsee of a note can recover only the amount actually paid for the note and not its face value, especially if he discounted it usuriously. *In re Many*,* 17 N. B. R., 514.

§ 1667. In an action by payee against acceptor, the plaintiff cannot recover the costs and damages recovered in a former suit against the payee as indorser on the same bill. *King v. Phillips*, Pet. C. C., 350.

§ 1668. A., of Illinois, made notes to B. of the same state. B. indorsed them to C., of Missouri. A. paid C. thirty per cent. of the value of the notes. B. having been adjudged bankrupt, C. filed a claim against his estate for the whole amount of the notes with interest and statutory damages under the Missouri statute. *Held*, that C. could recover only the unpaid balance on the notes, and that the Missouri statute, regulative of damages, had no application in Illinois. *In re Pulsifer*, 9 Biss., 487.

§ 1669. New promise.—The drawer agreed to pay his bill as soon as he should be able. *Held*, in an action on the new promise, that plaintiff could recover only the amount of the bill and interest from the time it was proved the defendant was able to pay it. *Lonsdale v. Brown*, 4 Wash., 149.

§ 1670. Specie value or legal currency.—Where a payment was to be made by A. to B., on a certain day, in the paper of the Miami Exporting Co., or its equivalent, and payment was not made on that day, *held*, that B. could recover only the specie value of the notes at the time they should have been paid, and could not recover the nominal amount of the notes in specie. *Robinson v. Noble*, 8 Pet., 181.

§ 1671. — note given during rebellion.—The sum in actual money which a promissory note given in Georgia during the rebellion represents is determined by the value in coin or legal currency of the United States at the time the note was made and at the place where it was made, of Confederate treasury notes, equal in nominal amount to the number of dollars specified. *Stewart v. Salamon*, 4 Otto, 434.

§ 1672. A. made a deposit in a bank in the bills of the bank, which bills were passing current at half their nominal value, and received a certificate of deposit in the following form: "A. this day deposited \$7,730.81 to the credit of B., which is subject to B.'s order on presentation of this certificate." *Held*, that B. should recover, and for the face of the certificate, in gold or silver. 1st. Because the language of the certificate is expressive of a general deposit. 2d. Because the act incorporating the bank provided that the bills of the bank should be payable and redeemable in gold or silver. *Bank of Kentucky v. Wister*, 2 Pet., 318.

§ 1673. The existence of an agreement with a depositor that his bank shall pay his checks in the same kind of money deposited is a question of fact for the jury. *Olshausen v. Lewis*,* 1 Biss., 419.

XIV. CONFLICT OF LAWS.

§ 1674. In general.—The question: Is the holder of a negotiable note who has taken it as security for a pre-existing debt a holder for value, and so protected against any equities subsisting between the original parties to it? is a question of general commercial law, and, in deciding it, federal courts are not bound by state decisions. *Wood v. Seitzinger*, * 2 Fed. R., 843.

§ 1675. The question whether or not a certificate of deposit is a promissory note is a question of commercial, not of local law, and the decisions of federal, rather than state courts, should determine it. *Austen v. Miller*, 5 McL., 153.

§ 1676. Bills of exchange.—The law of Spain governs a transaction in Cuba involving the drawing of a bill of exchange. *Wallace v. Agry*, 4 Mason, 336 (§§ 773-776).

§ 1677. Bills were written and indorsed in blank in Boston and forwarded to the maker's agent in New York, who negotiated them, at the same time filling up the blank indorsement. *Held*, that interest and damages were to be computed according to the laws of Massachusetts. *Ex parte Heidelberg*, 15 N. B. R., 495; S. C., 23 Int. Rev. Rec., 73 (§§ 1639-45).

§ 1678. Where the drawers and indorsers resided in Mississippi, and the bill was drawn and indorsed there, their contracts and liabilities are governed by the laws of that state. *Musson v. Lake*, 4 How., 262 (§§ 746, 747).

§ 1679. A bill of exchange payable in Philadelphia is governed by the laws of Pennsylvania. *Golden v. Prince*, 3 Wash., 313.

§ 1680. In giving a bill upon a person in a foreign country the drawer is deemed to act with reference to the law of that country and to accept such conditions as it provides with reference to the presentment of the bill for acceptance and payment. The law of Norway allows a year in which to present a sight draft, and a presentation of an American draft within three months after it was drawn is reasonable and lawful. *Pierce v. Indseth*,* 16 Otto, 546.

§ 1681. Acceptance.—An acceptance is governed by the law of the place where it is made. *Musson v. Lake*, 4 How., 262 (§§ 746, 747).

§ 1682. A letter of credit executed in Boston by the agent of a London banking house, and with their authority, is a contract governed by the laws of Massachusetts. *Russell v. Wiggin*, 2 Story, 214 (§§ 154-157).

§ 1683. Promissory note.—A note payable in Ohio is an Ohio contract, and governed by the laws of that state. *Gaylord v. Johnson*, 5 McL., 443.

§ 1684. Notes given in Louisiana, but made payable in Mississippi and indorsed there, render the indorser liable in accordance with the laws of Mississippi. *Brabston v. Gibson*, 9 How., 263.

§ 1685. Promissory notes made in Maryland, but delivered in New York and given for goods sold in New York, are payable in and governed by the laws of New York and cannot be discharged by the insolvent laws of Maryland enacted and in force prior to the contracts. *Cook v. Moffat*, 5 How., 294.

§ 1686. Where a note is drawn, assigned and payable in Kentucky, it will be considered with reference to the laws of that state. *United States Bank v. Tyler*,* 4 Pet., 366.

§ 1687. A., of New York, made promissory notes for the accommodation of B., of New York. The notes were made payable at A.'s office, to the order of B. B. indorsed the notes and placed them in the hands of D., a note broker in New York, to be negotiated for account of B. C., of Connecticut, purchased the notes at ten per cent. discount and sent D. a check for the amount of the notes at ten per cent. discount. D. collected the check. *Held*, that the transaction was governed by the law of New York and not the law of Connecticut, and that the notes were void for usury. That the giving of accommodation paper creates no debt, unless and until the paper is negotiated. *In re Dodge*, 9 Ben., 480.

§ 1688. Where notes were issued in Vermont by a railway company pursuant to a vote of the stockholders and under the authority of a statute of Vermont, but were payable in Massachusetts, *held*, that the question of usury was to be decided by the laws of Vermont. *Codman v. Vermont, etc., R. Co.*, 16 Blatch., 165.

§ 1689. A promissory note made in the District of Columbia, "negotiable at the Bank of Alexandria," is governed by the laws in force at Alexandria. *Gilman v. King*, 2 Cr. C. C., 48.

§ 1690. — delivery and negotiation.—Renewal notes were indorsed by A. in Indiana and sent by mail to the indorsee in New York. *Held*, that the acceptance of the notes was essential to the delivery of them, and that the notes were not deemed delivered until received by the indorsee in New York. The indorsement being deemed made in New York, the law of that state should govern. *Mott v. Wright*, 4 Biss., 53.

§ 1691. A promissory note was executed and made payable in New York, but indorsed for the accommodation of the maker in Rhode Island and there negotiated. *Held*, that the rate of interest was governed by the laws of Rhode Island. *Providence County Savings Bank v. Frost*, * 13 N. B. R., 358.

§ 1692. Notes made and signed in Philadelphia, but delivered and discounted in New York, are governed by the laws of New York. *In re Conrad*, * 8 Phil., 147.

§ 1693. A promissory note signed in Pennsylvania, but delivered in New York, is governed by the laws of New York. *Ludlow v. Bingham*, 4 Dal., 47.

§ 1694. A promissory note signed by the maker in New York was transmitted by him to Rhode Island to be discounted. *Held*, that being so discounted, the contract was to be governed by the laws of Rhode Island on the question of usury. *Providence Co. Savings Bank v. Frost*, 14 Blatch., 233.

§ 1695. Indorsement.—Contract of indorsement is a distinct contract from the note, and is governed by the law of the place where it is made. *Burrows v. Hannegan*, * 1 McL., 315.

§ 1696. The law of the place where an assignment is made governs it whether the instrument transferred be negotiable or not. *Dundas v. Bowler*, 3 McL., 397.

§ 1697. A bill payable in New York was indorsed in Illinois. *Held*, that the contract of indorsement was governed by Illinois law as to the diligence required of the holder in collecting the note of the maker. *Bank of Illinois v. Brady*, * 3 McL., 268.

§ 1698. Assignments of negotiable paper are governed by the law of the place where they are made. *McClintick v. Cummins*, * 3 McL., 158.

§ 1699. Where the indorsement is written in one state and delivered in another, the law of the place of delivery governs. *Mott v. Wright*, 1 Biss., 53 (§§ 582-584).

§ 1700. In an action upon an unaccepted bill drawn at Barbadoes upon parties in England and indorsed in Virginia, *held*, that the indorser was liable for damages according to the laws of Virginia. *Pomeroy v. Slocum*, 1 Cr. C. C., 578.

§ 1701. If A. at Alexandria indorse a foreign bill to B. of New York, damages are recoverable according to the law of Alexandria. *Lenox v. Maitland*, 1 Cr. C. C., 170.

§ 1702. The law of the state where the contract is negotiated regulates the damages on protest. *Orr v. Lacey*, * 4 McL., 243.

§ 1703. Law merchant in Louisiana.—The law merchant as to presentment and protest is in force in Louisiana. *Musson v. Lake*, 4 How., 263 (§§ 746, 747).

§ 1704. *Lex fori*.—The *lex fori* only affects the remedy. *Burrows v. Hannegan*, * 1 McL., 315.

XV. EVIDENCE.

§ 1705. Witnesses; competency; interest.—A notary is a competent witness to prove presentment of note for payment, although liable for negligence in not presenting it at the proper time. *Cookendorfer v. Preston*, 4 How., 317 (§§ 993-1000).

§ 1706. The maker of a note is a competent witness to prove that it was made to be discounted at a bank for the purpose of taking up a note, with the defendant's indorsement upon it, about becoming due, and that it was discounted without the consent of the defendant, and that time was given to the maker without defendant's consent. *White v. Burns*, 5 Cr. C. C., 123.

§ 1707. In an action by indorsee against remote indorser, the maker of a note is competent to prove that after its execution, and after it had passed out of his possession, it had been altered in a material part, the maker having been released from liability for costs. *Frazer v. Carpenter*, 2 McL., 235.

§ 1708. Payee sued drawer on a bill indorsed by the payee to A. and by A. to B. *Held*, that A. was competent as a witness to prove he indorsed the bill to C. without consideration and merely to recover the money for plaintiff, and that A. had no interest in the suit. *Lonsdale v. Brown*, * 3 Wash., 404.

§ 1709. The drawer and subsequent indorsers are incompetent to prove facts which tend to discharge a prior indorser. *Bank of Metropolis v. Jones*, 8 Pet., 12.

§ 1710. Burden of proof.—In an action by indorsee against maker of a draft, *held*, that an acknowledgment to plaintiff's attorney by the indorser that he had indorsed such a draft (the draft not being shown to him) sufficiently proved the indorsement to throw upon the defendant the burden of proving that there was another draft drawn by defendant and indorsed by the same indorser. *Hyer v. Smith*, 3 Cr. C. C., 437.

§ 1711. *Quære*: In an action by indorsees against maker of a note, whether the *onus* of proving that receipts given by the payee to the maker for partial payments were given before or after the assignment lay upon the maker or upon the indorsers. *Stuart v. Greenleaf*, * 8 Day (Conn.), 311.

§ 1712. Where a protested bill is held for a long time without notice, the *onus probandi* is thrown upon the holder. He must prove everything; nothing is required from the drawer. *Hopkirk v. Page*, 3 Marsh., 20 (§§ 1018-26).

§ 1713. Presumptions.—An indorsement without date upon negotiable paper is presumed to have been made at the time the paper was executed and before it was negotiated. *Michigan Bank v. Eldred*, 9 Wall., 544 (§§ 250-255).

§ 1714. Negotiable paper is presumed to be held for full value, and is to be paid at par value when in the hands of a *bona fide* holder. *Bronson v. La Crosse, etc.*, R. Co., 2 Wall., 288.

§ 1715. Drawee's possession of a bill is *prima facie* evidence that he has paid all who had any claims against him upon it. *Lonsdale v. Brown*,* 3 Wash., 404.

§ 1716. The possession of a bill of exchange by an acceptor for the accommodation of the drawers, after it has once been negotiated, is *prima facie* evidence of his right to sue. *Hunter v. Kibbe*,* 5 McL., 379.

§ 1717. Payment of a check by a bank is *prima facie* evidence that it has funds of the drawer; especially if the check be returned to the drawer. *Bank of United States v. Wilson*, 3 Cr. C. C., 218.

§ 1718. In an action on the last of a series of notes, the previous notes having been paid, it is not necessary, under a count for the original consideration, for the plaintiff to produce the previous notes. It is presumed they were surrendered when paid. *Lyman v. United States Bank*, 12 How., 225.

§ 1719. An agreement not to take advantage of the statute of limitations, and a promise to authorize counsel to docket a suit on the note, are not sufficient to authorize a presumption of actual notice. *The Bank v. Corcoran*,* 3 Cr. C. C., 46.

§ 1720. Parol evidence.—Parol evidence of any agreement or custom is inadmissible to alter or vary the contract of indorsement, whether it be in full or in blank. *Bank of Alexandria v. Deneale*,* 2 Cr. C. C., 488.

§ 1721. An allegation that a note was, by mistake, made payable to another besides the plaintiff must be sustained by proof. *McMicken v. Webb*,* 6 How., 292.

§ 1722. Parol evidence is not admissible to prove that at the time an indorser and the defendant indorsed the paper it was agreed that they were not to be held responsible. *United States Bank v. Dunn*, 6 Pet., 51.

§ 1723. Parol evidence is admissible to prove whether a party who puts his name upon the back of a note is to be regarded as an indorser, as a surety or as a guarantor. *Pierce v. Irvine*,* 1 Minn., 369.

§ 1724. Parol evidence of an agreement contemporaneous with a promissory note and varying its terms or legal effect is not admissible. *Brown v. Spofford*, 5 Otto, 474 (§§ 391-396).

§ 1725. Declarations and admissions.—Declarations made by the holder of a promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent holder, although the declarant may be in possession, as tenant with an agreement to purchase, of real estate which was deeded in trust to third parties as security for the note. The declarations of one in possession of land are competent only as against those claiming the land under him, and to show the character of the possession of the person making them and by what title he holds, but not to sustain or destroy the record title. *Dodge v. Freedman's S. & T. Co.*, 3 Otto, 879 (§§ 221-224).

§ 1726. A drawer's admission of liability is not competent evidence in an action by holder against indorser. *Allen v. King*, 4 McL., 128 (§§ 1041-47).

§ 1727. Where a notary is an indorser, the declarations of his deputy are not admissible in evidence. *Bank of Columbia v. Mackall*,* 2 Cr. C. C., 631.

§ 1728. Protest and notice; what competent.—It is competent for a notary to testify that he made demand and gave notice on the third day of grace, although he is unable to state the days of the month or year, without reference to his books, etc. *The Bank v. Abbott*,* 3 Cr. C. C., 94.

§ 1729. If a notary does not recollect whether he made demand, he may refer to his book and testify that he made demand as therein stated. *Thornton v. Stoddert*,* 1 Cr. C. C., 534.

§ 1730. Where a notary testified that he did not then recollect, nor had he any minute in his book of the time when he gave notice to the indorser; but that his book contains a memorandum that notice was given the indorsers, as well as a memorandum of the demand, and further that it was his universal practice to give notice on the day on which he made the demand, which was on the day after the last day of grace, and that he believes he gave notice on that day, *held*, competent evidence for the consideration of the jury. *Coyle v. Gozzler*, 2 Cr. C. C., 625.

§ 1731. The books of a notary public, proved to have been regularly kept, are admissible after his death to prove demand and notice of non-payment of a promissory note. *Nichols v. Webb*, 8 Wheat., 326.

§ 1732. The indorsement of the clerk of a notary, on the protest (he being living), that due notice was given the indorser, is not sufficient to bind the indorser, nor can the usages of the office supply the defect. In the absence of the clerk his deposition is necessary to prove the fact of notice. *Whitehead v. Jones*, 2 McL., 28.

§ 1733. The testimony of a notary who protested a bill of exchange that he sent the drawers notice of the dishonor of the bill, and the fact that the bill was enumerated among the debts of the drawers on the schedule returned to the court during proceedings in bankruptcy against the drawers, was held, in a subsequent suit against the drawers, sufficient evidence of notice of protest. *Hyde v. Stone*, 20 How., 170.

§ 1734. Proof that a letter containing notice was, on the third day of grace, addressed to the indorser and mailed, is enough to charge him with notice. The letter itself need not be shown in evidence. *Lindenberger v. Beall*,* 6 Wheat., 104.

§ 1735. A deposition of the notary public was offered to prove a copy of the protest. It contained a certificate, referred to and marked as "Document A.," under the seal of the notary, and which purported "to be a true copy of the original protest, draft and memorandum of the manner in which the notices were served, on file and of record in his office." Held, that the copy of the protest was sufficient evidence of the protest without producing the original, that being the record of protest in the notary's books and in his possession, and that the copy of the protest was properly considered a part of the deposition. *McAfee v. Doremus*,* 5 How., 53.

§ 1736. A statute of Mississippi (H. & H. Digest, 609, § 38) made the official act of a notary, "certified and attested by him," evidence of protest, and it was the usage of notaries, when making protests, for the notary to make demand and give notice, and after doing so, to write out the facts in his memorandum book, or to preserve them otherwise; and from these facts to make up the record of such protest as required by the statute. Held, that the statute was enacted with reference to the usage; and that a paper setting forth the facts of demand at the bank, and the answer of the teller that the note would not be paid because no funds had been deposited for such purpose, and that a formal protest for non-payment had been made, and also the fact of forwarding the notices, and concluding thus: "Which facts constitute, as herein set forth, a full and true record of all that was done by me in the premises," signed, sealed and sworn to by the notary, is sufficient evidence of the protest, although it purports to be an original record of itself. It need not necessarily be a copy of the notary's record. *Brandon v. Loftus*,* 4 How., 137.

§ 1737. A notary's certificate of demand and protest is admissible evidence. *Jones v. Heaton*,* 1 McL., 317.

§ 1738. Courts take judicial notice of the seals of notaries public. So held in relation to the seal of a Norwegian notary, authenticating a certificate of protest of a bill of exchange, which was received in evidence without proof. *Pierce v. Indeeth*,* 16 Otto, 546.

§ 1739. In an action against the indorser of a promissory note, the deposition of a party, which tends to prove the entries made in the notarial book of a deceased notary public, as to demand, protest and notice of the note, is admissible in evidence. *Whitney v. Hunt*, 5 Cr. C., 120.

§ 1740. The notarial certificate of protest of foreign bills is in itself sufficient evidence of the dishonor of the bill unless the suit is brought in the country where the protest was made. In such case the notary himself should be produced if within the reach of process, and his certificate is not *per se* evidence. But the notarial certificate of protest is competent evidence of the dishonor of a bill drawn in Kentucky upon persons in Louisiana. *Townesley v. Sumrall*, 2 Pet., 170 (§§ 142-150); *Jones v. Heaton*,* 1 McL., 317.

§ 1741. Note or bill; money counts.—A note is admissible as evidence for plaintiff (indorsee) and against defendant (remote indorser), under the general money counts. *Frazer v. Carpenter*, 2 McL., 235; *Brown v. Noyes*, 2 Woodb. & M., 75. And the case is open to evidence disproving the face of the note. *Id.* In an action by payee against maker the note is admissible. *Stone v. Lawrence*, 4 Cr. C. C., 11. An indorser who has paid the note and sues the maker should produce the note. *Morgan v. Rientzel*,* 7 Cr., 273.

§ 1742. Under the money counts a bill is admissible in an action by the drawer against the acceptor, although the bill do not contain the words "value received"—such words not being essential in a negotiable instrument. *Benjamin v. Tillman*,* 2 McL., 213.

§ 1743. The indorsement of a note is evidence of money had and received for the plaintiff's use, although the note was indorsed for the accommodation of the maker, who drew the money. *Bank of Alexandria v. Wilson*,* 2 Cr. C. C., 5.

§ 1744. In an action on a note on which was written "credit the drawer," held that such note, with such memorandum upon it, was not evidence of money had and received by the defendant for the use of the plaintiffs. *Bank of Alexandria v. Young*,* 2 Cr. C. C., 52.

§ 1745. H., the third indorsee, sued K., the maker, on a note. K. pleaded payment to L., first indorser, and had judgment in his favor. W., second indorser, then paid H. and sued L. on his indorsement and showed the foregoing facts, together with the note, which he produced in court, but which had not been reassigned to him by H. *Held*, not sufficient to prove a payment by W. for the use of L.; a reassignment should have been shown. *Welch v. Lindo*,* 7 Cr., 159.

§ 1746. Bill admissible without production of protest.—Unaccepted bills of exchange protested for non-payment are admissible in evidence although unaccompanied by protests for non-acceptance. *Clark v. Russell*,* 3 Dal., 415.

§ 1747. Where an action is brought against the indorser of a foreign bill of exchange for non-payment it is not necessary to produce the protest for non-acceptance. *Hodgson v. Turner*,* 1 Cr. C. C., 74.

§ 1748. In an action on a bill for non-payment, protest and notice of non-acceptance need not be proved. *Cox v. Simms*,* 1 Cr. C. C., 238.

§ 1749. Proving execution and delivery.—Under a count for the original consideration of a note given for the purchase price of land, plaintiff need not prove the execution and delivery of the conveyance. *Lyman v. United States Bank*, 12 How., 225.

§ 1750. Proof of execution may be dispensed with by rule of court requiring it to be denied by affidavit. A failure to file the affidavit will be a waiver of the right to require proof of the execution. *Mills v. Bank of United States*, 11 Wheat., 431 (§§ 958-933).

§ 1751. Assignment; what must be proved.—Assignment of a note must be proved to warrant judgment upon it in favor of assignee. *Clarke v. Cropper*,* *Hemp*, 213.

§ 1752. A plea that a note has been assigned to others than the plaintiff, who is the holder thereof, should be supported by proof that the assignee held the title to the note. *Conant v. Wills*, 1 McL., 427.

§ 1753. Payment.—A plea of payment must be supported by evidence before the plaintiff will be required to adduce any evidence on his part. *Archer v. Morehouse*, *Hemp*, 184.

§ 1754. In debt on a single bill it need not be produced in evidence by plaintiff against a plea of payment. *Turner v. White*, 4 Cr. C. C., 465.

§ 1755. Miscellaneous.—The production of a note does not make it part of the record unless it was produced on *oyer*. *Cook v. Gray*,* *Hemp*, 84.

§ 1756. The sufficiency of evidence of an admission by the acceptors that plaintiffs are legal holders of the bill is a question for the jury. *Payson v. Coolidge*,* 2 Gall., 233.

§ 1757. In an action on the last of a series of notes held by a bank, payable to "B., cashier, or order," and not indorsed by him, the bank offered the note in evidence. *Held*, not admissible, no title being shown in the bank; but *held*, that it might recover under a count for the original consideration. *Lyman v. United States Bank*, 12 How., 225.

§ 1758. The intermediate indorsement of a note being averred in the declaration must be proved, although it was made after the note had become payable, and although the suit was brought for the use of the intermediate indorser. *Coyle v. Gozzler*, 2 Cr. C. C., 625.

§ 1759. Notice of protest should be averred and proved in debt on a foreign bill. *Slacum v. Pomery*,* 6 Cr., 224.

§ 1760. In an action on a bill for non-payment, the averment of non-acceptance need not be proved. *Nicholson v. Patton*,* 2 Cr. C. C., 164.

§ 1761. Where the question was whether a foreign bill had been presented in a reasonable time, it was held that a usage of merchants by which the holder of such a bill was at liberty to consult his own discretion as to the time of presentment, might be considered by the jury. *Wallace v. Agtry*,* 5 Mason, 118.

§ 1762. In a suit against the last indorser, the prior indorsements need not be proved. *Whitemore v. Herbert*,* 2 Cr. C. C., 245.

§ 1763. A letter which does not authorize the particular bills drawn, although it authorizes other different bills, is not admissible to show that the drawer was entitled to notice of non-acceptance by the drawee. *Dickins v. Beal*, 10 Pet., 572 (§§ 950-957).

See BONDS.

As to Bills of Lading, see CARRIERS.

As to Collection Agents, see AGENCY, VII; BANKS, VIII.

As to Checks, Forged Paper and Certificates of Deposit, see BANKS, VI, IX, X.

As to the law of Guaranty, see CONTRACTS.

As to Sureties on Bonds, see BONDS.

As to Negotiability and the rights of Bona Fide Holders, see BONDS.

BLANK INDORSEMENT.

See *BILLS AND NOTES*.

BLOCKADE.

See *WAR*.

BOARD OF EXCHANGE.

SUMMARY — *Right to seat is property, § 1.—Creditors; preference, § 2.*

§ 1. The incorporeal right to a seat in a board of exchange is property; and, it seems, would pass to the assignee in bankruptcy on the holder's becoming bankrupt. *Hyde v. Woods*, §§ 8, 4.

§ 2. And a provision in the constitution of the board, that in case of the insolvency of a member his seat shall be assigned to be sold, the proceeds of the sale to be applied first to the payment of creditors who are members of the board, is not contrary to public policy nor in violation of the provisions of the bankrupt act. *Ibid.*

[NOTES.—See §§ 5, 6.]

HYDE v. WOODS.

(4 Otto, 523-527. 1876.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The San Francisco Stock and Exchange Board is a voluntary association for business purposes, organized in 1862, in that city. The membership is elective, with certain provisions for a right to sell and assign the seat, subject to an election of the purchasing member by the board. This is generally done, unless special reasons appear to the contrary; and the result is, that, as the number of members is limited, the right to a seat at the board has a moneyed value. When a member fails to perform his contracts, or becomes insolvent, he can no longer be a member of the board, until he resumes payment; but his seat may be sold for his benefit, or for that of his creditors, among the other members of the board. Art. 15 of the constitution of the board provides that, "in sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of this board exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

Thomas W. Fenn, who became a member of this board October 21, 1871, was declared a bankrupt October 1, 1872, and plaintiff in error was appointed his assignee. On the 24th day of August preceding, Fenn became a delinquent, by failing to fulfil his contracts with members of the board, and thereupon made and delivered to defendants in error an assignment of his seat in said board, with authority to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from him to the members of said board. They did sell it for \$10,000; the purchaser was duly elected and installed, and the money paid to creditors, who were members of the board, including \$2,973.30 to defendants. Upon these facts, found by the circuit court, sitting without a jury, the counsel for plaintiff asks a reversal of the judgment

of that court in favor of defendants, on the ground that the assignment by Fenn to the defendants, and their receipt and disbursement of the \$10,000, were preferences within the meaning of the bankrupt law, and that they are, therefore, liable to him as assignee for the amount received.

§ 3. *The incorporeal right to a seat in a board of trade is property.*

There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee.

§ 4. — *and a provision in the constitution of the board, that on the insolvency of a member the proceeds of a sale of his seat shall be applied first to the payment of creditors who are members, is valid under the bankrupt law.*

It is very ingeniously argued by counsel for the assignee that, being property of the bankrupt, he had no right to make the disposition of it which he did, by preferring his creditors who were members of the board to those who were not. The answer to this, so far as Fenn's assignment to defendants is concerned, is that the part of it which gives this direction to the proceeds of the sale was wholly unnecessary and nugatory; for if the article of the association which we have cited in full was effective, it controlled the disposition of those proceeds; if it is void, or for any other reason ineffectual, then it must be conceded that the assignment of Fenn was an unlawful preference within the meaning of the bankrupt law. The question turns solely upon the validity of that article of the association. There is no reason why the stock board should not make membership subject to the rule in question, unless it be that it is a violation of some statute or of some principle of public policy. It does not violate the provision of the bankrupt law against preference of creditors, for such a preference is only void when made within four months previous to the commencement of the bankrupt proceedings. Neither the bankrupt law nor any principle of morals is violated by this provision, so far as we can see. A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands soever it may come. As the creators of this right — this property — took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition.

The fundamental vice of plaintiffs' argument is to treat the case as though Fenn, owning this property absolutely as his own without restriction, had then fettered it, of his own accord, with the condition that it must always stand incumbered by a preferred lien to his fellow members. It is said that it is against the policy of the bankrupt law, against public policy, to permit a man to make in this or any other manner a standing or perpetual appropriation of his property to the prejudice of his general creditors; and it is to this point that the numerous authorities of counsel are cited. They all, however, relate to cases where a man has done this with property which was his own — property on which he himself imposed the direction or the incumbrance which impeded

creditors. It is quite different where a man takes property by purchase or otherwise which is subject to that direction or disposition when he receives it. It is no act of his which imposes the burden. It was imposed by those who had a right to do it, and to make it an accompaniment of any title which they gave to it. The principle here contended for by counsel was well considered in the recent case of *Nicholls, Assignee, v. Eaton*, 91 U. S., 716. In that case the mother of the bankrupt, Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy. But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy.

The case of *Nicholson, Assignee, v. Gouch*, 5 El. & Bl., 999, was in many respects very much like the present, the action having been brought to recover certain property which, under the rules of the exchange, of which the bankrupt was a member, had been received and paid to his fellow-members. This was asserted to be a preference void by the bankrupt law; and the rules of the exchange, under which it was done, were assailed on the same ground taken here. It is true that, in the decision of the queen's bench in bank, Lord Campbell, the chief justice, ruled against the plaintiffs on the ground that the money in question arose out of wagering contracts, which, as they could not have been enforced by the bankrupt, were, therefore, not subject to the claim of the assignee. But *Crompton, J.*, held, also, that the money being received and distributed under the rules of the stock exchange, by reason of the bankrupt having become a member subject to said rules, this was a sufficient defense to the party who so received and distributed it.

Judgment affirmed.

§ 5. Right to seat not property; contra.—A membership in a board of trade, which confers no property right, but only the right to trade upon the board, and not otherwise a source of profit to the holder, and not transferable by sale to a stranger without the consent of the board, is not assets, and does not pass to the assignee in bankruptcy. *In re Sutherland*, 6 Biss., 526. But in *In re Ketchum*, 1 Fed. R., 840, it was held that a seat in the New York Stock Exchange, salable only on condition, and with the consent of a committee of the board, is property, and passes to the assignee in bankruptcy. So, also, in *In re Warder*, 10 Fed. R., 275, a seat in the New York Produce Exchange, held and transferable the same as in the two cases above, was held to pass to the assignee in bankruptcy. Citing *Hyde v. Woods*, 4 Otto, 523 (§§ 3, 4).

§ 6. May exclude persons from rooms.—A board of trade which is a mere private corporation, composed of merchants dealing in the products of the country, and who, solely for their own convenience, provide a room where they meet to transact business, has a right to exclude all other persons from its rooms, or to admit only such as it chooses. Having no franchise which clothes it with any of the duties of a public corporation, it may exclude from its rooms reporters of telegraph companies who come there to obtain market reports to be transmitted to other parts of the country. *Metropolitan Grain and Stock Exchange v. Chicago Board of Trade*, 15 Fed. R., 847.

BONA FIDE PURCHASER.

See BILLS AND NOTES, IV; BONDS; LAND AND LAND TITLES.

BONDED WAREHOUSES — BOND FOR TITLE.

BONDED WAREHOUSES.

See REVENUE; WAREHOUSES.

BOND FOR TITLE.

See LAND AND LAND TITLES.

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From the "Central Law Journal," (of St. Louis, Mo.), after examining Vol. 1.

[One of the largest circulated Law Journals in the West. As a matter of purchase, no amount of money could have bought the below review from this Journal. Its oft-repeated unfavorable criticism of poor law books is so well-known that great confidence is placed in its opinions.]

That the plan of this remarkable publication, the first instalment of which is before us, was conceived by one possessing talent of no mean order, is a fact which stands out so boldly, that not even the most obstinate opponent of progressive ideas in law-book publishing can deny it. In from twenty-five to thirty volumes, are to be gathered all the decisions of every Federal court, from the district court to the Supreme tribunal, in the shape in which they are the most serviceable to the practitioner. By the method adopted, he will not only have all the reports which he ever can need, but in addition, an element of no small value, a series of text-books written by the ablest hands.

Every case in the reports was first arranged under its appropriate title. These were distributed among various assistants, among them able law writers. Such as embodied nothing more than the point decided, and those merely following a prior decision, are reduced to a digested form, the remainder of the decisions being rejected as wasting unnecessary space and being of no service. These are placed at the foot of the series of cases upon the given subject, as notes.

All cases selected to be printed in full, also those to be digested, are then referred to an expert, and he passes upon the efficiency of the sub-editor's work. He corrects the errors, replaces cases digested, if necessary, or reduces cases in full to a digested form. He certifies the results of his supervision, and we thus have the guaranty of able critics for the efficiency of the work. When a case involves two or more points, and it is to be published in full under one head, the other points are digested out and sent to their appropriate topic, by which means they appear at length under one head and digested under another. Thus a case may be seen in full or digested three or four times. If there is not sufficient in these minor points to warrant printing in full, the digested point appears in the notes at the proper place. Cases entirely reduced to a digest are known as star cases. Such cases are those which are unimportant, and generally appear to be decided without argument.

At the beginning of each subject or subdivision of a large subject, a summary of the points decided therein is given with reference, and at the conclusion, the notes appear at length. There are abundant cross-references, and thus all difficulty in investigation is avoided. The subjects are arranged after the method of a digest, of the best quality, and, consequently, any title may be examined, and almost all the law there is upon the subject obtained.

There is one feature which is especially worthy of commendation. Every paragraph of every case is numbered to the end of the particular subject in hand, and at the beginning of each paragraph are what are called catch words, which indicates the doctrine laid down therein, and often contains the whole point. When the series are to be used as reports, all that is required in a reference to the table of cases, by which means the cases desired are easily discovered. This table of cases is a perfect model, there being subdivisions, containing the names of all vessels, banks, etc. Thus, if one desires to find a case in which a bank figures as one of the parties, he may refer to the special list of banks.

Every feature of the publication indicates a strong contrast between it and the original reports in this, that every means is adopted for facilitating the investigations of the practitioner; the reporters, on the other hand, seem to have an instinctive desire to place the materials for which he is searching as far beyond his reach as possible.

The work is being compiled by W. G. Myer, Esq., who has made quite a reputation by his digests and indexes. He has demonstrated by his first volume of this series that a work involving the tact required by this, could have fallen into the hands of no one more competent. This volume is printed in large, bold type, and is bound in the best manner. No publication will receive a more hearty welcome in our *sanctum* than this one, and we await with impatience the completion of this great undertaking.

From the Central Law Journal, (March 7, 1884), after examining Vol. 2.

If the whole work is accomplished with the same satisfaction which these two volumes have given, there certainly ought to be no doubt in the minds of the publishers, as to the success of the project. It is true that the bar is conservative and it requires time to impress the legal fraternity with the merit of progressive plans. This with the crying down which it is receiving, and will continue to receive, at the hands of those publishers with whose reports this series apparently competes, renders the adoption of the idea difficult, and will compel the publishers to make efforts of more than ordinary character. Still, we think that in the end, the profession will begin to perceive the merits of the work, and will conclude that it is a necessary incident to every well cared for library.

This volume completes the subject of Appeals and Writs of Error, which is divided into twenty-nine chapters, and treats fully of Arbitration and Awards, Assignment and Attorneys. At the end of this volume is the table of cases to volumes I and II, and the index to the same volumes, which is very well done by one who seems to be no novice in legal literary work.

Desiring to convince ourselves of the judiciousness with which cases have been reduced to a digested form, we have examined a number of them, and we are of the firm opinion that the whole meat, of every case digested, is contained in the digest. To be sure, we had already the assurance of distinguished authors to that effect, but all doubts in our mind have been dispelled by this personal scrutiny of a list of cases selected at random. This series can therefore be well substituted for the original reports, and they are certainly in a much more available form. We have no reason to alter the views previously expressed by us, and we are glad that we have one more volume in our *sanctum* as a support.

ECHOES FROM THE PRESS.

From the Boston Advertiser, (March 6, 1884.)

Whose law book critic is one of the best known, and most highly respected reviewers in this country.

In Mr. Myer's "Federal Decisions" we find a new method of reporting, but one no less comprehensive than the system to which we have been accustomed. Indeed, the title is a modest one, in view of the vast labor represented and of the advantage which it promises, both for the bench and the bar. It is intended to include all the decisions of the federal courts, both those which have been published in the regular reports and those which are to be found in the various periodicals and in the different state and territorial reports.

The important cases are to be published in full; and those decisions which simply affirm or follow some leading case, or which turn merely upon some particular state of facts, without enunciating any real principle of law, are to be only digested. Where, as often occurs, a later case reviews and affirms a series of previous cases upon the same subject matter, such later case is to be given in full, and the others digested. All the decisions are to be arranged logically, rather than chronologically or topically, according to the subjects considered; all the cases being assigned to the various heads of the law, and these heads being divided and subdivided suitably, for convenience of arrangement and for reference, in the same system that is adopted in digests.

At the head of each division is given a summary of the points of law embraced in that division, followed by the cases in full, divided into convenient paragraphs, each of which is preceded by a brief statement of the point embraced in it. At the end of these cases is a digest of the points applicable to the particular subdivision, taken both from those cases which are to appear in full under some other head or subdivision and from those which are not to be given in full in any part of the work. It is accordingly anticipated that the work, when completed, will give all that has been decided by the federal courts on each topic of the law, arranged logically and in order, and mainly stated in the very words of the court, though with the matter of over 800 volumes compressed into less than thirty.

The work is one of which the proper performance demands unwearied patience and the hardest and dreariest labor; but we doubt very much if it is not the kind of work which must, sooner or later, be applied to all of our reports, if they are to be brought into any manageable compass. Of American reports alone there are now more than 8,000 volumes; and the muster-roll, already formidable to those who expect no more than the ordinary length of life, is increasing by more than 100 volumes every year, to say nothing of the constantly swelling bulk of the English and colonial reports, all founded on the common law, and all available and dangerous to the lawyer and the student. The "American Decisions" and "American Reports" have been found serviceable devices, but their arrangement and object must, in practical convenience, yield to those adopted by Mr. Myer. His method combines the merits of a digest and of a volume of reports; we have the scope and treatment of the latter, with the methodical arrangement of the former.

Many lawyers will indeed object to the abridgment of any cases, and yet more strongly to the limitation of others to a mere digested reference; but a little reflection will at once show that some abridgment and some omission are indispensable,

if the body of the reports is to be brought into any reasonable compass. After a principle has been affirmed in a dozen decisions, why should our books be encumbered with a hundred more repetitions, to be renewed whenever a persevering litigant or a shifty attorney chooses to call the principle in question? Is there nothing so certain that its affirmation is needless?

For our part, we are inclined rather to think that there has been in this volume too little condensation and too little omission; but the editors have, no doubt wisely, preferred to err rather by including too much than too little.

The real and vital test of the value of such a work as this is its accuracy, its thoroughness and its absolute copiousness. These points can be fully determined only by the test of daily use; but we have examined this first volume with no little care, and have been unable to find any blemishes under either of these heads. So far as we can see from the publishers' statement of the editorial labor, certainly every possible precaution has been taken against error or omission, each part of the work being passed through so many successive competent hands as, at any rate, to minimize the possibilities of mistakes.

The work is certainly constructed upon a plan which, though novel, is of manifest merit; it includes the series of decisions which, throughout this country, is confessedly more valuable than any other; and it includes the contents of volumes, many of which are now out of print, and a complete set of which could scarcely be obtained by any one.

It seems to us that Mr. Myer's work, when fully carried out, will be found to be an extraordinarily valuable contribution to the study of the law; and we very strongly suspect that he has found the basis upon which all our reports will in the future have to be reconstructed. He has well embodied and carried out the idea that was in the mind of Mr. Reed, when he said in his "American Law Studies" that we should expect in future series of reports "a great but accurate condensation of the opinions, and a much more concise statement of the facts, so that only the cases, the judgments, and the grounds of the latter, will be given. Such compression will benignly aid the student in mastering, and the practitioner and author in consulting and making use of, the reports; and it will be one of the ways by which a substitute for the multiplying volumes will be cheaply furnished to every law-office." But Mr. Myer has gone further in the way of improvement than Mr. Reed's anticipations extended; for he has added the great convenience of a logical and systematic arrangement by subjects to the merits enumerated by Mr. Reed; and this it is which seems to us to be the greatest advantage in his treatment. In this first volume, which covers titles under the letter A, half through "Appeals and Writs of Error," the work has been well and wisely done; only the right cases have been selected for abridgment and digesting; and the publishers have certainly a right to say that, upon each of the subjects here covered, the lawyer can learn more, in less time, of what has been decided by the United States courts than by using any other books which are yet available to the profession.

If, as we may well expect, the remaining volumes are executed with the same careful skill and thoroughness, the work will be one of the very highest value.

NOTICE!

We contemplated printing all the notices of Myer's Federal Decisions at length, as on the first two pages of "Echôes," but we find that to do so will soon make a large volume. From all sources come the same uniform and unlimited praise. Therefore, we have concluded to print only enough to fully satisfy inquirers of the merits of the series.

[From the Ohio Law Journal, March 15.]

* * * * *
A new departure is undertaken in the method of arrangement. The decisions are gathered under the subject upon which they treat, without regard to chronology. This innovation will receive universal indorsement as a great improvement upon the chronological arrangement plan. At the end of each series of cases is a digest of points applicable to the particular sub-division of the subject. The present volume which contains the subjects from "Accounts" to "Appeals and Writs of Error," shows great painstaking care and labor.

The work is a great undertaking, but the name of the publishers is a sufficient guaranty that it will be carried through to completion upon the plan of its inception. We predict for it great popularity.

[From the Boston Advertiser, March 15.]

The second volume of Myer's Federal Decisions includes the residue of the subjects under the letter A; the main topics treated of being Appeals and Writs of Error, Apprentices, Arbitration and Award, Assignment, and Attorneys. Under each of these heads, there is furnished to the reader all that has been decided by the United States Courts, in the same manner and with the same detail that we lately recapitulated in our notice of the first volume.

The good judgment with which the cases under these heads, which have not been fully reported, have been limited to a mere digest-reference is attested by the authority of such eminent writers as Messrs. M. M. Bigelow, James Schouler, and J. L. High.

The same high standard of diligence and exactness which we found in the first volume characterizes this continuation of the work; and we consider it a matter of congratulation that we may soon expect to have the labors of the Federal Courts made so convenient and easy of access.

[From the Maryland Law Record, March 15.]

* * * * *
We have received from the publishers Vol. I of this work.

* * * * *
The method of arrangement is a new one. The entire series of decisions, comprising all heads of law, are to be arranged alphabetically, according to the subject matter.

* * * * *
All important cases will be published in full, but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts, and do not announce any important principle of law, and in some instances those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes.

* * * * *
We believe that for reference and practical use the plan of arrangement is the best that has ever been adopted. It is as much superior in this respect to the original reports, as Appleton's Encyclopedia in its present form is to what it would be were the works of each of its contributors given in full and in chronological order. The plan is carried out with much ability and thoroughness.

* * * * *
Mr. Myer, whose ability is conceded, will be assisted in the final arrangement of important topics by such eminent law-writers, as Benj. Vaughan Abbott, John W. Daniel, J. L. High, Leonard A. Jones, Jas. Schouler and others.

* * * * *
The publishers offer to send specimen pages of the work on application, or for four cents in stamps to send a fifty page pamphlet giving the subject of Bailment in full. Parties interested in such a work will do well to write to them.

[From the Louisville Courier Journal, March 17,
after examining Vol. I.]

* * * * *
No work ever attempted in this country will do so much to produce uniformity and harmony between the different States and between them and the Federal Courts. It will result in or rather produce in a measure a complete codification of American law, as far as is possible as long as our dual system of Government lasts.

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* * * * *
Mr. Myer has succeeded in getting the very ablest law-writers in the country to assist him in this work by preparing the law on those subjects to which their studies have been specially directed,

and upon which they have in many instances already published works.

* * * * *
If this vast and wonderful enterprise should be as happily executed as it has been ably and wisely conceived, it will prove to be an Encyclopedia of American law. It is beyond a doubt the greatest and most ambitious legal work ever attempted in this country.

* * * * *
It required a great mind to conceive it, and it will require great ability and industry to execute it. The reputation of Mr. Myer and of his able and learned assistants is a guarantee of success which every lawyer can safely trust. The undertaking is so vast and comprehensive, yet so happily planned, that when completed it will be to all American lawyers a library in itself, and destined to affect at once in the most perceptible way the decisions of the State courts.

It is impossible in this article to give the details of the entire plan of this great work; they cover every standpoint from which a case can be considered, and from which the subject decided in it can be discussed.

ECHOES FROM THE PRESS.

[From John W. Daniel, author of the best known book extant on "Negotiable Paper."]

The "Federal Decisions" now being published under the editorial supervision of the well-known author, Mr. W. G. Myer, appears to me, from an examination of Volumes I and II, and of the prospectus, to be an admirably planned work, and I doubt not that they will prove the most useful and convenient series of Reports of Federal Cases that have yet been offered to the profession in commendous form. The clear and comprehensive method of presenting the body of Federal Law will greatly aid the labors of research, and put the adjudications of all the Federal Courts within reach of practising lawyers at a comparatively low cost. I am satisfied that the work deserves success, and cordially recommend it.

[From the St. Louis Republican.]

It is a very important work to a law practitioner, and will constitute a most valuable law library in itself. The first volume of the work has been gladly welcomed and warmly commended by eminent jurists and the law journal editors, who approve of its arrangement and commend its fullness and accuracy.

[From the Cincinnati Gazette]

The arrangement will be by topics alphabetically arranged as in a digest, with suitable cross references. As the result, the working lawyer is promised at about one-sixth the cost of the original Reports, everything in them that can be of any value to him in his practice.

It is a new undertaking, evidently involving a great outlay in editorial and other expense, and is rather venturesome in both publishers and editors. It is largely due to the great cost of the original Reports and the great difficulty, almost impossibility, of obtaining a set of them at any price. No reports are so valuable to the lawyer as these of the Supreme Court, and none carry greater weight in the State courts.

The editor, Mr. Myer, is well and favorably known by his indexes of the Supreme Court and various State Reports. They are a guarantee of the wise execution of the present work. The list of editors engaged to assist him in the final arrangement of the work contains many names of well-known legal writers of high standing.

We have especially noticed the treatment of the subjects, "Actions" and "Agency." Careful examination has satisfied us of the great merits of the work. It is worthy of commendation to our lawyers, who should, we think, feel a sort of gratitude for it.

[From the Boston Journal.]

The Gilbert Book Company of St. Louis have undertaken the publication of a very important collection and reprint of Federal Decisions, whose value and convenience members of the legal profession will be quick to appreciate.

The intention of the editors is to publish all accessible Federal Decisions, either in full or in a digested form, whether found in the regular series of reports or scattered through the various periodicals and State reports, including the opinions of the Circuit Court of the District of Columbia, the most valuable opinions of the Territorial Courts, and the opinions of general importance of the Court of Claims and the Attorney-General.

The cases are classified under the general heads of the law, and these are divided for convenience of arrangement and reference. A great deal of time and labor has clearly been spent upon the editorial work, with the result of making a compendium which lawyers will find invaluable for reference and consultation.

The first two volumes cover topics under the letter A, and are supplied with thorough indexes of cases reported and cited and principles applied.

[From the New York Daily Register, March 23.]
A Law Journal.

The first two volumes of the new and very important series of reports cannot fail to produce a very favorable impression upon the members of the legal profession throughout the United States. Mr. Myer is well known as a careful compiler, and the list of those who are to assist him in arranging the various subjects comprises the names of those who are widely known as legal authors.

The arrangement is simple. Cases are assigned to the general heads of the law, and these are divided and subdivided, with head notes or table of contents at the head of each subject.

At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject.

The publishers deserve praise for the excellent execution of the typography of the work.

From Hon. M. R. Waite, Chief Justice of U. S. Supreme Court.

On examining the first 400 pages of Volume I, he wrote.—"Thus far Mr. Myer appears to have done his work well, and that is good evidence of his fitness for the place in which he has been put. He has the right idea as to what such a book should be."

Later he writes, after using Vols. I and II, "I am more than ever satisfied with the value of the publication. The subject of Appeals and Writs of Error, I frequently consult, and always with satisfaction."

ECHOES FROM THE PRESS.

[From the *Daily American*, Nashville,
Tenn., March 24.]

The publication has the approval of the law journals and ablest law book critics in the country. In the series it is intended to include all the decisions of the Federal Courts, both those which have been published in the regular reports and those which are to be found in the various periodicals, and in the different State and Territorial reports.

The real and vital test of the value of such a work as this is its accuracy, its thoroughness and its absolute copiousness. So far as we can see certainly every possible precaution has been taken against error or omission, each part of the work being passed through so many successive and competent hands as, at any rate, to minimize the possibilities of mistakes.

The work is certainly constructed upon a plan which, though novel, is of manifest merit.

If the remaining volumes are executed with the same careful skill and thoroughness, the work will be one of the very highest value.

[From the *Washington Law Reporter*.]

From an examination made of volume one, we are convinced that if the series is continued with the same care and ability, it will prove an almost invaluable addition to the law literature of the country.

The book is much more than a digest; the decisions upon various subjects are arranged so that they can be readily examined and the important leading cases are published in full.

The vast number of volumes of reports that are being issued each year—a great many of them containing scarcely a single opinion of value to the profession at large—must, in the future, compel a compilation similar to the work undertaken by Mr. Myer in this book.

[From the *Legal Intelligencer*, Philadelphia,
March 21.]

This projected work, of which the first volume is now presented, is an undertaking of considerable magnitude. The intention is to group under alphabetical heads all the Federal Decisions.

The plan is excellent—and its satisfactory execution depends on the ability and judgment of those to whom it is committed. Upon this point it is promised that this work, subject to the general supervision of Mr. Myer, is and will be intrusted to certain gentlemen whose names are given in the prospectus. They are of distinguished legal attainments and of unquestioned prominence of the Bench and in legal literature, whose names are familiar to the profession.

This projected work promises to be an important professional aid, the value of which is manifest.

[From the *Albany (N. Y.) Times*.]

The Gilbert Book Company of St. Louis have undertaken the publication of a very important

collection and reprint of Federal Decisions, whose value and convenience members of the legal profession will be quick to appreciate.

With Mr. Myer are engaged in the editorship and the arrangement of the subjects, Messrs. Benjamin Vaughan Abbott, Robert D. Benedict, Edmund H. Bennett, Melville M. Bigelow, Benjamin R. Curtis, G. W. McCrary, James Schouler, William F. Wharton and a number of other well-known lawyers.

The cases are classified under the general heads of the law, and these are divided for convenience of arrangement and reference. A great deal of time and labor has clearly been spent upon the editorial work, with the result of making a compendium which lawyers will find invaluable for reference and consultation. The contents of the one hundred and five volumes of Supreme Court Reports, the one hundred and forty-two volumes of Circuit and District Court Reports, and sixty-five other volumes of miscellaneous reports will be included in the work.

[From the *Chicago Inter Ocean*, March 22.]

The plan of the work is to combine all the essential merits of full reports, an alphabetically arranged digest, and a synoptical treatise directly from the hands of Federal judges, covering every department of Federal law completely and exhaustively before passing to any other. For this purpose the managing editor of the series, Wm. G. Myer, Esq., is doubtless the most competent person who could have been selected, having been admirably prepared for this work by his previous labors in preparing his well-known index to the United States Supreme Court Reports, and indexes to the State reports of Illinois, Iowa, Ohio, Missouri and Tennessee, his digest of Texas reports and local works on pleading and practice.

The editor makes it a rule first to digest every case, not by taking a scissors and cutting out from the opinion such portion of the Judge's language as seems to enunciate some valuable general principle of law, but by carefully compiling an accurate statement of the points on which the decision of the case turned, as on those only does the language of the court constitute an addition or accretion to the body of legal learning previously existing. For that alone is the decision valuable as a report. The general legal propositions uttered by the court in arriving at its conclusion on the contested point are used merely for illustration or as stepping stones in the process of argument, and are no part of the decision itself, and derive no new authority from their reiteration in this connection.

The mode in which the work has been done thus far has received the emphatic approval of our law journals.

The theory upon which the work is prosecuted is excellent. The work of abridging the law, or as least its evidences, as the materials accumulate it as inevitable and valuable a part of the evolution of society as any that can be performed.

EXTRACTS FROM LETTERS

WRITTEN BY

EMINENT AND WELL-KNOWN JURISTS.

[All these letters and many others, printed in full, will be sent by mail on application.]

Thus far Mr. Myer appears to have done his work well, and that is good evidence of his fitness for the place in which he has been put. He has the right idea as to what such a book should be.—*M. R. Waite, Chief Justice of United States Supreme Court.*

The plan seems to be executed with ability, and I cannot but think will become popular through its proved utility.—*Stanley Mathews of the U. S. Supreme Court.*

In Mr. Myer's Index of the U. S. Supreme Court reports we have a guaranty of good work in the proposed publication. That Index is the first book I turn to when I want to find anything in our reports.—*Joseph P. Bradley, of the U. S. Supreme Court.*

Permit me to say that I concur in what the Chief Justice and Mr. Justice Bradley say of your editor. I have from the first used his "Index," both that of the Supreme Court and Tennessee Reports, and invariably use them to begin an investigation. I have a very high opinion of his qualifications for the work in which he is engaged, and think the profession can rely on him.—*E. S. Hammond, Judge of U. S. District Court, Memphis, Tenn.*

I take pleasure in saying that Mr. Myer is well fitted by learning, scholarship, industry and profound knowledge of the law, to prepare and take charge of such a work. Your work meets my unqualified approval.—*H. S. Orton, Wis. Supreme Court.*

The pages of the work now before me impress me with the belief that the editor has mastered his plan, has given his work scrupulous care, and has brought to his task keen powers of discrimination and analysis. The notes are well selected, concisely worded, and judiciously arranged. In every way the work seems a good one, and to be in capable and worthy hands.—*Byron K. Elliot, Judge Supreme Court of Indiana.*

All things considered, it seems to me that your work executed with such fidelity as to gain a reputation for reliability, will be more serviceable to the general practitioner than would be the original volumes, which you will arrange and condense.—*James B. Black, Commissioner Sup. Court of Indiana.*

The work submitted has been well done, and the reputation of Mr. Myer as an able and careful editor, gives promise that the series will be well and carefully edited and arranged.—*G. M. Sabin, Judge United States District Court, Nevada.*

There can be no doubt of the excellence of your plan. I have been much aided by Mr. Myer's Indexes, to which I frequently refer; and from what I have seen of his work, I believe him to be uncommonly capable and painstaking.—*R. A. Bakewell, Associate Judge St. Louis Court of Appeals.*

The index part of your plan is admirable, and in the hands of Mr. Myer, with whose work in this direction I am entirely familiar from constant use. I can say that the work cannot be done better.—*J. D. Westcott, of Sup. Court of Florida.*

I had an impression when I began the examination of your plan I should have several suggestions to make. But a further examination has shown that each one of them has been anticipated. If the work is carried out as promised by the specimen pages, it will certainly be a great thing accomplished for the profession. A better work even than the original publications.—*Chas. Danforth, of Supreme Court, Maine.*

The entire arrangement of the work is admirable. Where I discovered matters in which improvements might, as I supposed, be made, on fuller reflection I always found that the deficiency was imaginary—that the supposed want was provided for under the exhaustive plan for the execution of the work.—*Rich'd S. Walker, of Texas, Presiding Judge of Commission of Appeals Court.*

It embodies so many attractive features, that one cannot help wondering how it happens that no publisher has heretofore undertaken the same thing.—*Edward Lewis, Presiding Justice of the St. Louis Court of Appeals.*

The "new departure" is so good that 'tis strange it has not been adopted heretofore.—*W. H. Seavers, Chief Justice Sup. Court of Iowa.*

I have given the scheme some thought, and the more I reflect upon it, the higher is my opinion of its utility.—*John B. F. Graves, Chief Justice Sup. Court of Michigan.*

Your general idea is a good one.—*T. M. Cooley, Associate Justice of Michigan Supreme Court; also author of several well known law books.*

I think it is safe to speak with unqualified commendation concerning the fidelity and thoroughness of the work done.—*James V. Campbell, of the Michigan Sup. Court.*

I regard the plan as very convenient, as in a few volumes all of the decisions of the Federal Courts will be presented in a compact and an accessible form.—*Finkney H. Walker, Ch. Justice Sup. Court of Illinois.*

This much may be said without any hesitation: If the remaining portion shall be edited with the same learning and ability as the article on "Bailment," the work, when completed, cannot fail to be of the highest importance to the bench and the bar.—*John M. Scott, on the Illinois Sup. Court Bench.*

A. C. Snyder, of W. Va. Sup. Ct. agrees with the opinion expressed above.

After a very careful consideration of the general plan of your forthcoming work entitled "Federal Decisions," I have no hesitancy in saying it has my hearty approval.—*John H. Mulkey, of Sup. Court of Illinois.*

The plan of the work, as given, is, in my judgment, correct.—*Thomas J. Freeman, one of the Judges of the Tenn. State Sup. Court.*

If the plan be faithfully executed, the work cannot be otherwise than valuable.—*W. F. Cooper, of Sup. Ct. of Tennessee.*

EXTRACTS FROM LETTERS OF EMINENT AND WELL-KNOWN JURISTS.

I am much pleased with your plan of placing all cases relating to the same topic under one general head, and then arranging the subjects treated under these different heads in alphabetical order.—*W. E. Niblack, of Sup. Court of Indiana.*

The plan is entirely new to me, but it seems to be complete in all respects.—*J. P. Kidder, of Sup. Court of Dakota.*

Completed in the faithful manner, of which this chapter is the earnest, I think your work will be of great value, and that it will command a large sale.—*G. W. Stone, of Sup. Court of Alabama.*

I think your plan for the work is a very good one, and at the present I am not able to suggest any better one.—*D. M. Valentine, of Sup. Court of Kansas.*

I carefully examined the cases of *Casey v. Cavaroc*, *Tully v. Freedman's Savings and Trust Company*, and also of *Hayward v. National Bank*, as well as *Myers v. D'Mesa*, and *Westphal v. Ludlow*, that I might satisfy my mind on the accuracy and reliability of the manner and style of arrangement and expression, and I am so much pleased with it that I acknowledge the instruction I received by the examination of the opinions on the plan suggested.—*Wm. Archer Cocke, Judge Circuit Court, State of Florida, Ex-Attorney-General.*

The plan is an excellent one, and I am sure the work will be of great value to the judges of the Federal and State courts as well as to the lawyers who practice in either courts.—*Aleck Boorman, Judge U. S. District Court, Shreveport, La.*

The work seems to be thoroughly done, and presents, in a convenient and satisfactory manner, all the principles decided in the opinions of the cases reported. *John P. White, one of the Judges of the Court of Appeals, Texas.*

The plan is a happy one, and if faithfully executed, the reports will be a valuable accession to the library of the judge and active practitioner.—*R. R. Nelson, Judge United States District Court, St. Paul, Minn.*

Your plan is worthy of all commendation, and if carried out with the excellent judgment which the pages sent indicate, the completed work will result in much labor saving both to the bench and the bar.—*John T. Nixon, Judge United States District Court, Trenton, N. J.*

The plan of the publication is most satisfactory, and its execution, so far as it has proceeded and fore shadowed by the specimen pages, give excellent promise.—*D. M. Key, U. S. District Judge.*

I am satisfied that when your work comes before the legal public, it will be highly approved.—*Joseph P. Comegys, Delaware, Chief Justice Sup. Court.*

After careful examination of the proof-sheets sent to me, I freely say that I am pleased with the plan and arrangement of the work.—*H. E. Prickett Sup. Court of Idaho.*

Your plan of furnishing in a series of volumes all important decisions arranged under appropriate heads is excellent, and judging from the advance sheets sent me, I am satisfied that it is being faithfully and ably executed.—*Geo. W. McCrary, of U. S. Court, Eighth Circuit.*

Your scheme is immense. If the execution rises to the level of the plan, you will be the benefactors of the bar.—*David J. Brewer, of Kansas Supreme Court.*

I do not hesitate to say that if you can accomplish what you have undertaken, you will have rendered the profession a great service.—*E. B. Turner, Judge U. S. District Court, Austin, Texas.*

On the whole, it seems an answer to the reiterated query, "What shall we do with our reports?"—*Amasa Cobb, of Sup. Court of Nebraska.*

I am much pleased with the plan adopted.—*Joel Parker, of Sup. Court of New Jersey.*

The ease and rapidity with which the respective subjects can be examined will render the work of inestimable value to lawyers.—*R. S. Taft, of Sup. Court of Vermont.*

If the work is carefully executed, it seems to me that it would certainly be both useful and convenient.—*John M. Berry, of Sup. Court of Minnesota.*

I have received and carefully examined specimen copy of the "Federal Decisions," and am much pleased with the arrangement of the work.—*R. A. Hill, Judge U. S. Dist. Court for Mississippi.*

Your enterprise seems to me to be a most commendable one. The plan itself is a good one, and will I think, meet with general favor.—*Addison Brown, U. S. Dist. Judge.*

Your plan if carried out as contemplated, will commend itself at once to the profession.—*D. H. Pinney, of Sup. Court of Arizona.*

I have given your "Federal Decisions" a careful examination, and the result is, in my opinion, the plan and work proposed cannot fail to receive the cordial approval of the courts—both State and Federal—and also of the professional generally.—*Alex. M. Speer, formerly of Sup. Court of Georgia.*

I have carefully examined the prospectus and advanced sheets of your proposed "Federal Decisions," and cordially approve of the plan in all its characteristics and leading features. You have surmounted the difficulties admirably.—*Benj. Vaughan Abbott, Esq., Author.*

I have taken the trouble to see the lawyers of this Bar, and had most of them to see your work on Bailment. All are very much pleased with it, none offering any objections, and most of them expressing a decidedly favorable opinion.—*O. B. Freeman, Esq., Trenton, Tenn.*

The more I have studied it, the more favorably I am impressed with the plan and execution of the work.—*E. W. Pattison, of St. Louis, Author of the Missouri Digest.*

So far from condemning the plan of condensing decisions in some cases to a digested form is concerned, if the work is done with the ability and fidelity evinced in the treatment of the subject of Bailment. I regard it as one of the excellencies of the work.—*Samuel L. Tate, Probate Judge, Grand Haven, Mich.*

I think the number of subscribers who will feel that the cutting out of the surplus matter has been a positive advantage, will be more than equal to the number who will feel that a sacrifice has been made for economy's sake; especially when the improved arrangement of subjects, methods of catching at once the particular thing wanted, etc., etc., are considered.—*H. M. Wiltsie, Attorney for City of Chattanooga, Tenn.*

OUR FINAL EDITORS

And those who will assist Mr. Myer in arranging subjects.

It is impossible to give at present * the names of all who will act in this capacity on the various topics in our Federal Decisions, or to say how many of them will also have subjects arranged under their immediate supervision.

Below we give the names of those with whom arrangements have already been made; others will be announced from time to time as the work progresses.

All of the topics are now ready for final arrangement, and will be given out as rapidly as competent parties can be engaged.

* January, 1884.

Abbott, Benj. Vaughan, Author of a digest of the law of Corporation, and one of the Abbott Brothers who have for so long been favorably known to the profession, will take the arranging of any subject that may be assigned to him, as soon as his present editorial engagements will permit.

Baldwin, W. D., and Woodbury Lowery, Patent Lawyers, Washington, D. C., will edit the subject of "Patents."

Ball, F. Q., Attorney of Chicago; author of a work on National Banks. He has arranged the subject of Banks.

Benedict, Robert D., of the New York bar; nephew and former law partner of the late Erastus C. Benedict, author of Benedict's Admiralty; editor of Benedict's Reports; reporter of the Eastern District of New York for the Federal Reporter. He will certify to the subject of Maritime law. Most of the work of digesting and arranging this subject will also be done under his immediate supervision by his son and law partner Wyllys Benedict.

Bennett, Edmund H., of Boston, Mass., Judge of Probate 1858-1882—Editor of Story's Works, Benjamin on Sales, Massachusetts Digest, etc., and Dean of Boston University Law School, where he lectures on Contracts, Sales, and other topics.

Bennett, Samuel C., of Boston, Mass., Assistant Dean of Boston University Law School, and Instructor in Contracts and Sales, which two subjects he will digest and arrange under the supervision of his father.

Bigelow, Melville M.—Author of works on "Estoppel;" "Overruled Cases;" "Leading Cases in Torts;" "Law of Fraud;" "Equity;" "Elementary Treatise on Torts;" "Insurance Reports;" also editor "Jarman on Wills," 4th edition; and "Story on Contracts," 5th edition. He has already certified to Agency and Attorneys, and will do the same for any other topic referred to him. We hope his other engagements will enable him to take entire charge of the subject of Insurance.

Chase, George,—Professor of Criminal Law, Torts and Procedure, Law School of Columbia College. Editor of "Chase's Blackstone." Contributor of many legal articles to "Johnson's Universal Cyclopedia." Editor of "Johnson's Ready Legal Adviser." He will certify to the cases in Torts which are reduced to a digest.

Croswell, Simon Greenleaf, (grandson of author of Greenleaf on Evidence.) Editor of the new edition [14th] of Greenleaf on Evidence, will digest and arrange that topic.

Curtis, Benjamin R. (son of the late famous jurist, formerly Associate Justice of U. S. Supreme Court,) Lecturer at Boston University Law School, and editor of "Curtis's Jurisdiction and Practice of United States Courts," and "Curtis' Life and Writings." He will digest, arrange and edit the three subjects of COURTS, PLEADING, PRACTICE.

- Daniel, John W.**—Author of the celebrated work on "Negotiable Instruments," will certify to Banks, Bonds, Bill and Notes.
- Gould, John M.**, of Boston, author of "Gould on the Law of Waters," and other works, will certify to the subject of "Watercourses," and kindred topics, perhaps edit them.
- Hamilton, Adelbert**, of Chicago, did the work of digesting and arranging the subject of Attorneys, and also Arbitration and Award. We think an examination of his work will show him to be competent for the work undertaken. He has also done the work of arranging and digesting the topic of Bills and Notes to appear in Vol. III.
- Hammond, W. G.**, Dean of the St. Louis Law School, and a well-known writer for Law Magazines; also, one of the lecturers in the Boston University Law School. He will take entire charge of Constitution and Laws; States and Territories, and other kindred topics.
- High, J. L.**, Author of a well-known book on "Injunctions." He has certified to Actions and to Appeals and Writs of Error. He will examine and certify to any other subject we refer to him.
- Jones, Leonard A.**—Author of "Mortgages of Real Property;" "Mortgages of Personal Property;" "Railroad Securities," etc. He will take entire charge of the topics of "Liens," also, Conveyances (including Deeds, Deeds of Trust and Mortgages), and perhaps some others.
- Lowell, John, Hon.**, late Judge of U. S. Circuit Court, will certify to the subject of Insolvency and Bankruptcy.
- McCrary, G. W., Hon.**, late Judge of 8th U. S. Circuit, and author of a work on "Elections." He will certify to Elections, which subject is being edited by Mr. Hagerman, an attorney of Keokuk, Iowa, under his supervision.
- Mills, H. E.**—Author of "Mills on Eminent Domain." He will take entire charge of that subject.
- Morrison, R. S.**, of Colorado, author of a work on "Mines," will certify to that subject, perhaps edit it.
- Schouler, James**, Author of "Domestic Relations;" "Husband and Wife;" "Bailments, including Carriers;" "Executors and Administrators;" "Personal Property;" also, editor of last edition of "Story on Bailment." He has already certified to the subjects of Accounts, Arbitration and Assignment. He will take entire charge of the topics of Domestic Relations and Estates of Decedents, also Carriers, arrange the cases, and have the digesting done under his own supervision.
- Wharton, William F.**, of Boston, editor of the last edition of Story on Partnership, will take the cases on that subject, not printed in full, and certify to the good judgment used in discarding them.
- Willard, Joseph**—Editor of "Taylor on Landlord and Tenant." He will certify to Landlord and Tenant.
- Wood, H. G.**, author of a new and valuable work on Limitations, will revise and certify to the cases on that subject that are not printed in full. He is also author of a treatise on Fire Insurance, Master and Servant, Nuisances; also, editor of Brown on Carriers, Collier on Partnership and Best on Evidence.

We point with pride and satisfaction to the above list, which we believe includes more legal talent than has ever before been combined in any one publication, each name being instantly recognized as indicating the proper person to do the work undertaken.

Arrangements will be made with other well-known authors as rapidly as we are ready to give out the manuscript of subjects in their line.

PREFACE.

The aim in this work is to publish the decisions of the Federal Courts under a method of arrangement not hitherto attempted. The works on leading cases are quite numerous, but no attempt has been made to arrange alphabetically, according to the subject matter, an entire series of decisions, comprising all heads of the law. The plan here proposed has been developed by years of patient investigation and experiment, and has already met with the approval of judges and leading members of the bar in every state of the Union. The object is to present the federal decisions in such a shape that they may be easily consulted — to present under any given subject all the important cases in full appropriate to such subject, and a complete digest of points in cases assigned in full to other heads. By this means we are enabled to present in a complete and compact form every subject that has been litigated in the federal courts.

The intention is to publish all accessible federal decisions, either in full or in a digested form, whether found in the regular series of reports or scattered through the various periodicals and state reports, including the opinions of the Circuit Court of the District of Columbia, the most valuable opinions of the Territorial Courts, and the opinions of general importance of the Court of Claims and the Attorneys-General. The opinions of the Supreme Court are made the basis of the work, to be followed by those of the Circuit and District Courts, according to their value. All important cases will be published in full, (a) but cases which merely affirm or follow some leading case, or those which are based upon a particular state of facts and do not announce any important principle of law, and in some instance those which turn upon a well settled principle of law, will not be published in full, but only digested, the extract to be sufficiently full for all practical purposes. Where a series of cases, all covering the same ground and addressed to the same subject matter, are reviewed and affirmed in a later case, usually the last case will be given in full, and the others will be digested. (b) Whenever there is a well grounded doubt whether

(a) There are a few subjects, such as Slavery, Bankruptcy and Embargo Laws, under which, for obvious reasons, only a few cases, comparatively, will be printed in full. The old Embargo Laws and the questions connected with a state of slavery are obsolete, and, consequently, the cases on those subjects will be digested. The Bankrupt Laws are repealed, but as new laws are likely to be enacted from time to time, a sufficient number of cases will be printed in full to illustrate the general principles of the subject. There are other subjects, such as Maritime Law, Patents, Practice, Revenue, Prize of War, etc., from which a great many cases will be rejected, owing to the fact that there are a great number that are merely fact cases, or are confined to a statement of the same general principle. The remark here made is true of the subject of Appeals and Writs of Error, published in this volume, and will apply also to Courts.

(b) For an illustration of this point see *Crowell v. Randell*, p. 696, where MR. JUSTICE STORY reviews and reaffirms a long line of decisions touching the appellate jurisdiction of the supreme court under the twenty-fifth section of the judiciary act. It thus frequently happens that a line of decisions, all addressed to the same point, are rounded out and the question set

PREFACE.

a digest of a case will be sufficient, the case will be given in full. It is not intended, however, to publish in full the opinions of the Court of Claims, nor those found in the state reports and law periodicals, except those that are of more than ordinary value.

The opinions given in full under any subject are those which are devoted, either wholly or principally, to that particular subject. Many of the decisions comprise other points of law not appropriate to the general subject, but usually each decision is confined to a single, distinct subject matter by which it may be classified, the other points arising incidentally. It may be a surprise to many that a series of decisions can be thus classified; but an examination of the cases shows that if a decision is on the merits it is usually confined to one general head of the law, the points arising incidentally being such as relate to matters of practice; or if the case is decided on a point of practice or procedure, the question on the merits, as a general rule, is not considered. This fact makes it possible to classify the cases easily and accurately. (c)

The arrangement is very simple, and can be understood by a very little attention to details:—

(1) The cases are assigned to the various general heads of the law, and these are divided and subdivided, for convenience of arrangement and reference, with head-notes or table of contents at the head of each subject, the same as an ordinary digest. (d)

(2) For the sake of condensation, by avoiding the extensive duplicating of the various points, the cases are assigned to as few general heads as possible. (e)

(3) At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. (f)

at rest by a full and exhaustive decision. This latter decision is given the preference, because it purports to give all the reasons for the rule announced, and is manifestly intended to be final. A case is not always rejected, however, because another case covering the same ground is given in full. See, for example, page 698 *et seq.*, where a number of cases are given in full to show what is necessary to bring a case from a state court within the terms of section 25 of the judiciary act.

(c) See page 18, *Wiggins v. Burkham*. The question litigated in this case has reference solely to an account rendered. Other points arise incidentally, and will be found digested in the complete work under their appropriate heads. The cases are very rare in which it is difficult to determine to what head an opinion ought to be assigned.

(d) See the head-notes to Actions and Agency on pages 29 and 132.

(e) See, for example, the subjects of Actions and Agency. Under the former head will be found cases on cause of action, forms of actions, the various common law actions, the general principles of actions *in rem*, etc.; while the latter head comprises cases on the general doctrine of Agency, Powers of Attorney and Factors and Brokers. This plan is carried out in the subject of Appeals and Writs of Error, and will be followed in such subjects as Carriers, Constitution and Laws, Courts, Practice, Pleading, etc.

(f) See, for example, section 748 on page 672. The references at the end of the section show that the case is published in full under some other subdivision of the subject. On turning to the case (§§ 1175-1179), we find it published under the head *Rights Claimed under an Act of Congress*, and the points in the case appropriate to that head are digested and placed in the SUMMARY; while the point in the case on the breach of a marshal's bond will be found in the complete work under Bonds. See, also, § 24, page 407; § 48, page 408; § 51, page 409.

PREFACE.

(4) Next in order are the cases in full, arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. (g) The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*. (h)

(5) At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. (i) 2d. Points taken from cases which will appear in full under some other division of the same subject. (j) 3d. Points taken from cases which are assigned to some other general head. (k) 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General. (l)

Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.^{*} The tables of cases and indexes will also contain a similar designation of rejected cases, so that in consulting either the reader will readily see whether he is referred to a case in full or only a digest.

The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

(g) See the case on page 18, where the court states the facts; on page 32 a brief statement is prefixed to the opinion, while in some cases the statement of facts is found in the body of the opinion, as on page 661.

(h) The case of *Williamson v. Ringgold*, on page 83, will fairly illustrate the plan. There is really but one point in the case, which is stated in the SUMMARY, while the review of authorities and valuable points made by the court by way of argument are indicated in the *italic* sections.

(i) See the *star* case in section 17, page 21; also the foot-notes on pages 452 and 479.

(j) See sections 80, 81, 88, 748 and 749, and the references to the cases in full.

(k) This will be illustrated by any of the cases to which no *star* is annexed in sections 10 to 19, on page 21. These cases are assigned to other heads, and may or may not appear in full under those heads. If any of them are only digested when they are reached in their order, the fact will be indicated by a *star*, and the table of cases will also show that they are not published in full.

(l) These cases will be denoted by a *star* following the name of the case. There are also divisions of a subject under which there are no cases in full, as, *e. g.*, on pages 27, 81, 128 and 132. There are no cases in full appropriate to those subheads.

PREFACE.

The head-notes, or table of contents, at the beginning of a subject, followed by the numbers of the sections of each division and subdivision, the section numbers at the top of the page, the running title, giving the general title on the left-hand page and a subdivision of the subject on the right, and the numerous cross-references at the end of the sections, etc., are intended to facilitate the examination of the subject. The final table of contents and the general index to be published at the end of the series will be arranged so as to enable the reader to find the most obscure points. A table of cases and index will also accompany each volume.

The great merit of the work, therefore, consists in this: (1) The value of the cases. (2) The important cases are all printed in full. (3) The SUMMARY at the head of the cases and the digest matter following form a complete digest of a subject, as full and as conveniently arranged for consultation as an ordinary digest.

In the preparation of the digest matter following the cases in volumes I and II, I have been assisted by CHARLES N. BROWN, Esq., of Madison, Wisconsin.

WILLIAM G. MYER.

MADISON, WISCONSIN, 1884.

Volumes and Cases to be Included.

Supreme Court Reports, viz:	Vols.
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